TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

State Constitution

Federal Statutes

State Statutes

Federal Regulations

Newspapers

Other

STATE OF NEW YORK
APPELLATE DIVISION

SUPREME COURT
FOURTH DEPARTMENT

SCOTT PETERMAN, UPSTATE CITIZENS FOR EQUALITY, INC. AND PERSONS AND ENTITIES SIMILARLY SITUATED, and HON. DAVID TOWNSEND, a duly elected official of the New York State Legislature,

Plaintiffs-Respondents,

v.

GEORGE PATAKI, GOVERNOR OF THE STATE OF NEW YORK, NEW YORK RACING AND WAGERING BOARD and DIVISION OF STATE POLICE,

Defendants-Respondents.

Plaintiffs-Respondents' Brief
Oneida County
Index No. 99-533
CA 04-2580 &
CA 04-3078

ONEIDA INDIAN NATION OF NEW YORK,

Appellant.

PRELIMINARY STATEMENT

This Brief is respectfully submitted on behalf of Plaintiffs-Respondents, Scott Peterman, *et al.*, to address the issues raised in the Brief submitted by the Appellant, Oneida Indian Nation ("the Nation" or "the Oneidas") which has appealed from the orders of Supreme Court, Oneida County (McCarthy, A.J.S.C.) dated July 28, 2004 and October 17, 2004, respectively.

In what can only be charitably characterized as a schizophrenic series of legal maneuvers by the Tribe, whose myriad so-called "special appearances" are a testament to the

fact that it can not seem to make up their mind whether it wants to be "in" or "out" of this litigation, the Nation now asks this Court to reverse two orders by the lower court. The first, dated July 28, 2004 [R. 6-8], properly denied the Nation's motion to dismiss the Plaintiffs' complaint on indispensable party grounds (*i.e.*, that the Tribe's sovereign immunity precluded the lower court from addressing a profoundly important principle of New York constitutional law). The same order also granted Plaintiffs' motion for summary judgment that the 1993 Compact between the Nation and the State authorizing the Nation to operate a Class III Las Vegas style commercial gambling casino in Oneida County was invalid because the Governor lacked the necessary legislative authorization to enter into it. That order was based on a clear and binding precedent of the Court of Appeals handed down after this litigation was commenced (*Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801[2003], *cert denied*, 540 U.S. 1017 [2003]) ("*Saratoga County*").

The second order, dated October 17, 2004 [R. 1075-1080], denied the Nation's subsequent motion to renew based on a bizarre theory that the original adversaries - the Plaintiffs and the State Defendants-Respondents -- had now joined forces in some kind of collusive conspiracy to deprive the Indians of their alleged rights by agreeing to the terms of the judgment after the Court of Appeals handed down *Saratoga County*. This argument was advanced even though the Tribe had made an informed, voluntary decision not to intervene in this case in order to protect its interests. Indeed, the Plaintiffs had originally named the Nation as a Defendant. The Oneidas also lament the fact that after they consciously decided not to intervene, one of the other parties (the State Defendants-Respondents) thereafter failed

to make one of the arguments that supposedly could have been made by the Nation itself had it chosen to intervene – *e.g.*, laches.

All this, however, has been overshadowed in any case by an intervening event that occurred after the Nation perfected its appeal to this Court. The Oneidas' principal reason for not participating in this case to begin with was to deprive this State's courts of jurisdiction on indispensable party grounds in order to prevent them from rendering a decision that could adversely affect one of their rights – namely, their ability to continue to operate a major Class III Las Vegas style gambling casino (the Turning Stone casino) on lands they purchased just south of Exit 33 of the New York State Thruway in Oneida County. On March 29, 2005, the U.S. Supreme Court handed down a decision in which the Tribe was a direct participant; indeed, the Tribe itself initiated the suit. *City of Sherrill v. Oneida Indian Nation of New York*, ___US ____, Case No. 03-855, decided March 29, 2005 ("*City of Sherrill*"). That decision was far more damaging for the Tribe than anything that could have come from this case.

