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2 UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF NEW YORK
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5 THE ONONDAGA NATION
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9 Plaintiffs,
10 -versus- 05-CV-0314
11 (MOTION HEARING)
12
13 THE STATE OF NEW YORK and
14 ONONDAGA COUNTY
15
16 Defendants.
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19 TRANSCRIPT OF PROCEEDINGS held in and for
20 the United States District Court, Northern District of
21 New York, at the James T. Foley United States Courthouse,
22 445 Broadway, Albany, New York 12207, on THURSDAY,
23 OCTOBER 11, 2007, before the HON. LAWRENCE E. KAHN,
24 United States District Court Senior Judge.
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2 APPEARANCES:
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4 FOR THE PLAINTIFFS:
5 INDIAN LAW RESOURCE CENTER
6 BY: ROBERT T. COULTER, ESQ.
7 - and -
8 OFFICE OF JOSEPH J. HEATH
9 BY: JOSEPH HEATH, ESQ.
10 - and -
11 ALEXANDER, BERKEY LAW FIRM
12 BY: CURTIS G. BERKEY, ESQ.
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14
15
16 FOR THE NEW YORK STATE DEFENDANTS:
17 OFFICE OF THE NYS ATTORNEY GENERAL
18 BY: DAVID B. ROBERTS, AAG
19
20
21 FOR THE NON-STATE DEFENDANTS:
22 GOODWIN, PROCTER LAW FIRM
23 BY: MARK S. PUZELLA, ESQ.
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1 (Court commenced at 10:10 AM.)

2 THE CLERK: Thursday, October 11, 2007. The
3 case is -- and I have the wrong title -- Onondaga Nation
4 versus the State of New York, et al, Case Number 05-CV-3134.
5 May we have appearances for the record.

6 MR. ROBERTS: David Roberts, Assistant Attorney
7 General, appearing on behalf of the State of New York.

8 THE COURT: Mr. Roberts.

9 MR. PUZELLA: Mark Puzella from Goodwin,
10 Proctor, appearing on behalf of the non-state defendants.

11 THE COURT: Okay.

12 MR. COULTER: Robert Tim Coulter for the
13 Onondaga Nation.

14 MR. BERKEY: Curtis Berkey for the Onondaga
15 Nation, your Honor.

16 MR. COULTER: Joe Heath for the Onondaga
17 Nation.

18 THE COURT: Very good. Well, I see we have a
19 few people joining us in the audience, but I'll still go into
20 the law. And I think we'll begin since -- well, actually, you
21 brought the motion, so, Mr. Roberts, if you want to begin and
22 sort of sum up your position. I'm pretty much familiar with
23 the issues. And you have about 10 or 15 minutes anyways. So
24 go ahead. Or less if you want.

25 MR. ROBERTS: Your Honor, you are being over

1 modest when you say you are pretty much familiar with the
2 issues. This Court had directly before it a very similar
3 matter in the Oneida case, and that issue, that case has been
4 briefed by both sides in detail. As far as the ramifications
5 that it has in this matter, insofar as the motion that's
6 brought on behalf of the defendants in this matter is based on
7 the doctrine of laches. In sum, our contention is that this
8 case is clearly a disruptive possessory land claim that is
9 precisely the sort of action that the Supreme Court in
10 Sherrill, the Second Circuit in Cayuga and this Court in
11 Oneida held to be barred by the equitable principles of
12 latches and impossibility and acquiescence, and there's the
13 shorthand that's sort of developed in this -- these cases
14 where we speak of latches as being a basis of this defense.
15 And I think that one of the pitfalls that comes
16 about when you start trying to categorize the nature of a
17 defense is that you tend to fall into tests where you're
18 looking for certain essential elements that need to be
19 present. And the argument that's been made in this case, and
20 it was also made in the Oneida case, and certainly now is
21 being made by the Oneidas in the Second Circuit, is along the
22 lines that the traditional elements of a latches defense were
23 inappropriately applied by this Court in the Oneida case. We
24 would respectfully disagree with that kind of loss on what the
25 Supreme Court held on Sherrill and what the Second Circuit

1 held in Cayuga. The equitable principles that flow from those
2 three long established equitable defenses are what govern in
3 this case. And as this Court has already held, the grounds
4 for dismissal that are urged with respect to latches are well
5 established, are based upon facts that are largely
6 self-evident, facts of which this Court can take judicial
7 notice and facts which are appropriately resolved on a summary
8 motion, a Rule 12(b)(6) motion in this case, without the need
9 for factual development, without the need for trial or
10 development of summary judgment arguments. And in this case,
11 of course, there will be contested issues of fact. I don't
12 know that summary judgment could be granted if we were to go
13 down that path. I think what we're talking about in this case
14 is what the Second Circuit envisioned in Cayuga. This is a
15 complaint that was -- that raises a claim that was void at its
16 inception and it was subject to dismissal. I misspoke there.
17 Subject to dismissal abnitio is what it held in the Cayuga
18 case. And so, based on that, we're moving to dismiss on the
19 complaint. This is not a motion that should be converted into
20 a summary judgment motion. As this Court has already held in
21 Oneida, the factual issues that are presented on this motion,
22 to the extent there are any, are matters of which the Court
23 can take judicial notice and are properly grounds for this
24 motion.
25 THE COURT: At this point in time, shouldn't we

1 wait to see what the Second Circuit does with the cases
2 pending up there that could affect this case?
3 MR. ROBERTS: Well, at least insofar as you
4 fully know the issue that the State took up to the Second
5 Circuit is the novel part of the Oneida decision, and that was
6 the determination that the plaintiff could pursue a fair
7 compensation claim based on contract principles that did not
8 void the underlying transactions that are being challenged in
9 the case. And at least so far as the State is concerned,
10 that's not an issue that's in any way, shape or form present
11 in this case. So I don't know that there's guidance to be
12 gained by the Second Circuit on the issue we took up on
13 appeal, which really was novel.
14 The other issue that the plaintiffs want to --
15 you know, they're attacking this Court's application of Cayuga
16 in the Second Circuit. But as you know, Cayuga is a Second
17 Circuit decision, and that's not a novel issue, it's not an
18 issue that we would urge -- or would think is something that
19 the Second Circuit is going to revisit after only three years,
20 two years. And so I don't know there's much to be gained by
21 waiting.
22 The other aspect of the request for a delay,
23 obviously, is that our motion isn't based solely on the issue
24 of latches. It's also based on the Eleventh Amendment. And
25 insofar as our motion is based on Eleventh Amendment

