UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ONEIDA NATION OF NEW YORK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 6:10-CV-1071
	)	(DNH/ATB)
DAVID A. PATERSON, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Oneida Nation, by counsel, submits this opposition to Defendants' motion for summary judgment, which Defendants filed one month after the Nation moved to dismiss this action without prejudice pursuant to Fed. R. Civ. P. 41(a)(2). As previously demonstrated in the Nation's voluntary dismissal papers, and as further explained below, there remains no live controversy between the parties and thus no reason for a merits adjudication by this Court. Instead, the Court should grant the Nation a voluntary dismissal pursuant to Rule 41(a)(2).

I. Defendants' Summary Judgment Motion Is Untimely.

Defendants' summary judgment motion should have no bearing on the Court's resolution of the Nation's earlier-filed motion for a Rule 41(a)(2) voluntary dismissal without prejudice. To the contrary, granting a Rule 41(a)(2) dismissal will eliminate the need for a decision regarding summary judgment.

In *Conafay v. Wyeth Laboratories*, 841 F.2d 417 (D.C. Cir. 1988), the plaintiff moved for voluntary dismissal under Fed. R. Civ. P. 41(a)(2), for the purpose of refiling the action in the Superior Court for the District of Columbia to include a defendant whose joinder would destroy

federal diversity jurisdiction. *Id.* at 418. The defendant opposed the motion and simultaneously filed a motion for summary judgment. *Id.* The district court denied the plaintiff's voluntary dismissal motion and ultimately granted the defendant's motion for summary judgment. *Id.* at 418-19. On appeal, the D.C. Circuit held that the district court had abused its discretion in denying the plaintiff's motion for voluntary dismissal by, among other things, erroneously attaching significance to defendant's submission of a motion for summary judgment. *Id.* at 419-20. According to the D.C. Circuit, the summary judgment motion—though ultimately granted—was irrelevant "to the issue at hand" because it "was not filed until after the voluntary dismissal motion." *Id.* at 420. In particular, the court stated,

> Because the summary judgment motion was filed after the motion for voluntary dismissal, [defendant] clearly took a large risk that its work would be disregarded entirely in the first round of litigation. In fact, [defendant] could easily have declined to oppose the motion for voluntary dismissal and saved all its summary judgment energies for the second round of litigation. Of course, there is no reason why the summary judgment motion cannot be renewed at the appropriate time in any reinstituted action.

Id. (also recognizing that "[g]ranting voluntary dismissal would mean that [defendant] would lose an opportunity for a favorable final disposition of the case").[1]

Here, Defendants similarly filed their motion for summary judgment after the Nation requested a voluntary dismissal. Further, Defendants' delayed their summary judgment motion until almost one month after the date (September 1, 2011) by which the Court directed that it would dismiss this case *sua sponte* in the absence of a filing by either party. Aug. 2, 2011 Order (DE 75). As in *Conafay*, there is no reason why Defendants cannot re-file their summary judgment motion if litigation were renewed in the future. But very much unlike that case, in

[1] The court also held that the district court had abused its discretion by "attach[ing] too much significance to … the expense and inconvenience to [defendant] of enduring a second round of litigation in a different forum." *Conafay*, 841 F.2d at 419; *see also id.* (required finding of "clear legal prejudice on a defendant" to justify denial of a motion for voluntary dismissal "means something other than the necessity that defendant might face of defending another action") (internal quotation marks omitted).

which plaintiffs sought dismissal for the purpose of renewing the litigation (in a different forum), the Nation seeks such relief here because the Nation is not purchasing taxable cigarettes and, thus, there is no reason for continued litigation.

II. If the Court Were to Reach Defendants' Summary Judgment Motion, this Action Should Be Dismissed as Not Ripe or Because Discretionary Declaratory and Injunctive Relief Should Not Be Granted as to a Tax Scheme in Which the Nation Does Not Participate.