City of Sherrill has made it abundantly clear that the Tribe may not re-establish sovereignty over its former reservation land that it has long since abandoned simply by repurchasing parts of it in the open market. Reacquisitions by the Tribe of the fee title to such property did not rekindle "embers of sovereignty that long ago grew cold." *Id.*, slip op. at 14. Thus, while the Tribe might once again hold fee title to the property, that property is now subject to the laws of the State of New York. The Turning Stone Casino is located on just such property. Under the federal Indian Gaming Regulatory Act ("IGRA"), Class III

gaming is permitted only on "Indian lands" -- as defined in IGRA -- subject, of course, to other requirements as well – i.e., a Tribal-State Compact validity entered into under State law. *See, e.g., Hotel Employees and Restaurant Employees International Union v. Wilson*, 981 P.2d 990, 1008 (Calif. 1999). Turning Stone does not sit on "Indian land." Thus, the Nation that was so concerned about the adverse impact of any ruling by this State's courts has received – undoubtedly much to its chagrin -- an even worse decision from the highest court in the land in a case it brought upon itself. (*City of Sherrill).* That determination undermines any basis for their appeal in this case.

QUESTIONS PRESENTED

1. May the Nation claim to be both an "indispensable party" absent from this litigation while it continues to make so-called "special appearances" in this litigation to advance arguments on its own behalf and to file this appeal?

The Court below did not answer this question.

2. Assuming the Nation could file this appeal, was there a genuine case or controversy raised in this Declaratory Judgment action attacking the constitutionality of the Indian gaming compact between the Nation and the State on separation of powers grounds?

The Court below denied the Nation's motion to dismiss on the alleged grounds of the absence of a genuine case or controversy.

3. Is the Nation an indispensable party such that a case raising profound issues of constitutional law cannot be decided?

The Court below ruled that the Nation was not an indispensable party.

4. Does the equitable doctrine of laches apply to bar this suit, despite the fact that the Tribe was warned by the Governor's own negotiators that the compact might ultimately prove not to be legal, and the State went ahead and built its casino anyway?

The Court below denied the motion to dismiss on laches grounds.

5. Are the Nation's fears of an adverse decision by this Court of any remaining significance in light of the recent decision by the U.S. Supreme Court in *City of Sherrill v. Oneida Indian Nation*, decided March 29, 2005, wherein the Court ruled that former

reservation land, long since abandoned by the Tribe, did not constitute sovereign Indian land simply by virtue of the Tribe's reacquisition of fee title through a purchase on the open market?

The Court below did not deal with this question.

CONSTITUTIONAL AND STATUTORY BACKGROUND, FACTS AND PROCEDURAL HISTORY

In 1993, then-Governor Cuomo, purportedly acting on behalf of the State of New York, and representatives of the Oneida Indian Nation entered into a Compact purporting to authorize the Tribe to operate a Las Vegas-style commercial gambling casino on land situated in Oneida County, just south of Exit 33 of the New York State Thruway. A copy of the Compact is reproduced in the Record ["R."] at 83-127. That land was situated on former reservation land that the Tribe had long since abandoned and surrendered sovereignty over, but which it had recently reacquired fee title to by purchasing it on the open market. *See City of Sherrill v. Oneida Indian Nation*, _____ U.S. _____, Case No. 03-855, decided March 29, 2005.

The Compact was entered into pursuant to the Federal Indian Gaming Regulatory Act ("IGRA"), enacted by Congress in 1988, Public Law 100-497, codified at 25 U.S.C. §§ 2701-2721 and 18 U.S.C. §§ 1166-1168. IGRA made all State laws - both civil and criminal - prohibiting or regulating gambling applicable to Indian land. 18 U.S.C. § 1166(a), (b). Under IGRA, however, a Tribe may engage in sophisticated Las Vegas-style gambling, defined as Class III gaming (*see* 25 U.S.C. § 2703[6], [7], [8]), provided it first enters into a so-called Tribal State Compact with the State on which such Indian land is located, containing terms and conditions under which such gambling may occur. 25 U.S.C. § 2710(d). Absent such a compact, Class III gaming by Indians on Indian land is prohibited. *Id.* Contrary, however, to the Nation's assertion at page 4 of Appellant's Brief, states "may,"

but by no means are they "required" to enter into Class III gaming compacts with Indian tribes. 25 U.S.C. § 2710(d)(3)(B). *See also Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422, 1434 (10th Cir. 1994), *vacated and remanded on other grounds*, 517 U.S. 1129 (1996); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 281 (8th Cir. 1993) (IGRA does not force states to compact with Indian tribes). *See also* Conferences of Western Attorneys General, *American Indian Law Handbook* at 346 (2d Ed. 1998). *See also Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292, 1297 (D. Ariz. 1992); *Dalton v. Pataki*, 11 A.D.3d 62, 70 (3d Dep't 2004), *appeal pending*.