1 principles, they're clearly established principles that are
2 fully elucidated in our briefs. I won't repeat it all here,
3 but the short of it is that's a separate and independent
4 ground of dismissal, it's been asserted in this matter, that
5 was not available to the State in the Oneida matter, and that
6 a dismissal on that grounds is also fully warranted in this
7 case.
8 THE COURT: Thank you. Anything you want to
9 add, Mr. Puzella?
10 MR. PUZELLA: If I may just speak for a
11 moment --
12 THE COURT: Sure.
13 MR. PUZELLA: -- about Rule 19. I, obviously,
14 echo all of Mr. Roberts' arguments, but I would like to just
15 focus for a moment on the Rule 19 arguments that flow in
16 conjunction with the sovereign immunity rule, Eleventh
17 Amendment arguments.
18 In particular, there -- the disjuncture between
19 the plaintiffs' view of the rule 19 argument and the
20 defendants' view, at bottom, this case, if you look at the
21 complaint, concerns the propriety of the treaties between the
22 State and the tribe. There's no theory articulated in the
23 complaint as to how one could attack the title held by the
24 present day landowners except through that treaty. So with
25 respect to Rule 19, there's no separate approach to the

1 non-state -- the non-state defendants that would avoid the
2 State in that determination. So as a result, the State is, if
3 you read the complaint, the focus of the complaint. All of
4 the allegations concerning a route to liability, if you will,
5 flow directly through the State, and there's no other theory
6 articulated.
7 THE COURT: So you're saying if I dismiss the
8 State claim, yours has to follow?
9 MR. PUZELLA: Necessarily.
10 THE COURT: Okay.
11 MR. PUZELLA: Thank you.
12 THE COURT: Okay. And Mr. Coulter, I think
13 you're arguing for the tribe?
14 MR. COULTER: Yes. Good morning.
15 I would like to address the latches issue and
16 Mr. Berkey, co-counsel, will address the immunity issue and
17 the question of joinder of parties.
18 I think the large issue today is whether the
19 Onondaga Nation, having been excluded from the federal court
20 and the state courts for more than 185 years, will ever be
21 allowed to proceed with its land rights case.
22 THE COURT: Well, when you say it's been
23 excluded for 180 years, or whatever, could they have brought
24 this action 20, 30 years ago? In other words, they seemed to
25 join this late at this point. But you answered that, go

1 ahead. Could they have brought this action decades ago?
2 MR. COULTER: The law wasn't changed to permit
3 bringing an action such as this until, at the earliest, 1974,
4 when the Supreme Court didn't -- never decided that these
5 actions were viable legally until 1985.
6 THE COURT: Right.
7 MR. COULTER: And so there were a number of
8 reasons, particularly the rule that applied then and now that
9 latches was not an available defense in cases such as these,
10 and the action of Congress in enacting 28 USC 2415, which made
11 it clear there was no time limit for actions for title. So
12 that, yes, theoretically, it was possible to file an action as
13 early as 1985, but the Nation did act rather promptly after
14 that. There certainly has been no unreasonable delay.
15 The point that I'm wanting to make concerning
16 the motions right now is that, the question is whether the
17 Nation will ever have an opportunity to get any relief. The
18 question is not whether the particular declaratory judgment
19 prayed for in the complaint is necessarily proper, but whether
20 there's any relief that can be granted to the Nation, taking
21 the allegations of the complaint as true.
22 Now, the Nation has suffered enormously for
23 well over 200 years because of very blatant, straight forward
24 and willful violations of the federal law by the State of New
25 York in acquiring the Onondaga land. The State did that, not

1 only in violation of the federal laws and the federal
2 Constitution, but in violation of New York State's own laws
3 and Constitution, and in violation of the treaties that have
4 been made with the Haudenosaunee and the Onondaga Nation. And
5 that was all done with just a pittance of token compensation
6 to the Nation.
7 Now, the defendants, in essence, are arguing
8 that because all that happened so long ago, that the Nation
9 shouldn't be allowed to proceed with its case at all. But
10 that proposition that the mere passage of time is sufficient
11 to bar a suit such as this is a proposition that's never been
12 accepted in federal law. As this Court recognized and
13 observed in its Oneida decision in May, the law is that the
14 defense of latches is not available in lawsuits such as this,
15 lawsuits by an Indian nation to vindicate its rights under the
16 federal Trade and Intercourse Acts except in the class of
17 cases that are possessory and disruptive. Now, this case is
18 neither one.
19 THE COURT: Well, what are you seeking as
20 declaratory relief? In other words, you're not seeking the
21 lands, am I correct about that?
22 MR. COULTER: That's correct.
23 THE COURT: And you're not seeking money?
24 MR. COULTER: That's correct.
25 THE COURT: So what are you asking the Court to

1 do?

2 MR. COULTER: Solely for a declaratory
3 judgment. The declaratory judgment would require nothing of
4 any party, would not be any -- would not constitute any form
5 of coercive relief, and would not lead to any indirect results
6 that would be coercive or disruptive.

7 Now, the Nation has not in this case asserted
8 any possessory right at all, has not asserted a right to any
9 relief that's possessory in nature. The Nation also hasn't
10 asserted a right to any relief that's based on a right of
11 possession. And I also want to make clear, as we made clear
12 in the briefs, that the Nation does not want to accomplish an
13 eviction or an ejectment indirectly either by a declaratory
14 judgment that would somehow have the result of invalidating
15 present day deeds or titles. The Nation doesn't want that.
16 That is not what we request. And we would at every stage want
17 to be sure that a declaratory judgment doesn't do that. That
18 would be tantamount to an eviction; the Nation does not intend
19 to do that and will not do that.

