UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONEIDA NATION OF NEW YORK,

Plaintiff,

v.

DAVID A. PATERSON, in his official capacity as Governor of New York, JAMIE WOODWARD, in her official capacity as Acting Commissioner of the N.Y. Department of Taxation & Finance, WILLIAM COMISKEY, in his official capacity as Deputy Commissioner for the Office of Tax Enforcement for the N.Y. Department of Taxation & Finance,

Defendants.

Civil Action
No. 6:10-CV-1071
(DNH/ATB)

DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

This Reply Memorandum of Law is respectfully submitted in further support of defendants' motion for summary judgment (Dkt. No. 81) and in response to the opposition papers filed by plaintiff (Dkt. No. 84).

The Oneida Nation's opposition makes no attempt to defend its original claims against the 2010 amendments to the Tax Law nor to substantively address the defendants' motion. Instead, the Nation raises two procedural objections to the defendants' motion for summary judgment. As set forth below, neither objection has merit. Therefore, defendants' motion should be granted.

A. This Court Should Rule on Defendants' Motion for Summary Judgment.

First, the Oneida Nation asserts that the motion for summary judgment is untimely. The defendants, however, filed the motion within the time provided for in Federal Rule of Civil Procedure 56(b), and this Court's August 2, 2011 Order (Dkt. No. 75) did not expressly impose an earlier deadline for filing dispositive motions.

Conafay v. Wyeth Laboratories, 841 F.2d 417 (D.C. Cir. 1988), does not hold otherwise. That case faulted the district court for granting a motion for summary judgment without adequately considering a pending motion for voluntary dismissal. *See id.* at 419. But it did not hold, as the Oneida Nation suggests here, that a motion for voluntary dismissal somehow *precludes* a district court from considering a subsequently filed summary judgment motion. Instead, as this Court recognized in its October 4, 2011 hearing notice, both pending motions can and should be decided together. *See, e.g.*, *United Artists Theatre Circuit, Inc. v. Sun Plaza Enterprise Corp.*, 352 F. Supp. 2d 342, 355-56 (E.D.N.Y. 2005) (granting summary judgment motion and denying dismissal motion as moot).

Here, as the defendants explained more fully in their opposition to the motion for voluntary dismissal (Dkt. No. 78), the Oneida Nation's request to dismiss its complaint without prejudice is unwarranted. The Second Circuit's comprehensive decision categorically defeats the Nation's claims—as the Nation implicitly concedes here by waiving any response to the Second Circuit's conclusions or the State defendants' arguments. Accordingly, the Oneida Nation's only basis for a voluntary dismissal is its desire to avoid an adverse decision from this Court. But "seeking to

avoid a judgment that would be adverse to their interest . . . [is] not a legitimate justification for [the] desire to dismiss without prejudice." *Minnesota Mining & Mfg. Co. v. Barr Laboratories, Inc.*, 289 F.3d 775, 783 (Fed. Cir. 2002). Moreover, a dismissal under such circumstances would prejudice the defendants by depriving them of the conclusive end to this litigation mandated by the Second Circuit's decision. *See Grover by Grover v. Eli Lilly and Co.*, 33 F.3d 716, 718 (6th Cir. 1994) ("In view of the extra delay and expense experienced by defendant, and plaintiffs' defeat on the 'determinative' legal issue certified to the Ohio Supreme Court, the district court's order manifestly burdened defendant with clear legal prejudice."). Among these factors, the pendency of the defendants' motion for summary judgment—which is now ripe for decision—reinforces the conclusion that dismissal without prejudice is unwarranted here.

B. The Oneida Nation's Voluntary Cessation of Cigarette Purchases Does Not Preclude Summary Judgment.

Second, the Oneida Nation urges this Court to deny summary judgment because the Nation has voluntarily discontinued purchasing cigarettes from wholesalers (Opp. at 4). That decision, however, was the direct result of the Second Circuit's opinion, not an independent economic choice. It is well established that a party may not avoid an adverse result by its "[v]oluntary cessation of illegal conduct," particularly "where the cessation resulted from a coercive order." *N.Y. State Nat'l Org. for Women v. Terry*, 159 F.3d 86, 91-92 (2d Cir. 1998). Here, the Oneida Nation stopped purchasing cigarettes from wholesalers solely because the

Second Circuit's decision upheld the State's 2010 Tax Law amendments that barred the Nation from continuing it s previous practice of selling untaxed cigarettes to nonmembers. That reaction to a prohibitory decision does not permit the Oneida Nation to avoid a summary judgment ruling against it.

Because the Nation's voluntary forbearance from cigarette purchases rests on the validity of a legal ruling in this very dispute, it is simply not the case that "[a]djudication of the Nation's claims would serve no practical purpose" (Opp. at 5). To the contrary, a grant of summary judgment to State defendants in this case would confirm the Second Circuit's holding that the Oneida Nation's challenges to the 2010 amendments are meritless and would bar the Nation from rehashing the same fruitless claims in future litigation. A summary judgment ruling would also prevent the Oneida Nation from retreating from its policy of not purchasing cigarettes based on the assertion—which it hints at here (Plaintiff's Opp. (Dkt. 84) at p. 4)—that the Second Circuit's opinion means less than what it says. In the absence of a summary judgment ruling in favor of State defendants, it is far from "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 66 (1987).

Finally, regardless of the Oneida Nation's litigation-driven cessation of cigarette purchases, this case is ripe for adjudication. The Nation's long history of selling cigarettes tax-free to nonmembers provides more than enough "concrete, real-world facts" (Plaintiff's Opp. (Dkt. 84) at p. 4) with which this Court can

evaluate the validity of the 2010 amendments. *See, e.g.*, *Dep't of Taxation & Finance of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 69, 78 (1994) (dismissing pre-enforcement, pre-discovery challenge to New York's cigarette tax regulations). Indeed, if anything, the Nation's voluntary withdrawal from the cigarette market only makes its claims *more* speculative, and thus even more meritless. *See Oneida Nation of New York v. Cuomo*, 645 F.3d 154, 175 (2d Cir. 2011) (rejecting claims as overly speculative). Accordingly, this Court should deny the Oneida Nation's motion for voluntary dismissal and grant the defendants' motion for summary judgment.

CONCLUSION

Defendants' motion for summary judgment should be granted.

Dated: Albany, NY
November 10, 2011

Respectfully submitted,

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