UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONEIDA INDIAN NATION OF NEW YORK, THE ONEIDA TRIBE OF INDIANS OF WISCONSIN and THE ONEIDA OF THE THAMES,

Plaintiffs,

and

Civil Action No.
74-CV-187 (LEK) (DRH)

THE UNITED STATES OF AMERICA, THE NEW YORK BROTHERTOWN INDIAN NATION,

Plaintiffs-Intervenors,

-against-

THE STATE OF NEW YORK, THE COUNTY OF MADISON, NEW YORK and THE COUNTY OF ONEIDA, NEW YORK,

Defendants.

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

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PRELIMINARY STATEMENT

This action is brought by three Oneida tribal groups – the Oneida Indian Nation of New York ("New York Oneidas"), the Oneida Tribe of Indians of Wisconsin ("Wisconsin Oneidas") and the Oneida of the Thames ("Thames Band") (collectively, the "Oneidas" or "Tribal Plaintiffs") – against the Counties of Oneida and Madison, New York ("Counties"), and the State of New York ("State" and collectively with the Counties, "Defendants"). The Tribal Plaintiffs seek redress for allegedly unlawful transfers of land that took place over a 50 year span beginning in 1795, and ending in 1846 – over 150 years ago. To remedy these ancient alleged wrongs, the Oneidas ask this Court to disrupt over a century of private ownership on some 250,000 acres of land in central New York by declaring that the Tribal Plaintiffs hold a current possessory interest in the land in the claim area, and transferring to the Tribal Plaintiffs land to which the Counties and State hold title.

It has now been conclusively settled by the Supreme Court and the Second Circuit that these disruptive possessory land claims are precluded by the equitable doctrines of laches, acquiescence and impossibility. In City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) ("Sherrill"), an action brought by one of the Tribal Plaintiffs, the Court determined that the New York Oneidas, having been out of possession of former reservation lands since the early 1800's, was barred by equitable principles from re-establishing sovereignty over parcels of land within the boundaries of the former reservation area simply by purchasing the land in the open market. Following the Sherrill decision, the Second Circuit held in Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266 (2d Cir. 2005), cert. denied, 126 S. Ct. 2021, 2022 (2006) ("Cayuga"), that long delay in bringing the very same type of possessory land claim asserted in this case and the disruptive nature of such claim prohibited Indian tribes and the United States from asserting the claim under the same equitable

principles applied in Sherrill. The rationale of these cases mandates dismissal of the possessory land claims asserted by the Oneidas (and the United States on their behalf) in the instant case.

This action is now over 30 years old. The time has finally come to bring closure to this long and costly litigation and to put an end to the ongoing disruption and uncertainty it has created in the land claim area and central New York in general. The Oneidas' claims should be dismissed with prejudice.

STATEMENT OF FACTS

The Complaints

The Tribal Plaintiffs' Complaint

This case involves approximately 250,000 acres of land located in Oneida and Madison Counties (the "claim area" or the "subject lands"). See Affirmation of David B. Roberts, dated August 11, 2006 ("Roberts Aff."), Ex. A, ¶ 1. The Tribal Plaintiffs allege that this land was occupied "from time immemorial" by the "aboriginal Oneida Indian Nation" (id. at ¶ 11), and that after adoption of the United States Constitution, the United States in the 1794 Treaty of Canandaigua "acknowledged that the Oneida Indian Nation had the exclusive right to occupy the subject lands and guaranteed the Oneida Indian Nation's free and undisturbed use of the land." Id. at ¶ 19.

The Tribal Plaintiffs' Complaint, as amended on November 8, 2000 (the "Complaint"), states that "Plaintiff Tribes are identical to or are political successors in interest to the aboriginal Oneida Indian Nation . . . and, as such, are parties to or political successors in interest to the 1794 Treaty of Canandaigua." Id. at ¶ 11. The Tribal Plaintiffs challenge the validity of a series of 26 land transactions in which (i) the State purchased from the Oneida Indian Nation, and/or allegedly transferred, land within the claim area, and/or (ii) land within the claim area was transferred by tribal

members with State authorization. These transactions occurred over a period of roughly 50 years beginning in 1795 and allegedly continuing until 1846. Id. at ¶¶ 32, 34. Following the transactions, much of the land was transferred to private non-Indian purchasers (id. at ¶¶ 31, 35), but the Counties and the State "have occupied and continue to occupy portions of the subject lands." Id. at ¶ 36.