At or about the same time that the Nation and Governor Cuomo entered into this Compact, the Governor also entered into a virtually identical compact with the St. Regis Mohawk Tribe, purporting to allow that Tribe to operate a Class III casino at its Akwesasne reservation in Northern New York State. *See Saratoga County, supra*. In agreeing to both compacts, however, Governor Cuomo failed to obtain legislative authorization for or ratification of those compacts - a move that would subsequently prove fatal. Indeed, in June 1993, shortly after the compacts were executed, Elizabeth Moore, then counsel to Governor Cuomo, issued a dire warning in a memorandum [R. 191-197], noting specifically that the compacts were vulnerable to legal challenge precisely because the Governor had failed to obtain legislative authorization. *Id.* at 197. Moreover, she specifically mentioned in that Memorandum that:

> ... from the outset of negotiations with the St. Regis Mohawk Tribe in 1990 and with the [Oneida Indian] Nation last summer ... the State negotiators told their Indian counterparts

> that legislative approval would be required before the State could enter into effective compacts [R. 197].

Neither tribe, however, heeded the warnings contained in Ms. Moore's memorandum. Each proceeded to build a casino - the Oneidas at Turning Stone and the St. Regis Mohawks at Akwesasne in upstate New York. Predictably, that resulted in the filing of two lawsuits, both Declaratory Judgment actions initiated in 1999 - *Saratoga County Chamber of Commerce v. Pataki*, *supra*, challenging the constitutionality of the St. Regis Mohawks' compact, and this lawsuit, challenging the Oneida Compact. Both suits alleged, *inter alia*, that the Governor had entered into the respective compacts without legislative authorization in violation of the Constitution's separation of powers and that, even if they did not violate the separation of powers doctrine, the State nevertheless could not permit activity that was in direct contravention of Article I, § 9 of the State Constitution prohibiting commercialized gambling.

In this case, as distinguished from *Saratoga County*, however, the Plaintiffs originally named the affected tribe as a defendant. Thereafter, both the Nation and the State Defendants moved to dismiss on the grounds that (1) the Nation's sovereign immunity barred the Plaintiffs from suing the Nation, (2) the Nation was nevertheless, an indispensable party, and (3) the suit should also be dismissed because of the Plaintiffs' delay in bringing it (laches). *See* Appellants' Brief at 7.

Plaintiffs then moved for leave to file an amended complaint deleting the Nation as a party, but the Nation opposed, on the continuing ground that the suit should be dismissed altogether on indispensable party grounds. By that time, however, the Appellate Division -

Third Department had already ruled in *Saratoga County* that that case should not be dismissed on indispensable party grounds. 275 A.D.2d 145, 153-54 (3d Dep't 2000). Accordingly, the Court below denied the motion to dismiss on indispensable party grounds and later denied the Nation's motion to renew. *See* Appellants' Brief at 7-8. Later, the lower court denied the State's motion to dismiss on all other grounds and the State then appealed to this Court.

By then, however, *Saratoga County* had finally reached the Court of Appeals on June 12, 2003 - exactly three days less than ten years after Governor Cuomo's counsel, Elizabeth Moore, had written her warning memorandum. The Court proved Ms. Moore to be a prophet. It ruled that the compact between the St. Regis Mohawks and the State had been unconstitutionally entered into by virtue of the absence of legislative authorization and/or ratification. The Court of Appeals left open for another day the question of whether a compact receiving legislative authorization would nevertheless still be unconstitutional in light of the anti-gambling provisions contained in Article I, § 9 of the State Constitution. *Saratoga County*, 100 N.Y.2d 801, 824-825 (2003). On November 17, 2003, the U.S. Supreme Court denied the State's petition for *certiorari*. 540 U.S. 1017.

Following those developments, the State Defendants withdrew their appeal to this Court from the lower court order denying the State Defendants' motion to dismiss. *See* Appellants' Brief at 8. Thereafter, Plaintiffs moved for summary judgment to declare the Compact invalid because the Compact violated the anti-gambling provisions of Article I, § 9 of the Constitution and Article 225 of the Penal Law, as well as the separation of powers

doctrine [R. 20]. Although it was no longer a party to the case, the Nation's counsel urged the Attorney General to include in the State Defendants' response to the Plaintiffs' summary judgment motion the defenses of laches, lack of standing, and the fact that the Legislature had allegedly appropriated funds to implement the Compact, thereby defeating the separation of powers argument [R. 358]. It should be noted that in *Saratoga County*, the Court of Appeals had disposed of all three issues, including the legislative appropriation issue. *Id.* at 823-24.

