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STATE COUNSEL DIVISION  
LITIGATION BUREAU

May 17, 2004

Honorable James W. McCarthy  
Acting Supreme Court Justice  
Supreme Court Chambers  
Oswego County Courthouse  
39 Churchill Road  
Oswego, New York 13126

Re: *Peterman et al. Pataki et al.*, Index No. 99-533, RJI # 32-99-0520

Dear Justice McCarthy:

I am responding to the Supplemental Affirmation of Peter Carmen and Memorandum of Law recently submitted by the Oneidas asserting that there is no longer a justiciable controversy for this court to rule on with respect to the separation of powers issue. The Oneidas now urge that the State and the plaintiffs entered into an agreement regarding the separation of powers issue resolved in the Saratoga County Chamber of Commerce case which effectively prejudiced the interests of the Oneidas. There was never any "agreement" made between the State and the plaintiffs.

As the record demonstrates, the State conceded that under the principles of stare decisis, this court was bound to follow the Court of Appeals determination in Saratoga on the separation of powers question pertaining to the Governor's authority to enter into the 1993 Compact with the Oneida's without legislative authority. Tr. 60-62, 64-65, 67, 88. The State also conceded that application of the Saratoga decision to the instant matter would result in a declaration that the Governor violated State separation of powers law when he entered into the Compact with the Oneidas in 1993, and consistent with the ruling in Saratoga the Compact was void and unenforceable under State law. Tr. 67.

On the separation of powers question, all sides are in agreement that Saratoga is controlling precedent. As set forth in the State's papers, once this Court applies Saratoga to the instant matter it need go no further. The matter before the Court is clearly a matter of State separation of powers law and there is no legal basis for the Oneida's to conclude that there is no justiciable controversy to be decided here. The fact that controlling case law on the separation of powers issue undermined the validity of the State's defense on this issues does not make the issue non-justiciable, it simply makes the asserted defense unavailable.

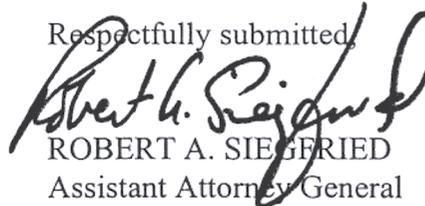
May 17, 2004

Page 2

Also as reflected in the record, I along with other members of the Office of the Attorney General familiar with this case and the Saratoga case, at the request of the Oneida's counsel met with them and considered factors which the Oneidas felt distinguished this case from Saratoga. We advised the Oneida's counsel, that we would consult with the Governor's office and decide whether we would pursue among other matters sought by the Oneidas, the defense of laches. Tr. 60-61, 69. Upon review of the factors presented by the Oneida's, it was the considered opinion of the Governor's office that there was no principled distinction between the laches defense in this case and that same defense raised by the State in Saratoga and rejected by the Court of Appeals. Tr. 61. This is the basis for the State's withdrawal of the laches defense.

In conclusion, there was no "agreement" between the plaintiffs and the State. In recognition of the controlling law as set down in Saratoga Chamber of Commerce, the State has only conceded that application of that case to the instant matter results in a declaration that Governor Cuomo was without authority to enter into the Oneida Compact in 1993, and the Compact is therefore void and unenforceable under State law.

Respectfully submitted,



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