The Oneidas allege that all of the challenged transactions listed in the Complaint violated the so-called Non-Intercourse Act provision ("NIA") of the Indian Trade and Intercourse Act ("ITIA") and other federal law and "were void ab initio." Id. at ¶¶ 1, 3. As a result, the Tribal Plaintiffs allege that their possessory rights in the lands have never been terminated and they have a current possessory interest in the subject lands. Id. at ¶¶ 3, 41, 48, 51, 54, 58, 61; p. 24.

The Oneidas seek the following forms of relief, among others: (1) a declaration that "Plaintiff Tribes have possessory rights to the subject lands conferred by federal law, and there has been no termination of those possessory rights . . . [and] the subject lands have been in the unlawful possession of trespassors. . . . "; (2) "declaratory and injunctive relief as necessary to restore Plaintiff Tribes to possession of those portions of the subject lands to which defendants claim title"; and (3) damages in the amount, inter alia, of the fair market value of the subject lands, as improved, and fair rental value of the land from the date of the challenged transactions relating to such land. Id. at pp. 24-25.

The United States' Complaint-In-Intervention

In March 1998, the United States moved to intervene in this action. The United States' complaint-in-intervention (as amended on November 13, 2000, the "United States' Complaint") parallels that of the Oneidas. Like the Oneidas, the United States challenges a series of alleged land transactions between 1795 and 1846 involving land once occupied by the Oneida Indian Nation.

According to the United States' Complaint, those transactions violated the NIA and the terms of the 1794 Treaty of Canandaigua. Id. at Ex. B at ¶¶ 1, 14. "Because these transactions violated the Trade and Intercourse Act, the State of New York failed to extinguish the Plaintiff Tribes' right to possess the Subject Lands under federal law." Id. at ¶ 1(b). The State "sold the Subject Lands to private parties, leading to the settlement of and trespasses on the Subject Lands." Id. at ¶ 9.

In the United States' Complaint, the United States seeks damages against the State, a determination that the challenged transactions by which land was transferred "are void," and "declaratory relief and/or ejectment, with regard to certain Subject Lands [to] which New York and the Counties of Oneida and Madison claim title. . . ." Id. at p. 16.

Procedural History

This case was commenced in 1974 by the New York Oneidas and the Wisconsin Oneidas against the Counties. This action remained dormant for nearly 25 years while the Oneidas pursued an earlier action brought in 1970 which challenged a single transaction from 1795 and the parties engaged in intermittent, but unsuccessful, efforts to reach a settlement. Oneida Indian Nation of New York v. County of Oneida, 199 F.R.D. 61, 65, 66 (N.D.N.Y. 2000).[1]

Nearly 24 years after the commencement of the present action, in 1998, the United States successfully moved to intervene as a plaintiff "to protect the Oneida Indian Nation's tribal rights under the Nonintercourse Act, the provisions of the Treaty of Canandaigua of 1794 and Federal common law." Roberts Aff. Ex. B at ¶ 12; see also id. at Ex. C, Docket No. 56.

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[1] While this action was pending, the New York Oneidas and Wisconsin Oneidas commenced actions challenging the validity of pre-constitutional treaties between the Oneidas and the State of New York. Those claims were dismissed. Oneida Indian Nation of New York v. New York, 520 F. Supp. 1278 (N.D.N.Y. 1981), aff'd in part and rev'd in part, 691 F.2d 1070 (2d Cir. 1982), on remand, 649 F. Supp. 420 (N.D.N.Y. 1986), aff'd, 860 F.2d 1145 (2d Cir. 1988), cert. denied, 493 U.S. 871 (1989).

In December 1998, the Oneidas sought to certify a class of over 20,000 defendants including "all persons or entities that currently occupy or have or claim an interest in the subject lands and their successors and assigns." Id. at Ex. D, p. 3. The United States joined in that request. Id. at Ex. E, p. 3. Both the Oneidas and the United States further sought leave of the Court to amend the original complaint and the original complaint-in-intervention, respectively, by adding "all persons and entities presently occupying the subject lands" in the claim area, including New York State, and three non-state entities in the proposed class action suit. See id. at Ex. A at ¶ 2; Ex. E, p. 3; Oneida, 199 F.R.D. at 95.