A. Facts

The Oneida Nation sued to challenge specific aspects of New York's new statutory and regulatory scheme, as applied to the Nation, for collecting taxes on the sale of cigarettes by Indian tribes to non-members. Complaint (DE 1). The complaint asserts two claims: (1) that the State of New York's new cigarette tax scheme impermissibly requires the Nation to prepay millions of dollars of taxes without interest, *id.* ¶¶ 26-36; and (2) that the scheme's prior approval system fails to protect the Nation's and its members' rights to obtain cigarettes for their own use free of state taxes, *id.* ¶¶ 37-51. The complaint prays only for declaratory and injunctive relief. *Id.* ¶ 52.

Prior to Defendants' implementation of the new tax scheme, this Court issued a temporary restraining order and a preliminary injunction as against Defendants' enforcement of the statutes and regulations at issue. *Oneida Nation v. Paterson*, No. 10-1071, 2010 WL 4053080, at *13 (N.D.N.Y. Oct. 14, 2010). In granting interlocutory injunctive relief, the Court relied on evidence submitted by the Nation concerning (1) the amount of funds the Nation would be out-of-pocket, and associated borrowing costs, if the Nation maintained its retail cigarette sales business at then-current levels; and (2) the financial incentives to wholesalers to take advantage of defects in the prior approval system upon its implementation. *Id.* at *8-9.

Defendants appealed, and on May 9, 2011, the Second Circuit "vacated" this Court's interlocutory orders and "remanded for further proceedings consistent with" its opinion. *Oneida Nation v. Cuomo*, 645 F.3d 154, 176 (2d Cir. 2011). Because the only orders on review concerned interlocutory injunctive relief, and not a final merits adjudication, the Second Circuit resolved only the Nation's entitlement to interlocutory injunctive relief and did not make a final merits determination. *Id.* at 175-76 ("The Northern District committed legal error in determining that both of [the Nation's claims] were likely to succeed, and thus abused its discretion in granting the Oneida Nation's motion for preliminary injunction."); *see Univ. of Tex. v. Camenish*, 451 U.S. 390, 394 (1981) (rejecting the argument that appellate determinations of no likelihood of success on the merits are "tantamount to decisions on the underlying merits," and holding that the argument "improperly equates 'likelihood of success' with 'success'").

After the Second Circuit's decision lifting the preliminary injunction, and before Defendants implemented the new tax scheme, the Nation ceased purchasing cigarettes subject to tax prepayments. Further, the Nation has not sought to purchase, under the prior approval aspect of the new tax system, untaxed cigarettes for the Nation's or any other use. Nov. 3, 2011 Declaration of Sean Brown Supporting Plaintiff's Opposition to Summary Judgment ("Brown Decl.") ¶ 6. The consequence is that the Nation has not been required to pre-pay state cigarette taxes and that the prior approval system has not denied the Nation and its members access to tax-free cigarettes.

There is thus no concrete, real-world set of facts to provide the basis for a final merits adjudication of the claims asserted in the Nation's complaint. The undisputed material facts are that the Nation is not pre-paying taxes or requesting but failing to receive the required amount of untaxed cigarettes, with the result that neither injunctive nor declaratory relief is required.

Defendants' summary judgment motion invites the Court to make a merits ruling based on future predictions, that were made when this action was filed, about the effect of the new tax scheme on the Nation, but the current facts are that the Nation makes no purchases that are regulated under the new tax scheme and therefore that no relief is needed.

