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## SENECA NATION OF INDIANS v. PATERSON

No. 1:10-CV-00687 (MAT).

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*SENECA NATION OF INDIANS, Plaintiff, CAYUGA INDIAN NATION, Plaintiff-Intervenor, v. DAVID PATERSON, Governor of the State of New York, JAMIE WOODWORD, Acting Commissioner, New York State Department of Taxation and Finance, WILLIAM COMISKEY, Deputy Commissioner, Office of Tax Enforcement, New York State Department of Taxation and Finance, JOHN MELVILLE, Acting Superintendent, New York State Police, each in his or her official capacity, Defendants.*

United States District Court, W.D. New York.

January 23, 2017.

### Editors Note

Applicable Law: 28 U.S.C. § 2201

Cause: 28 U.S.C. § 2201 Declaratory Judgement

Nature of Suit: 950 Constitutional - State Statute

Source: PACER

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### Attorney(s) appearing for the Case

*Seneca Nation of Indians, Plaintiff, represented by Carol E. Heckman, Harter, Secrest and Emery LLP.*

*Seneca Nation of Indians, Plaintiff, represented by David Thomas Archer, Harter, Secrest and Emery, LLP & Riyaz A. Kanji, Kanji & Katzen, PLLC.*

*Cayuga Indian Nation of New York, Intervenor Plaintiff, represented by Lee Alcott, Barclay Damon, LLP.*

*David Paterson, Defendant, represented by David J. Sleight, Office of the Attorney General, Michael J. Russo, New York State Attorney General's Office & Darren Longo, NYS Attorney General's Office.*

*Jamie Woodward, Defendant, represented by David J. Sleight, Office of the Attorney General, Michael J. Russo, New York State Attorney General's Office & Darren Longo, NYS Attorney General's Office.*

*William Comiskey, Defendant, represented by David J. Sleight, Office of the Attorney General, Michael J. Russo, New York State Attorney General's Office & Darren Longo, NYS Attorney General's Office.*

*John Melville, Defendant, represented by David J. Sleight, Office of the Attorney General, Michael J. Russo, New York State Attorney General's Office & Darren Longo, NYS Attorney General's Office.*

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*Jamie Woodward, Defendant, represented by Darren Longo, NYS Attorney General's Office.*

*William Comiskey, Intervenor Defendant, represented by Darren Longo, NYS Attorney General's Office.*

*John Melville, Intervenor Defendant, represented by Darren Longo, NYS Attorney General's Office.*

*Aaron J. Pierce, Amicus, represented by Lisa A. Coppola, Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC.*

*Red Earth, LLC, Amicus, represented by Lisa A. Coppola, Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC.*

*NEW YORK ASSOCIATION OF CONVENIENCE STORES, Amicus, represented by Richard T. Sullivan, Harris Beach LLP.*

*NOCO Energy Corp., Amicus, represented by Richard T. Sullivan, Harris Beach LLP.*

*Wilson Farms, Inc., Amicus, represented by Richard T. Sullivan, Harris Beach LLP.*

*American Cancer Society Cancer Action Network, Amicus, represented by Marc C. Panepinto, Dolce Panepinto PC.*

*American Cancer Society Eastern Division, Amicus, represented by Marc C. Panepinto, Dolce Panepinto PC.*

*American Heart Association, Amicus, represented by Marc C. Panepinto, Dolce Panepinto PC.*

*American Legacy Foundation, Amicus, represented by Marc C. Panepinto, Dolce Panepinto PC.*

*American Lung Association, Amicus, represented by Marc C. Panepinto, Dolce Panepinto PC.*

*American Lung Association in New York, Amicus, represented by Marc C. Panepinto, Dolce Panepinto PC.*

*Campaign For Tobacco-Free Kids, Amicus, represented by Marc C. Panepinto, Dolce Panepinto PC.*