The proposed amended complaints also tried to broaden the relief sought. Oneida, 199 F.R.D. at 67. The Oneidas expressly sought damages against the members of the defendant class for their period of occupancy, and damages against the State for the entire period since the Oneida Indian Nation had been without possession of the subject lands. In addition, the Oneidas sought the dispossession of every class member. See Roberts Aff. Ex. F, p. 25. The United States' proposed amended complaint in intervention similarly sought relief against every landholder in the claim area, including a declaration that asserted "the Oneida Indian Nation continues to have the right of possession to the subject lands claimed or held by any defendant," damages, and other relief, "possibly including ejectment." See id. at p. 20; id. at Ex. E, p. 3.[2]

In September 2000, Judge McCurn ruled on the motions of the Oneidas and the United States. Judge McCurn denied the Oneidas' motion to certify the defendant class, and denied both the

[2] At oral argument on its motion to amend, the United States made what Judge McCurn described as a "frantic attempt to back paddle" and asked for permission to strike all references to ejectment from its proposed amended complaint as it applied to private landowners. Oneida, 199 F.R.D. at 69.

Oneidas' and the United States' motions to amend their complaints to add private landowners as defendants. See Oneida, 199 F.R.D. at 95. The Court found, among other things, that the attempt by the Oneidas and the United States to add private landowners as defendants constituted bad faith, and that the amendment was futile insofar as it sought to add claims for relief against private landowners. Id. at 81-87, 94.[3] Judge McCurn however, did allow the Oneidas and the United States to add the State of New York and the Thames Band as parties to the action. See id. at 69-70, 95.

In May 2001, this Court permitted the New York Brothertown Indian Nation (the "Brothertown" and together with the Oneidas and the United States, the "Plaintiffs") to intervene as a plaintiff. Roberts Aff. Ex. C, Docket No. 239.[4] The Brothertown claim that it acquired 99,840 acres of the claim area from the Oneidas in a 1774 treaty and that its right to such land was recognized in the Treaty of Canandaigua. See id. at Ex. G, pp. 5-7. The Brothertown complaint alleges that by a series of actions between 1791 and 1827, the State dispossessed the Brothertown from the land. Id. at Ex. H ¶¶ 28-35. Thereafter, Brothertown Indians withdrew from the area. Id. at ¶ 38. The Brothertown seek a declaration that it "is the rightful owner of, has the legal and equitable title to, and has present rights to occupy and possess any and all" of the land it claims; an

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[3] The Wisconsin Oneidas nevertheless sued 60 private landowners in a separate action seeking ejectment and damages. See Oneida Tribe of Indians of Wisconsin v. AGB Props., Inc., No. 02-233, 2002 WL 31005165 (N.D.N.Y. Sept. 5, 2002) (Attachment A). In response to a motion to dismiss made on behalf of the landowners, this Court dismissed the actions and enjoined the Wisconsin Oneidas from filing similar actions against any other parties. Id. Although the Wisconsin Oneidas filed an appeal from that decision, they have yet to prosecute such appeal.

[4] Several additional parties have sought, unsuccessfully, to intervene in this action: Upstate Citizens for Equality as defendant and counterclaimant in January 1999 (see Roberts Aff. Ex. C, Docket No. 79); Oneida Ltd. as defendant in February 1999 (see id. at Docket No. 92); American Citizens, James M. Chappell and Thomas Laurin as defendants in March 1999 (see id. at Docket No. 113); and the Marble Hill Oneida as plaintiffs in November 2001 (see id. at Docket No. 311).

award of possession; and if possession is not possible an award of damages including rental value and current market value. Id. at p. 28; ¶ 54.

In the same month, the Plaintiffs moved to dismiss the Defendants' counterclaims and strike certain of the Defendants' affirmative defenses. The Defendants similarly cross-moved for dismissal for failure to join an indispensable party. See Oneida Indian Nation of New York v. New York, 194 F. Supp. 2d 104, 113 (N.D.N.Y. 2002). The Court addressed several of those motions in its March 2002 opinion, wherein it ruled, among other things, that it would strike several of the Defendants' affirmative defenses, including laches. Id. at 124; see also id. at 120-30 (granting in part, and denying in part, the Plaintiffs' motion to strike the Defendants' affirmative defenses).[5] The Court declined to dismiss the Defendants' counterclaims. See id. at 135-47.

