UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ONEIDA NATION,

Plaintiff,

v. Case No. 16-C-1217

VILLAGE OF HOBART, WISCONSIN,

Defendant.

PLAINTIFF ONEIDA NATION OPPOSITION TO DEFENDANT'S CIVIL L. R. 7(h) NON-DISPOSITIVE MOTION TO STRIKE PLAINTIFF'S RESPONSIVE EXPERT REPORT

In accordance with this Court's Order, Defendant Village of Hobart ("Hobart"), as the party carrying the burden of proof on the issue, produced its opening report on alleged diminishment/disestablishment of the Oneida Reservation by Dr. Emily Greenwald on November 15, 2017. Plaintiff Oneida Nation ("Nation") produced a responsive report by Dr. Douglas Kiel on December 15, 2017. *See* ECF No. 66. Hobart now moves to strike Dr. Kiel's report as non-responsive principally because it covers a time period, i.e., the post-Indian Reorganization Act ("IRA") period, not addressed by Dr. Greenwald in her opening report.[1] The Nation opposes the motion as contrary to the governing legal standard and prejudicial:

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[1] Hobart complains that the Kiel Report is not responsive to the Greenwald report because the former makes limited reference to the latter and because the former covers a time period not covered in the latter. Hobart seeks different relief for these two bases of its motion. But the difference between these two complaints is not self-evident and both are refuted by the obvious and admitted relevance of the entire time period.

1. In her opening report, Greenwald concludes that the Oneida Reservation was "effectively diminished or disestablished," without limitation as to time and presumably including the post-IRA period. Locklear Declaration, ¶ 5, attached. She also examines the views of federal officials and concludes that "the general consensus of federal officials was that the reservation had ceased to exist," again without limitation as to time. *Id.* Kiel addresses the views of federal officials and others on the existence of the Reservation after the IRA and reaches a conclusion contrary to Greenwald's; it is thus responsive to Greenwald. *Id.,* ¶ 6.

2. Throughout proceedings on whether to conduct discovery, Hobart consistently and repeatedly indicated that a vast historical record must be examined by expert witnesses, without any limitation as to time periods, specifically:

a. Hobart sought discovery of, among other things, "All records, documents, and communications that support the Nation's contention the fee land, upon which any of the 2016 Big Apple Fest activities occurred, are within the Nation's reservation." Declaration, ¶ 2.

b. In the Greenwald affidavit in support of Hobart's Memorandum in Opposition to Plaintiff's Motion for Protective Order, Greenwald asserted the need to research whether the Oneida Reservation "was ever diminished or disestablished." ECF No. 38, p. 2.

c. In memoranda insisting upon its right to conduct discovery on disestablishment, Hobart emphasized the scope and volume of the historical record to be examined. ECF No. 32, p. 5 ("vast historical record"); ECF No. 36, p. 8 ("numerous historical records"); ECF No. 41, p. 10 ("extraordinary large amount of factual data").

3. Throughout proceedings on whether to conduct discovery, Hobart relied upon *Wisconsin v. Stockbridge-Munsee Community,* 366 F. Supp. 2d 698 (E.D. Wis.), *aff'd* 554 F.3d

657 (7th Cir. 2009) as demonstrating the need for discovery on disestablishment.[2] There, the district court received and considered data relating to "Reorganization under the Indian Reorganization Act and the Modern Era." 366 F. Supp. 2d at 73l, 731-737 (reviewing data from 1934 to 1952).[3]

4. In its Order Clarifying the Burden of Proof, the Court indicated that the standard governing alleged disestablishment of the Oneida Reservation is that stated in *Nebraska v. Parker,* 136 S. Ct. 1072 (2016). There, the Supreme Court made clear that the post-IRA period is relevant to the alleged disestablishment of a reservation. *Nebraska v. Parker,* at 1079 ("...our precedents also look to any 'unequivocal evidence' of the contemporaneous and subsequent understanding of the status of the reservation by members and nonmembers, as well as the United States and the State...").

5. Under these circumstances, the Nation reasonably concluded that its responsive case on the alleged disestablishment of the Oneida Reservation must address the post-IRA views of federal, Oneida, and local officials regarding the Reservation. Accordingly, the Nation produced substantial documents regarding this period and the Kiel Report. Declaration, ¶¶ 3, 6. Because the period is patently relevant, this Court or the Seventh Circuit may view any record as fatally incomplete in the absence of evidence relating to the post-IRA period, to the extreme prejudice

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[2] In Hobart's words, "At the very least, discovery and expert testimony related to the 1906 Act and 'events following the 1906 Act' is necessary just like it was in *Wisconsin v. Stockbridge-Munsee Community*." ECF No. 31, p. 12.