20 THE COURT: But what would you want this Court
21 to do? If you were the Court, what would you want me to
22 declare?

23 MR. COULTER: The essence of it, and I think at
24 the very least the Court can declare that what the State of
25 New York did in acquiring the Onondaga Nation's lands, and

1 it's practically all their land, that that was in violation of
2 the federal Trade and Intercourse Acts, in violation of the
3 treaties made with the Haudenosaunee and the Onondaga Nation,
4 and in violation of the United States Constitution. That is
5 the very minimum. Exactly how that declaratory judgment
6 should read, how far it should go is open to discussion. We
7 have said that the Nation would like a declaration that title
8 is still in the Nation. But that does not mean that the
9 Nation intends to invalidate the deeds and documents of title
10 held by present day landowners. No, because that would, that
11 would, in effect, throw them off their lands, throw them out
12 of their homes. We don't want that. And we want to be
13 absolutely clear about that. No declaratory judgment we're
14 requesting should go that far. That would be tantamount to
15 ejectment, and the Nation denies that.
16 THE COURT: So if I heard you right, you're
17 asking the Court, among other things, or whatever you're
18 asking, to award title to the tribe with the understanding
19 that everything would stay the same but they have title?
20 MR. COULTER: Well --
21 THE COURT: Not sure --
22 MR. COULTER: -- the term "title" has many
23 different meanings.
24 THE COURT: That's why I'm asking. Right.
25 MR. COULTER: This is an action for title, but

1 the only relief we're requesting is a declaratory judgment.
2 And we believe that any declaratory judgment in a case such as
3 this should be one that does protect against unfair or unjust
4 outcomes for present day land holders. So when we say a
5 declaratory judgment about title, we do not mean something
6 that would have the effect, direct or indirectly, of throwing
7 people off their land or out of their homes. That is not what
8 we want. We're speaking of a title that is more abstract,
9 more general than that; a title that does not carry with it
10 possessory interests. That is possible. That concept of
11 title is well known.
12 THE COURT: Is that a concept of law? Does
13 that exist in the law?
14 MR. COULTER: Oh, yes.
15 THE COURT: Gives people title without any
16 right to do anything to the land or evict or to change
17 possession forever?
18 MR. COULTER: That's right. For example, the
19 Seneca Nation's title to Salamanca is that way. The United
20 States often claims this kind of title. So does the State of
21 New York. In the case of U.S. v Beach -- Beecher versus
22 Weatherby, in 1875, the concept of bare title is discussed.
23 Likewise, in the case of the Western -- or the Shoshone
24 Indians versus the United States, a Supreme Court decision in,
25 I believe, 1936 also discusses this same concept, the idea of

1 title that does not necessarily carry with it any beneficial
2 interests as such. That concept exists. Sadly, we have only
3 one word to cover all those different concepts, we always say
4 title, that that means so many different things.
5 I want to be clear that the Nation is not
6 requesting a declaratory judgment that would directly or
7 indirectly disturb the possession of anyone holding land
8 today. Whatever it takes, that's what the Nation wants, we do
9 not want to disturb the possession or expectations of present
10 day landowners.
11 THE COURT: You don't want to disturb title
12 either of the people who have title in the land?
13 MR. COULTER: Title in the sense of documents,
14 deeds and so on. Of course, it's clear, if one invalidates
15 the deed of someone, that can be tantamount, it can be
16 eviction by another name. The Nation has said that's unfair.
17 The Nation itself has been thrown off its lands, and it
18 doesn't want to do that to anyone else. It knows how that
19 feels. And the Nation has foresworn that, both in this
20 lawsuit and publicly; they do not want that. And we want to
21 be sure that a declaratory judgment doesn't have that affect.
22 The Nation wants declaratory judgment because
23 the Nation thinks these land rights issues should be resolved
24 through negotiation, through agreement, through Government to
25 Government talks with the federal government, first of all,

1 and with the State of New York, so that these issues can be
2 resolved correctly and fairly and on a Government to
3 Government basis. But when we initiated talks with the State
4 of New York in the 1980s, the State of New York ended up
5 telling us that they will not proceed further until the Nation
6 filed its case in court. We can see their point, in a sense.
7 We thought it was a shame to stop the effort to resolve it by
8 an agreement. But they said you got to file your case in
9 court before we'll talk any further. They want to know --
10 understandably, perhaps -- they want to know, do we really
11 have a case? Is what the State did really wrong? Was it
12 really in violation of the law? Of course, it was, and that's
13 why we're here. We want this Court to say so. Then we
14 believe that negotiations can proceed.
15 You know, the Nation also believes that it's
16 useful and valuable to have a declaratory judgment about these
17 things because the Nation wants to have a more effective voice
18 in protecting the earth, in protecting this land particularly
19 and protecting Onondaga Lake particularly for demanding a
20 cleanup and restoration of this territory and that lake in
21 particular.
22 The Nation also has felt enormous pain for
23 generations, knowing and seeing that the legal system of this
24 country and the legal system of this state has been unwilling
25 to provide any redress, has been unwilling to acknowledge in

1 any way that a very blatant violation of the law took place to
2 deprive the Nation of its lands. They rightfully have felt
3 that they're not being accorded the quality before the law.
4 It's understandable that they feel marginalized and
5 discriminated against. And a declaratory judgment in this
6 case would go very far toward healing that wound. It would
7 also go far toward wiping away the stain of what has been
8 done, a stain on the honor of this country and a stain on the
9 history of the state.
10 That's why we've asked for a declaratory
11 judgment. That's what the Nation wants. We do not want
12 anything that's going to disrupt the neighbors of the nation.
13 We don't want to do that directly or indirectly. We want them
14 to live comfortably and well with the Nation just as they do
15 now. This suit is not disruptive. And if this Court sees
16 anything in the suit that's disruptive, we think a declaratory
17 judgment -- we know that a declaratory judgment can be written
18 that would not be disruptive. It would not be possessory in
19 any way and it would be perfectly consistent with the Cayuga
20 decision.
21 THE COURT: What is the position of the federal
22 government? Obviously, they haven't intervened. I don't know
23 why. What's the status there, if you want to comment on that?
24 MR. COULTER: I got a telephone call late
25 yesterday afternoon from the Interior Department saying that