Following that decision, the parties engaged in fact and expert "merits" discovery. This phase of discovery was completed by November 19, 2004. See Roberts Aff. Ex. C, Docket No. 516. Following completion of such discovery, the proceedings in the case were stayed until September 2005 pending settlement discussions conducted under the auspices of court-appointed mediator John Tabner. See id. at Docket No. 569.

In March 2005, the U.S. Supreme Court issued its decision in Sherrill, in which it held that the New York Oneidas could not unilaterally reassert tribal sovereignty over land in the claim area

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[5] This Court has inherent power to reconsider earlier rulings in an ongoing case. See United States v. LoRusso, 695 F.2d 45, 53 (2d Cir. 1982) ("A district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment."); see also Parmar v. Jeetish Imports, Inc., 180 F.3d 401, 402 (2d Cir. 1999) (quoting LoRusso); United States v. Uccio, 940 F.2d 753, 758 (2d Cir. 1991) (same). A change in controlling law certainly warrants such reconsideration. Olvera-Morales v. Int'l Labor Mgmt. Corp., No. 02-1589, 2006 WL 931752, at *1 (N.D.N.Y. Apr. 10, 2006) (Attachment B). In the circumstances present here, Defendants do not believe that a formal motion for reconsideration is required but are, of course, prepared to file such a motion should the Court deem it necessary.

which it had purchased in the last decade. Following the Sherrill decision, the Second Circuit handed down its decision in Cayuga, applying the equitable principles cited by the Supreme Court in Sherrill to possessory land claims asserted by two tribal groups who alleged they were the successors of the aboriginal Cayuga Indian Nation and the United States as plaintiff intervenor. Cayuga, 413 F.3d at 266. In August 2005, the Court extended the stay in this case pending the Cayuga plaintiffs' petition for rehearing to the Second Circuit, and subsequently, pending the Cayuga plaintiffs' petition for certiorari to the U.S. Supreme Court. The U.S. Supreme Court denied certiorari in Cayuga on May 15, 2006. See Cayuga, 125 S. Ct. at 2022.

The Undisputed Facts

The Subject Land and the Oneidas

In 1788, the Oneida Indian Nation (the "OIN") entered into the Treaty of Fort Schuyler with the State of New York. Under that treaty, the OIN ceded "all their lands" to the State and an area of approximately 250,000 acres was reserved for the "use and cultivation" of the OIN. See Roberts Aff. Ex. I; Ex. J, p. 85.[6]

Beginning in 1795 the State and the OIN entered into the first of a series of land transactions challenged in this action. The last of the transactions allegedly occurred in 1846. See id. at Ex. A, ¶ 32; Ex. B, ¶ 16.

As a result of these transactions, lands in New York in which the OIN had an interest diminished dramatically in the last decade of the eighteenth century and the early decades of the

[6] In 1794, the United States entered into a Treaty with the Six Nations ("Treaty of Canandaigua"). In Article II of that Treaty, the United States "acknowledge[d] the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property . . ." 7 Stat. 44.

nineteenth century. According to the Oneidas' expert, Alan Taylor, the OIN ceded approximately 132,000 acres, more than half of their reservation in the 1795 transaction.[7] Roberts Aff. Ex. J, p. 137. By 1802, the OIN had transferred nearly 70% (approximately 173,000 acres) of the 250,000 acres reserved for the OIN's use in the Treaty of Fort Schuyler (see id. at pp. 137, 146, 149);[8] and by 1810, over 200,000 acres had been transferred. Id. at p. 169. As of 1838, federal officials reported that the OIN were in possession of only 5,000 acres. Id. at Ex. K, OW014279. In the next eight years, the bulk of that amount would be transferred to the State. When the challenged transactions were completed, the OIN held less than 500 acres in New York. Id. at Ex. L, p. 461. The small amount of land still occupied by the OIN was then divided in severalty and the OIN were scattered. Id. at Ex. M, p. 25. See also id. at Ex. N, p. 314. At the time this action was filed, only 32 acres within the area reserved in the Treaty of Fort Schuyler remained under the jurisdiction of the Bureau of Indian Affairs. See id. at Ex. O, p. 61.

As the lands were acquired from the OIN, they were sold to non-Indians and the area's character changed dramatically. Taylor stated:

> In 1790 only one settler town abutted the reservation on the east . . . with a population of 1,891. Given an Oneida population of 588, that meant a ratio of three settlers per Indian in that vicinity. During the next decade the local settler population (defined as those portions of Herkimer and Chenango County that subsequently became Madison and Oneida counties) surged more than ten-fold to 28,815, dwelling in eighteen towns all around the reservation. In 1800 the local settlers outnumbered the Oneida by forty-two to one. Ten years later, the settler invasion swelled the populations of Madison and Oneida counties to 55,778 in thirty-two towns. In 1810 the Oneida country had nearly seventy settlers per Indian.