*City of New York, Amicus, represented by Mark R. Uba.*

*New York State Association of Counties, Amicus, represented by Mark R. Uba.*

## DECISION AND ORDER

**MICHAEL A. TELESKA**, *District Judge.*

### I. Introduction

The Seneca Nation of Indians ("SNI") commenced this action on August 17, 2010, seeking declaratory and injunctive relief "to prevent [d]efendants from infringing on the Nation's federally-protected right of self-government and from plunging the Nation's well-regulated tobacco economy into chaos." Doc. 1 at ¶ 1. The Cayuga Indian Nation ("CIN")<sup>1</sup> subsequently moved for and was granted permission to intervene. After granting a temporary restraining order, on October 14, 2010 this Court (Arcara, J.) denied the plaintiffs' motion for a preliminary injunction. See *Seneca Nation of Indians v. Paterson*, 2010 WL 4027796 (W.D.N.Y. Oct. 14, 2010). This Court then granted plaintiffs' request for a stay pending an interlocutory appeal. On May 9, 2011, the Second Circuit affirmed this Court's denial of a preliminary injunction, and the stay was subsequently vacated by this Court. See *Oneida Nation of New York v. Cuomo*, [645 F.3d 154](#) (2d Cir. 2011); doc. 100 (order vacating stay).<sup>2</sup>

Presently before this Court are defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56 and plaintiffs' cross-motion to dismiss the complaint pursuant to Fed. R. Civ. P. 41(a)(2). Docs. 101, 106. For the reasons discussed below, defendants' motion is granted and plaintiffs' motion is denied.

### II. The Pending Motions<sup>3</sup>

Defendants' summary judgment motion argues that plaintiff's complaint should be dismissed in its entirety on the merits. Plaintiffs' motion for voluntary dismissal pursuant to Rule 41(a)(2) requests that the Court dismiss the matter "with prejudice to the Nations' asserted claims that N.Y. Tax Law §§ 471(1), (2), (5), N.Y. Tax Law § 471-e, as amended June 2010, and 20 N.Y.C.R.R. § 74.6 should be declared invalid as written and enjoined prior to their implementation and enforcement as violative of the federally protected rights of the Nations, their members, and their licensed business." Doc. 106-1 at 8. However, plaintiffs' motion further requests that dismissal be granted conditionally "without prejudice to any future action brought by the Nations, their members, and/or their licensed businesses claiming that the actual implementation or enforcement of [the above-enumerated tax laws] has resulted in the violation of their federally-protected rights." *Id.*

### III. Standard of Review

Summary judgment is appropriate where the court determines "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." See Fed. R. Civ. P. 56(c). The court must view all facts in the light most favorable to the nonmoving party, but "only if there is a 'genuine' dispute as to those facts." See *Scott v. Harris*, 550 U.S. 372, 380 (2007). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." See *Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242](#), 248 (1986). The nonmoving party, however, may not rely on "[c]onclusory allegations, conjecture, and speculation," *Kerzer v. Kingly Mfg.*, [156 F.3d 396](#), 400 (2d Cir. 1998), but must affirmatively "set out specific facts showing a genuine issue for trial." See Fed. R. Civ. P. 56(e). To meet this burden, "a plaintiff must come forward with evidence to allow a reasonable jury to find in his favor" on each of the elements of his prima facie case. See *Lizardo v. Denny's, Inc.*, [270 F.3d 94](#), 101 (2d Cir. 2001). A Court may dismiss an action pursuant to Fed. R. Civ. P. 41(a)(2) at the plaintiff's request, "on terms that the court

considered proper."

## IV. Discussion

The tax law amendments at issue in this case are set forth in N.Y. Tax Law §§ 471(1), (2), (5), N.Y. Tax Law § 471-e, as amended June 2010, and 20 N.Y.C.R.R. § 74.6 (collectively, "the amendments"). The amendments provide that the cigarette tax imposed under New York State Law shall be applied to all wholesale sales of cigarettes in New York State, and "the ultimate incidence of and liability for the tax shall be upon the consumer." N.Y. Tax Law § 471(2). Under the statutory scheme, the tax does not apply to cigarette sales "to qualified Indians for their own use and consumption on their nations' qualified reservations," but a tax is imposed on all cigarettes sold "on an Indian reservation to non-members of the Indian nation or tribe" and "evidence of such tax shall be by means of an affixed [New York State] cigarette tax stamp." Id. § 471(1). The amendments provide that Indian nations and their members may obtain tax-exempt cigarettes by means of either a "coupon system" or a "prior approval system." The Court refers to its October 14, 2010 order for a thorough review of these alternate systems. See doc. 87 at 8-11; Seneca Nation, 2010 WL 4027796, at \*4-6.