The Attorney General's office chose not to advance the arguments proposed by the Nation and so the Nation filed what it refers to as a "special appearance" to assert once again its sovereign immunity (which no party disputed) and to renew its earlier motion to dismiss, already once denied, with respect to indispensable parties. *See* Appellants' Brief at 9. The State Defendants, in the meantime, realizing that *Saratoga County* was dispositive, dropped its opposition to the motion and agreed with the Plaintiffs that summary judgment should be granted declaring the Oneida Compact illegal solely on the separation of powers grounds that the Court of Appeals had relied on in *Saratoga County*, *supra* [R. 1020].

Apparently never out of ink, the Nation then supplemented its earlier motion, now arguing that the case should be dismissed because there was no longer a case or controversy given the State's agreement that the Compact was illegal. Appellant's Brief at 11. At this point, the State, apparently now having had enough, opposed the Nation's motion, and requested the State to enter a Declaratory Judgment solely on the separation of powers

grounds, which is what the Court ultimately decided in its June 25, 2004 decision [R. 9-18] and the July 28, 2004 Order based on that decision [R. 6-9].

The Nation persisted, however, in going back to the inkwell yet again, "specially appearing" once more to renew its earlier motion, also made by special appearance, to dismiss the Complaint on the grounds that there was no actual controversy. The Court below denied that motion in all respects in a joint decision and order dated October 27, 2004 [R. 1075-1080]. The Nation now appeals from both the July 28, 2004 and October 27, 2004 Orders.

ARGUMENT

POINT I

This Appeal Should Be Dismissed as There Is No Longer Any Legal Basis For A "Special Appearance" Under New York Law. By Virtue of Its Appearance in This Case, Therefore, the Nation Has Waived Any Jurisdictional Objections And/Or Indispensable Party Claims

The Nation contends that it has entered a "special appearance" in this case, apparently to raise issues concerning both sovereign immunity and its status as an indispensable party. Appellant's Brief at 10. There is, however, no longer any such form of appearance. It has long since been abolished by the CPLR. *See generally,* Siegel, *New York Practice*, § 109 *et seq.* at 190 *et seq.* (3d Ed. 1999) ("Siegel").

Ignoring the CPLR, however, the Nation apparently wants to have its proverbial cake and eat it too, weighing in whenever it wants while at the same time invoking sovereign immunity when it suits its purpose in a vain effort to deprive the court of jurisdiction and the right to decide a case with profound constitutional dimensions under New York law – namely, whether the Governor of the State had the power to enter into a Compact with the Nation allowing it to engage in Class III gambling without legislative authorization.

The Nation consciously chose not to intervene (*see* CPLR § 1012 *et seq.*) and, indeed, earlier in the case it moved to dismiss when it had been named as a party. Having nevertheless subsequently participated in this case by making arguments via the "back door" that address the merits, the Nation has made what – for lack of any other appropriate term –

is considered an "informal appearance." Siegel, *supra* at § 112. By playing it cute, it has, however, outsmarted itself, waiving any jurisdictional objections it might otherwise have. *Id.* By making itself a party to the case, it is no longer an "indispensable" party, which, by definition, is a party which has not been joined to a case. The Nation has also subjected itself to the jurisdiction of the court and is now bound by any determinations rendered in this litigation. *Id.*

If the Tribe is an "indispensable party" as it claims, then it is not a party to this case and this appeal should be dismissed. It cannot simultaneously be both a "spectator" and a "player."

POINT II

This Case Presents a Genuine Case or Controversy, and There Was No Collusion By and Between the Plaintiffs and the State Defendants to Obtain a Judgment Against the Nation's Interest

Even if this Court were disposed to allow the Nation's appeal, its arguments are totally without merit. First, it disingenuously implies that the Plaintiffs-Respondents and the State Defendants-Respondents engaged in some form of conspiracy to deprive the Tribe of its rights, citing a multitude of cases where theoretically adverse parties actually had a commonality of interests and sought to use a Declaratory Judgment action as a vehicle to obtain a judgment that could then be asserted against unrepresented third parties. That, however, is hardly the case at bar.