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[7] For purposes of this motion, the Defendants are assuming the accuracy of the acreage figures presented by the Oneidas' expert. The figures calculated by the Defendants are slightly different, but the Defendants do not believe these differences are dispositive of the current motion.

[8] This included 30,000 acres transferred by a 1798 treaty that the Plaintiffs concede was effected pursuant to the NIA. Roberts Aff. Ex. J, p. 146.

Id. at Ex. J, p. 143. See also id. at p. 158 ("The interplay of road and settlement transformed the Oneida landscape"). That transformation – well underway by 1810 – was completed in the following decades.

The disparity between the Indian and non-Indian population that existed in 1810 only increased thereafter as the OIN began leaving the State. At least by the second decade of the nineteenth century, the federal government was encouraging the OIN to remove beyond white settlements and supported efforts by the New York Indians, including the OIN, to acquire land from the Menominees in what is now Wisconsin. See id. at Ex. P, pp. 121-23. Nearly 150 of the OIN moved to Wisconsin in 1825 to land purchased from the Menominees. See id. at p. 123; Ex. Q at p. 65. The OIN migration continued in subsequent decades. In 1838, there were roughly 654 of the OIN in Wisconsin and 620 in New York. Id. at Ex. P, p. 139; 7 Stat. 556 (Schedule A). The OIN who stayed in New York after that time diminished in number. A few hundred of the OIN moved to Canada by 1842 (id. at Ex. P, pp. 160-61), and the bulk of the OIN who remained in New York "removed to Wisconsin in 1846." See id. at Ex. R, p. 223. See also id. at Ex. S, p. 288 ("Most of the tribe removed to Wisconsin in 1846."). "[B]y the mid-1840's, only about 200 Oneidas remained in New York State . . . ." Id. at Ex. T, pp. 9, 13. And some of those eventually left the claim area and moved onto the Onondaga reservation. See id. at Ex. U, p. 88 ("About 100 of them have 'squatted' on the Onondaga Reserve . . . [and] many of those have intermarried with the Onondaga"). Today, the Wisconsin Oneidas number over 14,000; the Thames Band numbers 2,000; while there are reportedly only 1,000 members of the New York Oneidas. Id. at Ex. V.

At the same time that the OIN population was dwindling, the non-Indian population increased dramatically. By 1890, there were 106 Oneida Indians in the claim area. Id. at Ex. M, p. 6. This

number of Oneida Indians compared to total 1890 populations numbering 42,892 in Madison County, and 122,922 in Oneida County. Id. at Ex. W, Table 4. A century later, the 1990 Census of Population and Housing Report issued by the U.S. Department of Commerce stated that among the 250,836 residents of Oneida County, only 0.2% of the population were native Americans (i.e., American Indians, Eskimos and Aleutians), and that among the 69,120 residents of Madison County, approximately 0.4% of the population were native Americans. Id. at Ex. X, pp. 71, 74. In 2000, the population of native Americans in Oneida and Madison Counties comprised only 0.2% and 0.5% of the populations, respectively, of these counties. Id. at Ex. Y.[9]

It goes without saying that the land in the claim area has been drastically altered. In the words of Judge McCurn, "development of every type imaginable has been ongoing for more than two centuries." Oneida, 199 F.R.D. at 92. That development has been accomplished by non-Indians. See generally id., at Ex. J, pp. 152-165 (detailing the ways the claim area became a "landscape transformed"); Ex. Z (summarizing the history, growth and development of Oneida County); Ex. AA (summarizing the history, growth and development of Madison County).

At no time prior to 1970 did the Oneidas or the Brothertown initiate any judicial action challenging the transactions at issue in this case, or seek any relief against the State, counties or private property owners with respect to any portion of the subject lands. The first judicial action by the Oneidas that related to the challenged transactions was filed in 1951 against the United States – an action brought before the Indian Claims Commission ("ICC") in which the Oneidas sought damages against the United States for violating its fiduciary duties by failing to assure that the

[9] It is also undisputed that since the challenged transactions, the claim area has been subject to the jurisdiction of state and local governments.