In its decision and order dated October 14, 2010, denying plaintiffs' initial request for a preliminary injunction, the Court found that plaintiffs had failed to establish a likelihood of success on the merits with respect to their tribal sovereignty claims. See Seneca Nation, 2010 WL 4027796, at \*6-17. Specifically, the Court held that plaintiffs' "right of tribal sovereignty is not unconstitutionally burdened by implementation of the tax law amendments." Id. at \*17. For the same reasons as stated in the previous order's lengthy discussion, this Court again finds that the amendments at issue in this case do not unconstitutionally burden plaintiffs' right of tribal sovereignty and therefore denies plaintiffs' request for a declaratory judgment regarding this issue.

Plaintiffs further argue that the amendments violate the interstate commerce clause, U.S. Const., art. I, § 8, cl. 3, and the Internet Tax Freedom Act ("ITFA"), reproduced at 47 U.S.C. § 151 note §§ 1101-09,<sup>4</sup> and request declaratory relief to that effect. As defendants point out, however, this Court previously noted that "an entirely separate provision of the New York Tax Law provides a mechanism for cigarette retailers to obtain a refund for cigarette sales made to out-of-state purchasers." Id. at \*12 (citing N.Y. Tax Law § 476). "This refund provision represents a legitimate, nondiscriminatory state law that applies equally to reservation and non-reservation cigarette sellers operating in New York." Id. (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)). Accordingly, the Court likewise denies plaintiffs' request for a declaratory judgment regarding their Interstate Commerce Clause and ITFA claims. Therefore, defendants' motion is granted and the complaints are dismissed in their entirety, with prejudice.

The Court further notes that plaintiffs' request for dismissal pursuant to Rule 41(a)(2) is essentially conditional since plaintiffs ask that dismissal be granted "without prejudice to the assertion of any post-enforcement claims that [may] arise from the actual implementation and enforcement of the scheme and that would have been speculative or hypothetical prior to enforcement." Doc. 106-1 at 6. Plaintiffs concede, however, that their complaints do *not* relate to any post-enforcement scenario and allege only pre-enforcement claims. The Court cannot extend its holding to include "future" or "hypothetical" claims, as those claims are speculative and unripe. In the interest of clarity, the Court emphasizes that the dismissal ordered herein regarding plaintiffs' motion pursuant to Rule 41(a)(2) is with prejudice as to all of plaintiff's claims.

## V. Conclusion

Defendants' motion for summary judgment (doc. 101) is granted and plaintiffs' motion to conditionally dismiss pursuant to Rule 41(a)(2) (doc. 106) is denied. The complaints (docs. 1, 30) are therefore dismissed in their entirety with prejudice.

ALL OF THE ABOVE IS SO ORDERED.

## FootNotes

1. The SNI and CIN will be referred to collectively as "plaintiffs."

2. This case was originally assigned to Judge Richard Arcara. Judge Arcara transferred the case to this Court by order dated January 19, 2017.

3. This Court refers to a prior order dated October 14, 2010 (doc. 87 at 2-11; Seneca Nation, 2010 WL 4027796, at \*2-6), for a thorough summary of the factual background of this matter.

4. As enacted, the ITFA created a moratorium prohibiting individual states from imposing internet access taxes on internet service providers (ISPs), unless the ISP did not offer filtering software to the customer. 47 U.S.C. § 1101(a)(1) (former); see Pub. L. 105-277, Title XI. The SNI claims that the amendments at issue in this case violate the ITFA by "prohibit[ing] Nation-licensed businesses from obtaining non-New York taxed cigarettes for purposes of internet sales to out-of-state residents, which sales are subject to cigarette tax in such persons' state of residence." Doc. 1 at ¶ 69. The CIN does not explicitly state a claim under the ITFA, but claims that the amendments impermissibly "require[s] the prepayment of cigarette tax to which it is not legally entitled." Doc. 30 at ¶ 55.

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