[3] The district court also noted that the Stockbridge-Mundsee Community was not allowed by the BIA to organize under the Act until a new land base was established for the Community, *because it lacked a reservation at that time.* 366 F. Supp. 2d at 366. By contrast, the historical record here will establish that Oneida was allowed to organize immediately under the Act *precisely because it occupied a reservation.*

of the Nation.[4]

6. In her rebuttal report produced on January 15, 2018 (and after this motion to strike was filed), Greenwald responded to post-IRA data. Declaration, ¶ 7. As a result, Hobart will suffer no prejudice from the denial of its motion to strike.

7. The Nation made every good faith effort to respond to Hobart's expansive discovery demands. It has produced 8,315 documents, of which approximately 80% relate to alleged disestablishment of the Reservation. Hobart has produced 225 in total. Declaration, ¶ 4. Now, having demanded that this discovery take place, Hobart's objection that the Nation has produced too much admittedly relevant historical data should be summarily rejected.

For these reasons, the Nation respectfully urges the Court to deny the motion to strike.

Dated this 17th day of January, 2018

Respectfully submitted,

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[4] In her rebuttal report produced on January 15, 2018, Greenwald also concedes the relevancy of this time period: "As I understand it, the case *Solem v. Bartlett* established a three-part test for diminishment that includes looking at the aftermath of allotment and surplus land sales." Declaration, ¶ 7.

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DECLARATION OF ARLINDA LOCKLEAR

Arlinda F. Locklear declares and states as follows:

1. I am counsel for Plaintiff Oneida Nation ("Nation") in this matter and make this declaration in support of the Nation's Opposition to Defendant's Civil L. R. 7(h) Expedited, Non-Dispositive Motion to Strike Plaintiff's Responsive Expert Report.

2. On November 14, 2016, Defendant Village of Hobart ("Hobart") requested production of all documents "that support the Nation's contention the fee land, upon which any 2016 Big Apple Fest activities occurred, are within the Nation's reservation."

3. The parties agree that the legal standard governing Hobart's counterclaim and affirmative defense of alleged disestablishment of the Oneida Reservation is set out in *Nebraska v. Parker,* 136 S. Ct. 1072 (2016), and *Wisconsin v. Stockbridge-Munsee Community,* 366 F. Supp.2d 698 (E. D. Wis.), *aff'd* 554 F.3d 657 (7th Cir. 2006), both of which clearly make the post-Indian Reorganization Act ("IRA") period relevant to the determination.

4. The Nation made good faith efforts to comply with Hobart's discovery demands and

its Rule 26 obligations. As of this date, the Nation has made several productions of documents for a total of 8,315 documents, of which approximately 80% relate to the disestablishment and other historical issues. By contrast, Hobart has produced a total of 225 documents. Hobart has made no written claim of deficiency or other objection to the Nation's production.

5. On November 15, 2017, Hobart produced Dr. Emily Greenwald's opening report. With no limitation as to time, Dr. Greenwald concluded that the Oneida Reservation was "effectively diminished or disestablished." With no limitation as to time, she also concluded that "the general consensus of federal officials was that the reservation had ceased to exist."

6. On December 15, 2018, the Nation produced a responsive report by Dr. Douglas Kiel which disputes the Greenwald conclusions regarding federal officials' view and the disestablishment of the Reservation for the post-IRA period.

7. On January 15, 2018, Hobart produced a Greenwald Rebuttal Report. That report includes a section titled, "Rebuttal of the Kiel Responsive Report." Greenwald also concedes the relevance of the post-IRA period under *Solem v. Bartlett.* Since Hobart has responded to the Kiel Report, denial of its motion to strike the Kiel Report will not prejudice Hobart.

8. The Nation has expended considerable resources in its efforts to comply with Hobart's discovery demands and its Rule 26 obligations. Further, in light of the governing legal standard, this Court or the Seventh Circuit may conclude that the record in this matter is fatally incomplete in the absence of a post-IRA historical record, to the obvious prejudice of the Nation.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of January, 2018.

/s/ Arlinda F. Locklear