Oneidas received "conscionable consideration" in the transactions. United States v. Oneida Indian Nation of New York, 576 F.2d 870, 872 (Ct. Cl. 1978). The Oneidas withdrew that action after they filed the 1970 action. Oneida Indian Nation of New York v. United States, Nos. 301 & 300-A, 1982 WL 25826 (Ct. Cl. Sept. 10, 1982) (Attachment C).

United States' Knowledge of the Land Transactions

It is undisputed that representatives of the United States knew of the first two challenged transactions – 1795 and 1802 – by which approximately 143,000 acres were transferred – in advance. Senior federal officials were informed of the 1795 transaction before it was completed. Roberts Aff. Ex. BB, p. 107. A federal treaty commissioner appointed by the President attended, and the Senate voted to ratify, the 1802 transaction. Id. The United States' expert also concedes that the United States had knowledge of the 1795 transaction before it was completed, and participated in the 1802 transaction. See id. at Ex. P, pp. 83-84, 86, 88-89.

Although the United States appears to dispute exactly when, or in what detail, it learned of other challenged transactions, there is no question that U.S. representatives were informed of later transactions at or near the time of such transactions.

Throughout the 1802-1838 time period, the United States had agents located in New York charged with keeping abreast of and reporting significant occurrences regarding Indians, including the OIN, within the Office of Indian Affairs. See id. at Ex. BB, p. 7. The agents did not live with the OIN but visited periodically and undoubtedly knew of the continued sales of OIN land. See generally id. at Ex. P, p. 94, 103; Ex. BB, p. 20 (agents were to spend three months each year with the tribes). For some period, the agents distributed to various tribes annuities paid by the State pursuant to the terms of its land transactions with the Tribe. See id. at Ex. P, p. 92 (citing proposal

by U.S. agents to State to distribute annuities to the OIN, Onondagas and Cayugas). In the 1810's, the Indian agent was a state court judge who would have received, as part of his judicial duties, the state laws enacted to authorize state purchases of OIN lands. See id. at Ex. BB, pp. 34-35.

Further, the record contains numerous communications to federal government officials in the nation's capital reporting on state purchases. By way of example,

- In an 1818 memorial to the President, the OIN stated that their lands had been much reduced because they had "sold to the State of New York a great proportion of their reservation." Id. at Ex. CC, OIN55352.

- In 1827, representatives of the Ogden Company (which held a preemption right with respect to the Seneca lands) informed the Secretary of War that the OIN had sold "a large portion of their Lands to the State of New York . . ." Id. at Ex. DD, NYS027129.

- In 1828, Thomas L. Ogden submitted a letter to the Office of Indian Affairs stating that: "[t]he State of New York who owns the pre-emptive title to the lands occupied by the Oneida and other Tribes of the Six Nations have repeatedly, nay almost annually, purchased releases of the Indian Right to these lands, without the interference of the United States." Id. at Ex. EE, OIN85190.

- In 1829, Ogden informed Commissioner McKenney of the "late sale by the Oneidas to the State …" Id. at Ex. FF, NYS027134.

- In 1830, U.S. Senator Forsyth, during Senate debate, referred to a recent purchase of lands from the OIN negotiated by the Governor of New York. Id. at Ex. GG, p. 337.

- J.T. Schermerhorn informed Secretary of War Poinsett that the Oneida chiefs had stated "that they are now negotiating with the State of New York for all their lands in the State . . ." Id. at Ex. HH, US033215.

See also Roberts Aff. Ex. P, 125-26.

During the same time period, the federal government developed and implemented a policy of removal of eastern Indians to the west. Federal officials encouraged the OIN and other New York Indians to sell their lands and remove. Id. at Ex. P, pp. 97, 121-22, 130-31.

And federal officials were well aware that the OIN (and other New York Indians) were in fact taking steps to remove. With assistance from federal officials, the New York Indians negotiated the purchase of land in Wisconsin from tribes located there, which, after extensive proceedings, was eventually approved by the United States. Id. at Ex. P, pp. 135-38.

In 1838, pursuant to the federal policy of removal, the United States negotiated a treaty (the Treaty of Buffalo Creek) which provided for the removal of the OIN (and other New York Indians) from New York. Id. at p. 156.