B. Ripeness

The Nation's claims are not ripe for adjudication, given the change in circumstances. *See Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 405 (2d Cir. 2011) ("A claim is not ripe if it depends upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'") (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)). In the absence of record evidence suggesting the Nation will purchase cigarettes from third parties that are required to pre-collect state cigarette taxes under the challenged statutes and regulations, or will seek to buy untaxed cigarettes, it is "quite possible that a resolution of [the Nation's] current claims will not be necessary in the future." *Simmonds v. I.N.S.*, 326 F.3d 351, 360 (2d Cir. 2003) (uncertainty over "whether or when" event would occur rendered plaintiff's claim unfit for adjudication). Adjudication of the Nation's claims would serve no practical purpose. *See id.* at 359 (withholding resolution of issues not fully fit for adjudication "save[s] … the district court from issuing a decision that may turn out to be unnecessary"), *Oneida Nation v. Cuomo*, 645 F.3d at 175 (noting prematurity of Nation's pre-enforcement challenge to new cigarette taxation scheme). Accordingly, the only judgment Defendants could be entitled to receive is one dismissing this action because the claims herein are not ripe. But, because the Nation has sought to voluntarily dismiss under Rule 41(a)(2), there is no point to dismissal on ripeness grounds.

C. Availability of Discretionary Equitable Relief

The Nation's complaint prays only for declaratory and injunctive relief. Complaint ¶ 52 (DE 1). This Court is vested with broad discretion to determine whether to grant or to deny such relief. *See In re Orion Pictures Corp.*, 4 F.3d 1095, 1100 (2d Cir. 1993) ("A district court has broad discretion to decide whether to render a declaratory judgment."); *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 68 (2d Cir. 1999) ("An award of an injunction is not something a plaintiff is entitled to as a matter of right, but rather it is an equitable remedy issued by a trial court, within the broad bounds of its discretion, after it weighs the potential benefits and harm to be incurred by the parties from the granting or denying of such relief."). Moreover, the Nation does not contend that it is being irreparably harmed by a tax scheme in which it is not participating. *See Roach v. Morse,* 440 F.3d 53, 56 (2d Cir. 2006) (showing irreparable harm required for permanent injunction). Thus, although summary judgment theoretically could be awarded on the ground that the Nation, in the current circumstances, is not entitled to the discretionary equitable relief sought in the complaint that was filed back at a time when the Nation bought cigarettes from wholesales that were subject to the new tax scheme, there would be no real purpose to such a ruling. A Rule 41(a)(2) voluntary dismissal is the appropriate result on the current record.

D. Inaccuracy of Defendants' Statement of Undisputed Facts

Defendants erroneously contend that the Nation "directly purchases cigarettes from wholesalers," asserting that there is no dispute about it. Defendants' Statement of Undisputed Facts (DE 81-1) ¶ 6. Directly to the contrary, as confirmed in the attached Brown Declaration, the Nation no longer purchases cigarettes from wholesalers or other third parties subject to the new tax scheme, and has not done so since Defendants began to implement the new tax scheme.

Brown Decl. ¶ 6.[2] Defendants' reliance on current purchases of cigarettes subject to the new tax scheme, although erroneous, is an implied recognition that a merits ruling in this case is not appropriate unless the Nation is participating in the new tax scheme.

III. Conclusion

For these reasons, the Court should grant voluntary dismissal under Rule 41(a)(2) and should not reach Defendants' summary judgment motion. If the motion is reached, it should be granted only on the grounds that this action is premature because the Nation's claims are not ripe or because the current undisputed facts show that there is no need for the discretionary equitable relief requested in the complaint filed over a year ago.

Date: November 4, 2011

Respectfully submitted,

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[2] This erroneous statement of fact is among the very few actual "facts" that are set forth in Defendants' 12-paragraph Statement of Undisputed Facts with specific citations to the record where such facts are established. In contravention of the requirements of Local Rule 7.1(a)(3), Defendants' Statement consists largely of pure legal propositions and mere recitations of the procedural history of this action. There are no material facts at all about the effect of the new tax scheme on the Nation which is not surprising in view of the fact that the Nation is not buying cigarettes from wholesalers subject to the new scheme. *See* Local Rule 7.1(a)(3) ("Failure of the moving party to submit an accurate and complete Statement of Material Facts shall result in a denial of the motion.").

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November 2011 I caused the foregoing to be filed with the Clerk of Court via the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ *Michael R. Smith*
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