1 I'm authorized to say this morning, and I've informed
2 Mr. Puzella and Mr. Roberts, that the Interior Department is
3 processing a litigation request, that is a request by the
4 Department to -- the Justice Department to initiate litigation
5 in support of the Onondaga Nation. I'm authorized to say
6 that, based upon conversations with an individual in the
7 Interior Department, that the Solicitor's Office in the
8 Interior Department has recommended that litigation by the
9 United States in support of the Onondaga Nation proceed. They
10 have said, as of yesterday afternoon, that that litigation
11 request should be forwarded to the Justice Department in about
12 ten days. That's as much as I know.
13 THE COURT: Do you think that's essential for
14 your case, that they should be here so we can take care of
15 other claims that they bring up, Mr. Roberts?
16 MR. COULTER: Well --
17 THE COURT: The State?
18 MR. COULTER: -- the United States has the
19 obligation to do that under the treaties that they've signed
20 with the Haudenosaunee, they should do that in all honor and
21 fairness. And, actually, the United States has filed suit in
22 almost all of the other Trade and Intercourse Act claims in
23 this state. That gives us some information about what they're
24 likely to do. And they generally do that at the 11th hour and
25 50 minutes. But beyond that, I don't know what to say. I

1 don't think it's essential. In other words, I think this case
2 can proceed, and Mr. Berkey will elaborate, this case can
3 proceed very well even if the State of New York is not a
4 party. We think the state action doesn't have immunity. But
5 even if they were found to have immunity, we think the case
6 should and can proceed fairly, in good conscience whether the
7 state is here or not and whether the United States is here or
8 not.
9 THE COURT: Are there any facts in your case
10 that distinguish your claims from the Oneida Nation?
11 Especially as to continuing possession? Is there any legal
12 significance to any difference? And is there a difference?
13 MR. COULTER: Well, the Nation, the Onondaga
14 Nation has presented its case very, very differently from the
15 beginning. We have not ever sought possessory relief. That
16 declaratory judgment we're asking for isn't predicated on any
17 possessory claim at all. That's, that's the difference. The
18 Onondaga Nation, to be very blunt about it, doesn't want a
19 casino, will never have a casino, it is not seeking lands for
20 a casino or for any purpose like that. That's the difference.
21 Even though it may not have particular legal significance,
22 it's on everybody's mind, the Onondaga Nation does not want a
23 casino. This litigation has nothing to do with a casino.
24 THE COURT: And that's on the record.
25 MR. COULTER: Well, yes.

1 THE COURT: Go ahead.
2 MR. COULTER: I would be delighted. I think
3 the whole world knows that. But if there's any doubt about
4 it, I want to remove that.
5 Another thing that I'm quite sure, although we
6 haven't had a council meeting to confirm this, we don't need
7 one, I'm quite sure that the Onondaga Nation will ever accept
8 money in exchange for land rights. It's morally repugnant to
9 them. It isn't a question of law, but they simply would not
10 do it and be regarded as selling their mother. They simply
11 would not do that; that's the difference.
12 THE COURT: I understand you don't want money
13 and you don't want the land back and you don't want land
14 rights. And I know you want to wipe away, as you say, the
15 stain and the pain of what's happened in the history here.
16 But what are you asking the Court to do besides that? Is
17 there anything tangible we can do to redress the wrongs, let's
18 say, that exist?
19 MR. COULTER: The only relief we're asking for
20 is what's in our complaint. A declaratory judgment is,
21 indeed, what we want. We don't envision, by the way, any
22 further judicial action. Of course, the future will bring
23 whatever the future brings. I may not be here. These chiefs
24 and clan mothers may be gone some day, but nothing is
25 envisioned, there's no other shoe to fill.

1 THE COURT: You're saying no matter what I
2 decide, you're not going to appeal me?
3 (Laughter.)
4 THE COURT: You said no further legal action.
5 MR. COULTER: No, no, sometimes we've been
6 asked whether we're asking for a declaratory judgment now, but
7 oh, in the future then you'll ask for evictions, then you'll
8 be seeking land for a casino, then you'll try to throw
9 everyone off their land.
10 THE COURT: I take you at your word. That's
11 not in my mind.
12 MR. COULTER: No, no. And if ever such
13 litigation were brought, that litigation should be decided on
14 its merits. And if the Cayuga decision holds, then such a
15 decision -- I mean, that is, such a litigation would probably
16 be dismissed. But, by the way, I want to be clear, we think
17 Cayuga was wrong, and we will reserve our arguments about that
18 for appeal, but we understand that this Court is bound to
19 apply the Cayuga decision as it reads it.
20 I think I can sum up by saying, even if this
21 Court does find that there's something disruptive or
22 possessory about this claim, that even so, the Nation has got
23 to have a hearing about any latches defense that's presented.
24 That's an affirmative defense. We simply do not accept the
25 fact that the facts about latches are self-evident or that

1 they can all be subject to judicial notice. That is not the
2 road to go. We do admit that 200 years or so have passed, but
3 virtually every other fact is in dispute. And we believe that
4 the defendants should be put to the test of proving that there
5 has been an opportunity to sue, that there has been
6 unreasonable delay, because they can't prove that. They can't
7 prove, I believe, that they're actually prejudiced or that
8 something unfair happened. I think they'll have an almost
9 impossible job to prove that they come to the court with clean
10 hands, particularly the State of New York. They're not in a
11 position to ask this Court to dismiss this case on the ground
12 of fairness when they, in fact, have been guilty of such bad
13 faith in the past.
14 Now, these are matters to prove. I'm not
15 asking the Court to accept my word at this time. But I am
16 saying that this is not the kind of case where a summary
17 ruling about latches can or should be made. Cayuga doesn't
18 demand that. Cayuga said that that case could have been
19 dismissed abnitio, but it didn't say on a 12(b)(6) motion, on
20 a hearing. In fact, Judge Cabranes mentioned the hearings and
21 evidence and decisions that have been made by latches in this
22 case. Certainly didn't hold that a case could be dismissed on
23 a 12(b)(6) motion without any proof. That just isn't possible
24 in a case like this, where all of the facts about latches are
25 in dispute. So we think that we need an opportunity to

1 confront the evidence and present evidence of our own on all
2 the issues of latches. This case shouldn't be dismissed on
3 that basis, particularly at this stage.
4 And I should leave it at that and let my
5 co-counsel address the other issues.
6 THE COURT: Before we get to Mr. Berkey, I
7 think maybe we could let the State respond briefly to what you
8 just said, and we'll do the same with Mr. Berkey, if that's
9 okay.
10 MR. COULTER: Okay. Fine.
11 THE COURT: Mr. Roberts.
12 MR. ROBERTS: Yes, sir. The main thing I would
13 point out, and we just ask you to take a look at the complaint
14 itself, the first amended complaint, you know, when
15 Mr. Coulter stands up and says that they don't seek to disrupt
16 present day owners of fee title that live within the claim
17 area, that's completely inconsistent with the relief that's
18 sought in this case. It's inherently disruptive.
19 What they seek is a declaration that the
20 ancient treaties by which title passed from the Onondagas to
21 the State and ultimately through generations to the current
22 people that live in a swath that runs 10 to 40 miles wide from
23 the Canadian border down to the Pennsylvania border, bisecting
24 the State of New York, they're asking this Court to issue an
25 order that would say that the plaintiffs in this case hold fee