The United States was well aware that in fact large numbers of the OIN were leaving New York and settling in Wisconsin, and others were resettling in Canada. Id. at Ex. P, p. 140; Ex. BB, p. 76. The United States could hardly have been ignorant of the fact that the land from which those OIN departed was sold to the State; and of course to the extent the United States was aware of that fact it was also aware of the alleged absence of direct federal participation in these transactions.

In a report submitted by the Oneidas in their action before the ICC against the United States, Professor Richard Kohn concluded that the "federal government knew about the Treaties, 1795-1847 [sic], between the State of New York and the Oneida Indians . . . ." Id. at Ex. BB, p. 108. The ICC itself reached the same conclusion, finding, in a lengthy decision, that the United States had actual or constructive knowledge of the Treaties at the time they occurred. Id. at Ex. II at 406-07. See also

id. at 409 ("We believe that this record indicates that the Federal government was fully aware of New York's negotiations with the New York Indians at all times").

Despite that knowledge, the United States took no legal action with respect to any of the challenged transactions. The only legal action taken by the U.S. with respect to any land within the area reserved in the Treaty of Fort Schuyler was United States v. Boylan, which involved a 32-acre parcel of land that is not the subject of this action. 256 F. 468, 469 (N.D.N.Y. 1919), aff'd, 265 F. 165 (2d Cir. 1920). Neither before nor after Boylan did the federal government take any other action until it intervened in this case in 1998.

This is true despite the fact that in the early decades of the twentieth century, the federal office of the Commissioner of Indian Affairs examined the situation of the Oneidas and was fully aware that the Oneidas' interest in the bulk of lands in the claim area had been sold to the State without direct federal involvement. Roberts Aff. Ex. P, pp. 169-70. The United States consciously elected to not take action despite requests by the Oneidas that it do so. Id. at pp. 168-71.

ARGUMENT

POINT I.

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT DISMISSING THE ACTION

A. The Claims Are Ripe For Summary Judgment

Summary judgment is appropriate if it can be established "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Curley v. Village of Suffern, 268 F.3d 65, 69 (2d Cir. 2001). A dispute regarding a material fact is genuine "'if the evidence is such that a

reasonable jury could return a verdict for the nonmoving party.'" Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)); see also Stuart v. American Cyanimid Co., 158 F.3d 622, 626 (2d Cir. 1998); Tenenbaum v. Williams, 193 F.3d 581, 593 (2d Cir. 1999), cert. denied, 529 U.S. 1098 (2000).

B. The Oneidas' Land Claim Is Barred By the Decisions In Sherrill And Cayuga[10]

The heart of the Plaintiffs' case is the claim that they have a current possessory interest in the claim area that dates back to time immemorial that was recognized by the United States in the 1794 Treaty of Canandaigua and has never been extinguished. See, e.g., Roberts Aff. Ex. A at ¶ 1 ("Plaintiffs . . . bring this action to vindicate tribal right in approximately 250,000 acres of land located generally in the Counties of Madison and Oneida . . . ."); id. at ¶ 41 ("Plaintiff tribes have Indian title and the exclusive right to occupy the subject lands . . ." which right has never been terminated). The relief they seek – a declaration that the Plaintiffs have "possessory rights to the subject land conferred by federal law and there has been no termination of those possessory rights" (id. at p. 24); recovery of land to which the Counties and the State "claim title" (id. at p. 25); and damages for the value of the benefits received by occupants of the land from the time the land was sold to date, and the current value of the land (id.) – rest directly on this claim of a current possessory interest. See, e.g., id. at ¶ 3 ("Under Federal Common law, the Nonintercourse Act and the Treaty of Canandaigua, Plaintiff Tribes . . . have 'possessory rights' in the subject lands 'based on federal common law,' . . . and seek, in vindication of those rights," the enumerated forms of relief); id. at ¶¶ 24-25.

[10] The same reasoning set forth in the text applies to the claims of the Brothertown.

The decisions in Sherrill and Cayuga are absolutely clear that such a claim is barred. In Cayuga, the Cayugas alleged that they had aboriginal and reserved title in land as of 1795; that in 1795 and 1807 the historic Cayuga Nation of Indians entered into land transactions with the State that violated the NIA and the Treaty of Canandaigua and were therefore void; as a result, the Cayugas' possessory interest in the land was never extinguished; and, as a consequence, the Cayugas were entitled to eject the current occupants of the land and recover the rental value of the land for the period when the Cayugas were out of possession. See Cayuga, 413 F.3d at 269. In Cayuga, the district court granted summary judgment on liability in favor of the Cayugas. Denying the remedy of ejectment, it fashioned a damage remedy that was intended to serve as a monetary equivalent of ejectment: the current fair market value of the land instead of recovery of the land itself, coupled with rental value (mesne profit) of the land for the period the Cayugas were out of possession. Cayuga Indian Nation of New York v. Pataki, 165 F. Supp. 2d 266, 366 (N.D.N.Y. 2001), rev'd 413 F.3d 256 (2d Cir. 2005). The court ultimately awarded $250 million in damages based on the current fair market value of the land in the claim area, rental value of such land for the 200 years the Cayugas were out of possession, and prejudgment interest against the State. See id.