As the Nation knows all too well, when this case was commenced in 1999, the State Defendants-Respondents vigorously defended the validity of the Nation-State Compact between the Oneidas and the State of New York which purported to give the Tribe a right to operate a Class III gaming casino at Turning Stone. The State interposed lengthy pleadings, affidavits and memoranda of law opposing the Plaintiffs-Respondents' allegations that the Compact violated New York's constitutional separation of powers and the anti-gambling provisions of Article I, § 9 of the State Constitution. Even Appellant admits the existence of such controversy. Appellants' Brief at 13-14.

The State-Defendants, however, ultimately capitulated – as well they should have – when another case on a faster track that involved identical issues to the case at bar was

litigated to conclusion in a different part of the State. In June, 2003, the State's highest court ruled that an Indian Gaming Compact virtually identical to the one at issue here that was unilaterally entered into without legislative authorization by the Governor with the St. Regis Mohawk Tribe violated the State Constitution's separation of powers. *Saratoga County, supra* at 823-824. Given the State Defendants-Respondents' duty not to protract litigation once the outcome was inevitable by virtue of the ruling of the State's highest court in a related case, the Attorney General's office took the ethically appropriate action of dropping his opposition to and joining in the Plaintiffs-Respondents' Motion for Summary Judgment.

It is one thing for parties to abuse a Declaratory Judgment action by "manufacturing" a case or controversy; it is quite another, however, to imply that the State Defendants-Respondents eliminated any case or controversy by some sinister agreement with the Plaintiffs-Respondents to join in their motion for summary judgment. Rather, recognizing that the proverbial handwriting was on the wall after the decision in *Saratoga County*, the State Defendants understood that there was nothing more to be litigated. It was not the State Defendants-Respondents' actions that eliminated the case or controversy here; it was simply that the definitive decision by the Court of Appeals in *Saratoga County* resolved it. Is Appellant really suggesting that the Plaintiffs-Respondents should now be forced to give up their hard-earned victory because their position was vindicated by the Court of Appeals in another case?

On Page 19 of its Brief, the Nation also advances the specious proposition that the existence of a controversy between the parties and an "absent" third party does not confer

jurisdiction upon a court to issue a Declaratory Judgment. This argument also falters upon the obvious inherent contradiction that the Appellant claims to be "absent" while, nevertheless, fully participating at every critical juncture of this proceeding. The Tribe cannot play both ends against the middle. It is "in" this litigation, but even if it were not, its arguments regarding indispensable party status are without merit. *See* Point III, *infra*.

POINT III

The Nation Is Not An Indispensable Party

No matter how exhaustively the Appellant Nation attempts to spin the facts in this case to distance itself from the holding of the Court of Appeals in *Saratoga County*, it has failed to do so. *See* Appellant's Brief at 25 *et seq.* Plaintiffs-Respondents wish to remind this Court once again that the Oneidas, as *amicus curiae*, made virtually the same indispensable party arguments they advance here to the Court of Appeals in *Saratoga County*, where they were rejected. *See* Appendix "A", annexed.

Beginning at page 26 of its Brief, the Nation would have this Court review again each of the five criteria enumerated in CPLR 1001(b) to determine whether this case should be dismissed on indispensable party grounds. The Court of Appeals, in *Saratoga County*, already went through that exercise on virtually identical facts, and ruled that the St. Regis Mohawk Tribe in that case was not an indispensable party. *Saratoga County*, *supra* at 820-821. The Nation utterly fails to establish any material differences between this case and *Saratoga County* that would dictate a different result.

The Nation's arguments are really nothing more than a rehash of those advanced in *Saratoga County*. Moreover, the Tribe is simply in denial about the most overwhelming consideration that caused the Court of Appeals in *Saratoga County* to reach the conclusion it did with respect to the indispensable party issue. The principal rationale for the indispensable party rule is to protect "otherwise absent parties who would be embarrassed by

judgments purporting to bind their rights or interests where they have had no opportunity to be heard." *Saratoga County, supra* at 820.

That rationale simply does not apply here any more than it did in *Saratoga County*. The Nation in this case was fully aware of the current litigation and had a full opportunity to be heard but chose, instead, not to participate. Indeed, it was originally part of the case, but moved to dismiss. The Court below expressly cited the Court of Appeals rationale in *Saratoga County* as a basis for rejecting the Nation's arguments here [R. 13].