1 title to that swath of land. There are a couple of very
2 strange aspects of their assertion that that would not be
3 disruptive to the people in the claim area.
4 First of all, this Court made clear in its
5 holding in the Oneida case that that kind of possessory claim,
6 even though it's couched as a declaratory relief claim, is
7 inherently disruptive. It doesn't -- there's no mandate that
8 there be a request for ejection in the complaint before the
9 Court can conclude that it's disruptive. The Oneidas in the
10 case before Judge McCurn, in the decision that's published at
11 199 FRD, Judge McCurn was confronted with a very similar claim
12 where the Oneidas were saying all we seek is a judgment from
13 this Court that will assure that our historic rights that were
14 violated by virtue of the state's treaties with us violated
15 the Nonintercourse Act is all we ask for, we wouldn't eject
16 anyone. And Judge McCurn and this Court alluded to that
17 language in its decision in Oneida. Judge McCurn held that
18 the simple request for the declaratory relief simply sets the
19 stage at a later juncture for the ultimate ejectment of
20 everybody who lives there. And that, in itself, is inherently
21 disruptive.
22 THE COURT: I don't think he said he did want
23 fee title. I don't think he used the word "fee". It was more
24 abstract.
25 MR. ROBERTS: It's definitely abstract. But if

1 you look in their briefs, they actually say they want fee
2 title. And the thing that's strange about this contention is
3 that it turns the ancient doctrine of discovery on its head.
4 As the Court fully knows, the doctrine of discovery would hold
5 that the crown holds fee title to lands in the country that's
6 being colonized, and that remains subject to the possessory
7 aboriginal right of the natives that live there. And that's
8 the title, the aboriginal title that was extinguished in the
9 treaties that were entered into in this case.
10 THE COURT: Legally distinguished?
11 MR. ROBERTS: Pardon me?
12 THE COURT: Is it legally distinguished?
13 MR. ROBERTS: Yes, sir. And the thing that's
14 strange about the argument you're hearing here today from the
15 plaintiffs is that they're asking this Court as a remedy for
16 its ancient transfer of an exclusively possessory interest in
17 the lands, it should be remedied today by a Court declaratory
18 judgment that would give them fee title but only a bare title
19 under which the current occupants would have what essentially
20 adds up to a right to possess, undisturbed by the plaintiff.
21 So what they're asking for is a role reversal. What they're
22 asking for is that this Court enter a judgment that would
23 afford them a bare title without any right to possess and that
24 the people that are currently there can, although they had,
25 you know, a good valid deed to the farm that they might be

1 living on, actually only hold some bare title to continue to
2 occupy that land. It's a very confounding source -- or sort
3 of title that the plaintiffs are asking for in this case. And
4 this -- I don't think this Court has a legal basis whatsoever,
5 as flexible to what the principles might be, to afford a court
6 leave to fashion equitable relief in the way it does justice.
7 The Court can completely alter the underlying interests in the
8 land that are at issue in this case in the manner in which the
9 plaintiffs suggest. And the reason they go through all those
10 gymnastics is because they're trying to find some way of
11 wiggling around clear precedent that came from both this Court
12 and the Second Circuit in Cayuga that spell doom to their
13 claim.
14 THE COURT: Trying to find some way to get
15 justice.
16 MR. ROBERTS: If they're trying to find some
17 way to salvage a claim so they would be in a position to
18 assert, we don't know. I mean they, they -- what -- the
19 purpose of a declaratory judgment, one would think, is to
20 provide people with useful remediable guidance as to what
21 their rights and obligations are. What the plaintiffs are
22 asking this Court to do is to completely undercut the validity
23 of title in this gigantic swath of land and to essentially
24 unsettle and cloud the question of what the rights are of
25 everybody that lives in that area. And we would submit that

1 this is a strange and unwarranted conclusion for the
2 plaintiffs to be urging on this Court. Thank you.
3 MR. PUZELLA: One minute.
4 THE COURT: You want a minute? Well, you want
5 to add to that?
6 MR. PUZELLA: Just a word or two. Counsel
7 suggested that there's nothing in the complaint suggesting
8 that the claim is predicated on a possessory right.
9 THE COURT: Right.
10 MR. PUZELLA: I think if you review the
11 complaint, you'll see that the claim is exclusively predicated
12 on a possessory right insofar as the claim is premised upon a
13 claim of aboriginal title that has never been distinguished.
14 And, as the Court knows, aboriginal title is exclusively
15 possessory. So there's -- it simply is not the case that the
16 claim of title, whatever, theoretical, abstract, whatever we
17 call it, isn't predicated in a possessory right. In the
18 complaint, it's exclusively predicated on a possessory right.
19 The second point I wanted to make is that
20 counsel also commented that another purpose of this abstract
21 or theoretical title is to give the Nation a voice in
22 protecting the lake and its lands and so forth. That speaks
23 to the question of whether the declaration the Court might
24 issue is coercive or not. That voice is only effective if
25 there's the -- you know, the force and effect of this Court

1 behind it. Without the declaration having some teeth, that
2 voice is meaningless. So there's no scenario under which it
3 can get a declaration that is anything but coercive.
4 THE COURT: Okay.
5 MR. PUZELLA: Thank you.
6 THE COURT: You want a brief surrebuttal?
7 MR. COULTER: Very briefly. The defendants are
8 attempting to put words in the mouth of the Onondaga Nation
9 the Nation has asserted to right of possession, whatever, and
10 doesn't intend to do that, even indirectly. They're doing
11 that because that's the only way they can make this case fit
12 the Cayuga exception. This argument that Indian title is
13 exclusively possessory is completely wrong. That is not the
14 law of the United States. Indian title, in any event,
15 includes all the incident of ownership without exception. I
16 refer you to United States versus Mitchell, 1835, Justice
17 Baldwin. The Nation has not requested fee title. The Nation
18 has requested no possessory relief whatsoever. I think it can
19 be said that the issue today is not whether the Nation is
20 entitled to a particular declaratory judgment without title or
21 anything else, but whether the Nation is entitled to any
22 relief at all. That's all this Court needs to find, is that
23 the Nation may be entitled to some form of relief, taking the
24 allegations of the complaint as true, as the Court must.
25 It seems to me that even though there may be

1 disputes to certain aspects of the declaratory judgment, that
2 there is certainly some form of declaratory judgment with
3 appropriate protective provisions, with appropriate safeguard
4 elements to assure that these disruptive or possessory
5 elements do not enter in; that some form of relief can be
6 granted. And that's as far as we need to go to defeat this
7 motion.
8 THE COURT: You're asking the Court to use its
9 own creativity. Shouldn't you spell out what you think the
10 Court should do?
11 MR. COULTER: Certainly. That should take
12 place in the course of litigation.
13 THE COURT: But at this point you don't know
14 exactly what, specifically?
15 MR. COULTER: I'm sorry, I'm trying to look
16 around the light.
17 THE COURT: Yeah.
18 MR. COULTER: Sorry, it seems awkward. But
19 it's all right.
20 THE COURT: Okay. I'm just thinking, what
21 specifically, instead of abstractly, would you like this Court
22 to grant in terms of relief?
23 MR. COULTER: I think this Court can grant a
24 declaratory judgment, essentially, as prayed in the complaint.
25 I think that, in light of Cayuga, it would be, should be the

1 case that appropriate protective language be included in the
2 declaratory judgment to assure that this kind of
3 misunderstanding doesn't take place. The Onondaga Nation
4 isn't asking for some form of title that would secretly carry
5 with it a right of possession that would somehow indirectly
6 result in dispossession of the Nation's neighbors. That can
7 be written right into the declaratory judgment. I haven't
8 drafted that though. I mean, it's a bit early in the
9 litigation --
10 THE COURT: Okay.
11 MR. COULTER: -- to actually draft it, but I
12 think it could be done. And I do think, at a bear minimum, a
13 declaratory judgment determining that the land was originally
14 the land of the Onondaga Nation and the Haudenosaunee and that
15 it was taken from them in violation of the Trade and
16 Intercourse Act, in violation of the treaties and in violation
17 of the Constitution, at a bear minimum, that is possible and
18 have no possessory claims at all.
19 THE COURT: And say that, however, there is no
20 relief the Court can grant?
21 MR. COULTER: We don't want coercive relief
22 such as an injunction or something of that nature. It's not
23 needed. We haven't asked for it.
24 THE COURT: Okay. I see. We still have some
25 time left.

1 MR. ROBERTS: Could I just clarify one thing?
2 The place where you'll find their suggestion that they hold
3 fee title is on page 27 of their memorandum of law in
4 opposition. And it's also referenced in footnote 3 of the
5 supplemental memoranda that were submitted.
6 THE COURT: I'll read that. And I already
7 have. And we'll say what he said.
8 MR. COULTER: Yes, sir. That's where you'll
9 find it.
10 MR. BERKEY: Your Honor, Curtis Berkey for the
11 Onondaga Nation. I'll address the Eleventh Amendment and the
12 indispensable parties issues.
13 It's our position that if the United States
14 were to intervene or file an action in support of the Nation,
15 that both of these issues would be moot; that the lawsuit
16 could go forward notwithstanding these defenses. We've
17 briefed the Eleventh Amendment issue fully in the papers. I
18 would want to supplement one aspect of that argument.
19 There's the question about how specific
20 Congress needed to be in 1790 when it adopted the Trade and
21 Intercourse Act, as you'll recall, our position is that that
22 statute never gave the State of New York's immunity with
23 regard to actions to enforcing its provisions. The defendants
24 say that Congress needed to be specific and explicit. It
25 needed to spell out with magic words that the Onondaga Indian

1 Nation could sue the State of New York and other states in
2 federal court. It's our position that that degree of
3 specificity is not required simply for the reason that the
4 Eleventh Amendment was adopted eight years after the Trade and
5 Intercourse Act. There was no Eleventh Amendment in effect at
6 the time the Act was passed. In fact, there's pretty good
7 argument that the State didn't even have immunity at the time
8 the Trade and Intercourse Act was passed. In 1793, the
9 Supreme Court said that citizens could sue states in the
10 courts that were available at the time. So to require
11 Congress in 1790 to adhere to a standard that was adopted by
12 the Supreme Court in 1985, and in the Tuscarora decision,
13 1960, the specific abrogation standard, a modern standard,
14 would be unfair. We wouldn't expect Congress to be that
15 explicit in 1790.
16 It's our position that because the purpose of
17 the statute was to control Indian land transactions in a
18 centralized authority in Congress, which was necessary to
19 maintain peace on the frontiers and the states where the
20 principal cause of warfare at the time, that would haven been
21 inconceivable that Congress pass a law directed at the states
22 while at the same time exempting them from its enforcement.
23 That's why the statute can be read, should be read as
24 abrogation.
25 We also in our briefs have argued that Congress

1 had such authority under the war powers clause, and that
2 relates to the problems the states were causing the frontier,
3 the adoption of the war powers clause is related to the
4 problems that the new Government was having with regard to
5 conflict that the states were causing. The framers intended
6 to give Congress ample authority to maintain peace by passing
7 statutes that were regulating Indian lands. And that
8 authority is certainly broad enough to authorize Congress to
9 abrogate state immunity. Last year, in 2006, the Supreme
10 Court said that under appropriate circumstances Article One
11 powers of Congress could be read to authorize abrogation of
12 state immunity, and this is one of those circumstances.
13 On the indispensable party argument,
14 indispensability, there are two questions there. The first
15 one, of course, is whether the State is necessary to the
16 adjudication of the issues here. The State is here
17 principally as a landowner. The interests they assert is that
18 of an ordinary landowner, another party in the chain of title,
19 if you will. This is not the first time this issue has come
20 up. Judge Port, in 1977, in the first Indian land claim, the
21 Oneida test case, directly and squarely held that the State of
22 New York was not an indispensable party to that land claim.
23 That case, for that purpose, is indistinguishable from our
24 case. It's on point. It's four square applicable. And that,
25 itself, should be enough to dispose of the indispensable party