The Nation also argues that this case should be decided on federal law, not state law. The Nation, however, neglects to mention in its Brief to this Court that it already tried that tack in this very case and lost. In 2000, it went into federal court, invoking the All Writs Act, 28 U.S.C. § 1651, seeking to enjoin the Plaintiffs-Respondents from bringing this very action in State court on the grounds that it interfered with a pending federal action. *Oneida Indian Nation v. County of Oneida*, 132 F.Supp.2d 71 (N.D.N.Y. 2000) ("*Oneida Indian Nation*"). In denying that relief, the Northern District specifically rejected the notion that federal courts have exclusive jurisdiction over cases like the one at bar, citing the Appellate Division, Third Department's decision in *Saratoga County*, 275 A.D.2d 145 (3d Dep't 2000), that has since been affirmed by the New York Court of Appeals. *See Oneida Indian Nation, supra* at 76.

Finally, it must be emphasized that the drastic action of dismissing a case on indispensable party grounds is an absolute "last resort," which courts should avoid whenever possible. *Saratoga County, supra* at 821, *citing* Siegel, *supra* at § 133. Given the profoundly important Constitutional questions posed by this case, and the fact that the Nation

had more than ample opportunity to be heard, this is not a case where such draconian "last resort" action should be taken.

POINT IV

There Is No Merit To the Nation's Equitable Arguments, Including Laches and the Interests of Justice

The Nation claims that the equitable doctrine of laches, as well as general considerations of "justice," dictate that this case be dismissed. *See* Appellants' Brief at 41-42. The Oneidas claim that the six-year delay between the time the Turning Stone Casino opened and the time this suit was brought undermined their economic investments, noting that "between 1993 and 1999, the Nation, its members, and many non-Indian employees of the casino made substantial financial and personal commitments in reliance on the continued operation of Turning Stone." Appellants' Brief at 38.

Precisely the same claim, however, was made on behalf of the St. Regis Mohawk Tribe in *Saratoga County*, where the Court of Appeals specifically rejected the argument that "the nearly six-year delay between the effective date of the 1993 Compact and the start of this suit has prejudiced the Tribe." *Id.* at 816.

Even more to the point, the Court in *Saratoga County* noted that:

> ... the Tribe was on notice as to the possible illegality of the Compact, citing a memorandum from Governor Cuomo's counsel indicating that the Tribe had been informed that legislative approval would be required before the State could enter into effective compacts. Thus, while the Casino is presumably expected to make large sums over the next several years, and while Plaintiffs' suit threatens that source of revenue, the prejudice caused by a loss of expected profits based upon a predictably vulnerable compact is not the sort of prejudice that supports a defense of laches. Were it

> otherwise, very few suits would proceed past laches analysis, and certainly no suits seeking to invalidate illegal contracts could ever proceed.

Saratoga County, supra at 817-818.

That analysis applies with equal force to the case at bar. The famous - or perhaps "infamous" from the Nation's perspective - memorandum of the Governor's counsel, Elizabeth Moore, is reproduced in the Record here [R. 390-395]. Written in June 1993, she warned that the State's Compact with the Oneida Tribe (as well as the St. Regis Mohawk Tribe) could be in jeopardy if the State Legislature failed to ratify its terms. Most notably, she stated:

> We have long recognized the need for legislative action to implement the Compacts. The Governor has consistently taken the position that the Legislature would have to authorize the State to implement compacts that require the State to negotiate and oversee Indian gaming. *That is why the Governor submitted a program bill in 1990 and 1991, seeking authority from the Legislature to negotiate and enter into compacts with any Indian tribe or nation, and that is why, from the outset of negotiations with the St. Regis Mohawk Tribe in 1990, and with the Nation last summer, the State's negotiators told their Indian counterparts that legislative approval would be required before the State could enter into effective compacts.* (emphasis supplied)

[R. 395]

The "Nation" referred to in the Memo by Ms. Moore refers to the Oneida Indian Nation, the Appellant herein [R. 390].

The Nation's whole laches argument collapses beneath the weight of this memorandum. The Tribe went ahead and took its chances with its eyes wide open, and now

that the dire events Ms. Moore had cautioned about have unfolded, the Oneidas cannot claim that they were not warned. *See also Pueblo of Santa Ana v. Kelly*, 101 F.3d 1546, 1549 (10th Cir. 1997), *cert denied*, 522 U.S. 807 (1997) (Tribe must bear responsibility for its own precipitous conduct in engaging in gambling before it was determined whether it was legal). The Tribe's hardship in this case was totally "self-inflicted." They took the risk and lost, and having made their own proverbial bed, they now must lie in it.