1 argument. If we were to apply the Rule 19 facts, we believe
2 that the result would be exactly the same as Judge Port
3 reached in 1977. If the State is not a party to this action,
4 they're not bound by anything that happens here. There's no
5 possible way that their interest in the lands that they hold
6 would be affected. They have no legal interest in the lands
7 of the other defendants. This is not a case where there are
8 competing defendants, different groups of defendants claim the
9 same parcel of land. These are different parcels of land. So
10 there's no, there's no adverse affect on the State's interests
11 there.
12 In any event, the non-state defendants
13 certainly can adequately represent the interests of the State
14 of New York. There's no dispute about that. They haven't
15 said that they can't. They haven't made that point. It's an
16 obvious point that fully applies here.
17 Even if the State is found to be necessary,
18 then the next question, of course, is: Should the case
19 proceed in their absence? And the rule requires balancing of
20 the equities. The specific language, as you know, is should
21 the case proceed in equity and good conscious? Here, the
22 prejudice to the Onondaga Nation is severe. It is
23 significant. It's substantial. The reason for that is
24 there's no other place the Nation can go to have this case
25 heard. In 1952, Congress eliminated state courts as forums to

1 hear these claims, in 25 USC 233, or 232 I believe it is.
2 There's no administrative body where this claim can be heard.
3 Defendants say to go to Congress for this relief. We all know
4 that's a highly speculative option. And I think it's safe to
5 say that Congress would take no action on a petition from the
6 Onondaga Nation unless there is some judicial determination
7 that at a minimum the Trade and Intercourse Act was violated.
8 Congress is not going to act in a vacuum. They're not going
9 to act in the absence of some judicial determination. So this
10 is it for the Onondaga Nation. This is the only place where
11 this claim can be adjudicated and can be heard. Contrasted
12 with the prejudice to the Nation, it's not -- it would not be
13 unfair for this case to go forward without the State of New
14 York. As I say, the non-state defendants can actually
15 represent them. The State would not be bound if they're not a
16 party. There might be some -- if there's an adverse
17 determination on a point of law or fact, the prejudicial
18 effect of that is not adequate to satisfy the -- to, to meet
19 the requirement of a severe impairment of their interests in
20 this case. And for all practical purposes, they're already
21 here. They're required by state law to pay the costs of the
22 defense of the non -- of the private, the non-state parties in
23 this case. They're already involved here. They have --
24 they're playing a role. Whether they're a formal party or
25 not.

1 And, finally, your Honor, there's no prejudice
2 to the non-state defendants if this case goes forward without
3 the State of New York. They can put up an adequate defense
4 and vigorously defend it. Not the kind of case where the
5 State possesses evidence, documents that no one else has
6 access to. These issues will be decided based on historical
7 documents we all have access to, we can all analyze. There's
8 no special role they play with regard to evidence, or in any
9 other way for that matter.
10 So, to conclude, we believe this case can go
11 forward without the State if you find they're a necessary
12 party. And thank you.
13 THE COURT: Thank you. Mr. Roberts, you want
14 to respond, and then Mr. Puzella?
15 MR. COULTER: Yes, sir. First of all, the
16 plaintiffs have responded to our Eleventh Amendment motion
17 partly on the basis of what Curtis Berkey just said. The
18 other aspect of their argument have been based on a claim that
19 ex-party Young would permit the Court to address this claim,
20 notwithstanding the Eleventh Amendment defense. It hasn't
21 been discussed by Curtis in his arguments, so I won't discuss
22 it here. It's adequately covered in our papers. The two
23 primary cases on that issue, and they're dispositive, the
24 Cortland case versus the State of Ohio and the Western Mohegan
25 case, they lay to rest any assertion that the ex-party Young

1 doctrine would form a basis for the Court to entertain this
2 claim.
3 The other aspect of his argument which I will
4 address here goes to the question of whether or not the
5 Nonintercourse Act was enacted under the war powers authority
6 of Article I. The case law doesn't bear that out. The Cayuga
7 decision by the Second Circuit back in 1985 -- I'm sorry --
8 2005, expressly says that the Nonintercourse Act was enacted
9 pursuant to the Court's -- to Congress' authority under the
10 Indian Commerce Clause, Article I. And that holding has been
11 reestablished in a number of other cases also cited in our
12 briefs. So I think they're barking up the wrong tree to claim
13 that the war powers authority of Congress were the basis, and
14 I think the only reason they're doing that is because of the
15 Seminal case. Seminal made very clear that the Indian
16 Commerce Clause is not a source of congressional authority
17 that would permit Congress to override the State's immunity
18 embodied in the Eleventh Amendment. And it -- therefore, even
19 if they clearly and expressly in the language of the statute,
20 as is required under Tuscarora and the other cases, had
21 indicated an intent to make the states amenable to suit, it
22 still would have been beyond the authority of Congress to have
23 done so. And that's why they have done additional gymnastics
24 to assert in this Court that the war powers authority is the
25 source for the Nonintercourse Act. It's simply not borne out

1 by the case law, and Seminal makes it clear that that's a
2 doomed argument.
3 The other part of the argument that you heard
4 was that the Nonintercourse Act predated the Eleventh
5 Amendment and, therefore, could not have anticipated a need,
6 Congress could not have anticipated a need to expressly
7 indicate in the text of the statute that the states were to be
8 made amenable to suit in federal court. The argument, of
9 course, overlooks the fact that two of the transactions that
10 are challenged in this case took place before the
11 Nonintercourse Act even existed. The 1788, 1789 treaties
12 between the State and the Onondagas predated the statute under
13 which they claim it's invalid.
14 The other aspect of this -- that particular
15 argument ignores the fact that the Nonintercourse Act
16 originally enacted in 1790 expired by its own terms after
17 three years. And it was subsequently reenacted several times
18 through and into probably 1822. Probably four, five different
19 permutations of that statute have, obviously, many of which
20 postdated the enactment of the Eleventh Amendment, I think in
21 1790...
22 MR. BERKEY: 1798.
23 MR. ROBERTS: Yeah, 1798. So the other point
24 we make too is the State's sovereign immunity is not something
25 that resides solely as a result of the enactment of the

1 Eleventh Amendment. The sovereign immunity of the states is
2 something that's inherent in the states. I think that the
3 uproar among the ... people of the 1790s, there was, there was
4 a tremendous uproar when Chisolm versus Georgia was rendered
5 because it never occurred to anyone that states could be
6 dragged into court until the decision was rendered. And it's
7 my understanding that the Eleventh Amendment was thereafter
8 passed by Congress and the states, as well as an amendment to
9 the Constitution to make clear that that sovereign immunity
10 was there. But it's not something that was just created in
11 the first instance in 1798.
12 Those are all the points I'll make. Thank you.
13 THE COURT: Mr. Puzella, do you want to add
14 anything to that?
15 MR. PUZELLA: If I could address the Rule 19
16 argument.
17 THE COURT: Yeah, sure.
18 MR. PUZELLA: I won't rehash the non-State
19 defendants' reply, but I would direct the Court to the reply.
20 I think it addresses many of the arguments made. But I would
21 like to make four quick points.
22 First, with respect to the notion that the
23 State is just another landowner and that the case can proceed
24 without them, that's simply not the case. As one reads the
25 complaint, you'll see that the ultimate question here is the

1 state's conduct with respect to the treaties and the tribe.
2 So the only path to get to the non-state defendants today is
3 through that treaty. So they're much more than just another
4 landowner. They are the source of all title. And that's not
5 to say that they're just there as a predecessor in title, as
6 the Nation phrases it. They're more than that. They are,
7 they are responsible and have a governmental interest in --
8 and this is in the Second Circuit case, the Thruway decision,
9 in securing and protecting property rights acquired on behalf
10 of the people of the State. Through that treaty, the State of
11 New York acquired property interests on behalf of the people
12 of the State. So they had an interest there apart from its
13 interest as just a property owner. So I think that's an
14 important point.
15 Turning to the issue of Judge Port's decision
16 in 1977, it's a fellow district court decision, I would just
17 direct the Court to the Second Circuit opinion in the Seneca
18 case, which is both more current and, of course, a Second
19 Circuit opinion. Also, in the decision by Judge Port, that
20 there's really no analysis in that decision of the 19 -- the
21 Rule 19 factors, it's quite conclusory. I direct the Court to
22 page --
23 THE COURT: You don't have to cite that.
24 MR. PUZELLA: -- 546. It's a short section,
25 there's no analysis, so I don't think it's necessarily

1 informative, particularly in light of the former cases.
2 The next question is whether state title will
3 be affected. And this is touched on in our reply, but there's
4 this, I think, disconnect with the plaintiffs' point of view
5 of the case and their view of the Nonintercourse Act. The
6 Nonintercourse Act is really an all or nothing proposition.
7 If the treaties entered into with the State and the Nation on
8 the other hand are void abnitio, it is in the least case that
9 all of the parcels and titles in the entire claim area have a
10 cloud on them. It may not be the case that those issues or
11 just those deeds and titles are thrown out the window. But
12 they at the least have a cloud in them. And I think the Court
13 recognized that in the Oneida decision, I think it was the
14 Oneida EBG properties case. This Court wrote: Even lawsuits
15 brought by a smaller number of defendants more carefully
16 chosen creates substantial unrest in the community and raises
17 the specter of widespread loss of lands for private landowners
18 in the claim area. So I think that that's reminiscent of the
19 same notion; that the Nation can't necessarily pick and choose
20 among those landowners in the claim area whose title they'd
21 like to attack. It exposes all of the titles to at least, you
22 know, unrest, a cloud, and so forth.
23 The last point is with respect to the equitable
24 factors that go into the Rule 19(b) analysis. First, that's
25 equitable and not bound necessarily by the four factors

1 articulated there. But, more importantly, as set forth in the
2 reply, the state's sovereign immunity in many respects trumps
3 the balancing test set forth there. So if the Court finds
4 that sovereign immunity applies and turns now to the Rule 19
5 argument, in 19(b) at least that immunity trumps the balancing
6 of those factors. Thank you.
7 THE COURT: Okay. A brief response.
8 MR. BERKEY: Yes.
9 THE COURT: And then we'll --
10 MR. BERKEY: Very briefly, your Honor. Three
11 points on the Eleventh Amendment. Counsel cited from the
12 Second Circuit's decision with regard to the source of
13 Congress' authority to pass the Trade Intercourse Act. The
14 issue of whether that was exclusive authority was not
15 litigated in that case. That was purely dictum. You're not
16 bound by that. Secondly, it's not necessary for Congress to
17 specify the source of its authority to pass the act. It could
18 have -- it could be several sources of authority in the
19 Constitution. Secondly, on the Cortland case, the Cortland
20 case does not apply here for the simple reason that the Nation
21 is not seeking the same -- exactly the same relief that was
22 sought by the Cortland Tribe against the State of Ohio in this
23 case. In that case the core sovereign interest of the State
24 were directly implicated because the relief sought to
25 invalidate virtually every single state law, every regulatory

1 law that applied to that land. Because of that extreme
2 intrusion in the state sovereignty, the Court found that
3 ex-party Young was not available. And that's not our case at
4 all. We make no request of any kind with respect to
5 jurisdiction and sovereignty.
6 Finally, counsel mentioned that -- suggested
7 that there's no authority for the proposition that the war
8 powers clause is a source of congressional authority to
9 abrogate state immunity. I direct your attention to the First
10 Circuit's decision in 1996, in the case Diaz-Gandia versus
11 Dapena, where the Court expressly found that that clause was a
12 source of authority to abrogate. Thank you.
13 THE COURT: Thank you all. It's very
14 interesting, and I know it's significant to the parties. And
15 we have all the submissions, I'll read everything over, and my
16 clerk and I will be working on it. And I thank you very much.
17 MR. ROBERTS: Thank you.
18 MR. PUZELLA: Thank you.
19 (Court adjourned at 11:15 AM.)
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3 C E R T I F I C A T I O N
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6 I, BONNIE J. BUCKLEY, RPR, Official Court Reporter
7 in and for the United States District Court, Northern District
8 of New York, do hereby certify that I attended at the time and
9 place set forth in the heading hereof; that I did make a
10 stenographic record of the proceedings held in this matter and
11 caused the same to be transcribed; that the foregoing is a
12 true and correct transcript of the same and whole thereof.
13
14
15
16 ______________________________
17 BONNIE J. BUCKLEY, RPR
18 USDC Court Reporter - NDNY
19
20 DATED: NOVEMBER 13, 2007
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