As for the Oneidas' claim that the interests of justice and the upsetting of their economic expectations weigh in their favor, the Court will hopefully forgive Plaintiffs-Respondents for characterizing that claim as more than just a little hypocritical. While the Tribe invokes "justice," and feigns outrage that the Plaintiffs waited six years before challenging the Compact herein, it was this very same tribe which, only a few years ago, unsuccessfully sought to upset the settled expectations of those who are Plaintiffs in this case. That occurred when the Nation tried to amend its 25-year-old land claim in what a Federal court characterized as a "bad-faith" effort to eject landowners from their homes, despite chains of title that went back nearly 200 years. *Oneida Indian Nation of New York State v. County of Oneida*, 199 F.R.D. 61 (N.D.N.Y. 2000). Many of those landowners are members of one of the Plaintiffs-Appellants in this case, Upstate Citizens for Equality, and they will not easily or soon forget the Tribe's efforts to play "hardball." This Court may rest assured that the Tribe's claims of "justice" do not exactly resonate with the Plaintiffs-Respondents in this case.

POINT V

The U.S. Supreme Court's Recent Ruling in *City of Sherrill* Overshadows Any Prejudice the Tribe Claims Might Result From This Case

As if the weaknesses of this case did not pose enough problems for the Appellant Nation, they pale in comparison to what happened when the U.S. Supreme Court handed down *City of Sherrill*, *supra* on March 29, 2005. While here the Oneidas are worried that any state court decision invalidating the Tribe's Indian gaming compact with the State might jeopardize their continued right to operate the Turning Stone Casino, the U.S. Supreme Court decision in *City of Sherrill* removed all doubt as to the legality of that operation.

As already noted, *supra* at 3, by virtue of the decision in *City of Sherrill*, Turning Stone is not located on Indian land. Under IGRA, Indian tribes can conduct Class III gaming only on "Indian land" as defined by IGRA. *See* 25 U.S.C. § 2710(d)(1) and § 2703(4). *See also* 18 U.S.C. § 1166(a), (b). Lest there be any doubt that the Oneidas fully recognize the implications of the decision in *City of Sherrill*, within a week of that decision it frantically initiated a process to place that land into trust. *See* Syracuse *Post Standard*, "Oneida Nation's New Tack to Keep Land Off Tax Rolls," April 13, 2005 at A-1 (copy annexed as Exhibit "B"). If the property were to be placed into trust, the Oneidas hope that it would restore their legal "cover" to continue to operate Turning Stone. *See* 25 U.S.C. § 2719(b)(1)(A). *See also City of Sherrill*, *supra*, slip op. at 20-21.

"Land to trust," however, is a lengthy, bureaucratic process. *See* 25 U.S.C. § 465; 25 C.F.R. Part 451. Moreover, there is no guarantee that the local governments where such land

is located will readily agree to cede their jurisdiction and forgo the tax revenues they receive from it and the sovereignty they exercise over it. In the meantime, there is simply no question that Turning Stone sits on soil that is subject to the sovereignty of the State of New York. In that case, Article I, § 9 of the Constitution prohibiting commercialized gambling absolutely and unequivocally applies.

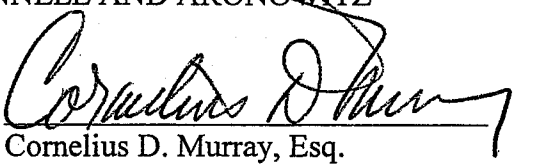
Thus, by any measure, the decision by the highest federal court in the land renders the Nation's arguments in this case about prejudice totally insignificant, not to mention irrelevant. The Tribe now has neither a legal venue to locate a casino nor a valid compact to conduct Class III gaming therein.

CONCLUSION

The Orders appealed from should be affirmed in all respects.

DATED: April 22, 2005

O'CONNELL AND ARONOWITZ
By:



Cornelius D. Murray, Esq.
Attorneys for Plaintiffs-Respondents
Office and P.O. Address
54 State Street
Albany NY 12207-2501
(518) 462-5601

G:\DATA\ATTORNEY\CDM\Upstate Citizens\BFupstate-mk.doc