While an appeal was pending in the Second Circuit, the Supreme Court issued its seminal decision in Sherrill, a decision that "dramatically altered the legal landscape against which we consider [the Cayugas'] claims." Cayuga, 413 F.3d at 273. In Sherrill, the court held that the claim of the New York Oneidas to sovereign jurisdiction over parcels of land, located within the "reservation" established by the 1788 Treaty of Fort Schuyler and acknowledged by the United States in the Treaty of Canandaigua and purchased in the open market in the last decade, was barred by the equitable principles of laches, impossibility and acquiescence. Sherrill, 544 U.S. at 202-03. In reaching that

conclusion, the Court focused on a number of factors. The Court emphasized the dramatic change in the makeup of the population and the character of the land since the OIN sold it, specifically, the predominant occupation and development of the land by non-Indians. Id. at 216-217 ("[T]he . . . dramatic changes in the character of the properties, preclude [the tribe] from gaining the disruptive remedy it now seeks."). The Court similarly placed great weight on the long passage of time since the Oneidas exercised tribal sovereignty on the land at issue (and other land within the former reservation). Id. at 202-03, 214-16. The Court was particularly concerned with the disruptive effect that the exercise of tribal sovereignty would have on established state and local governance. Id. at 202 ("[W]e decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns."). The final factor cited by the Court was the failure of the Oneidas to assert tribal sovereignty over the land through litigation or acquisition until the latter part of the twentieth century. Id. at 214-16.

The Second Circuit in Cayuga held that the equitable principles relied upon by the Supreme Court in Sherrill applied to the possessory land claim asserted by the Cayugas. "We understand Sherrill to hold that equitable doctrines, such as laches, acquiescence, and impossibility, can, in appropriate circumstances, be applied to Indian land claims, even when such a claim is legally viable and within the statute of limitations." Cayuga, 413 F.3d at 273. In doing so, it found that "the broadness of the Supreme Court's statements indicates to us that Sherrill's holding is not narrowly limited to claims identical to that brought by the Oneidas [in Sherrill], . . . but rather . . . apply to 'disruptive' Indian land claims generally." Id. at 274. Concluding that, "[w]hile the equitable remedy sought in Sherrill – a reinstatement of Tribal sovereignty – is not at issue here, this case involves comparably disruptive claims," and the court decided "to treat this claim like the tribal sovereignty

claims in Sherrill." Id. at 274, 275. As a result, the Second Circuit concluded that "the present case must be dismissed because the same considerations that doomed the Oneidas' claim in Sherrill apply with equal force here." Id. at 277.

In reaching that conclusion, the Court focused on the following factors:

> Generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation," Sherrill, 125 S. Ct. at 1483; "at least since the middle years of the 19th century, most of the [Tribe] have resided elsewhere," id.; "the longstanding, distinctly non-Indian character of the area and its inhabitants," id.; "the distance from 1805 to the present day," id. at 1494; "the [Tribe's] long delay in seeking equitable relief against New York or its local units," id.; and "developments in [the area] spanning several generations." Id.; see also id. at 1492-93 . . .

Id.

There can be no legitimate dispute that Sherrill and Cayuga foreclose the Plaintiffs' claims. The Oneidas' possessory land claims are on all fours with those asserted in Cayuga;[11] and indeed the Cayuga court relied on the history of the land claimed by the Oneidas in this case, cited by the Supreme Court in Sherrill, as the basis for dismissing the Cayugas' claims. In substance, the Second Circuit has already determined that the very claims at issue in this case are barred by laches. An examination of each of the factors cited in Cayuga only confirms this conclusion.

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[11] The Cayugas, like the Oneidas, claim that they have aboriginal title to the land in their respective claim areas; that in the 1794 Treaty of Canandaigua (indeed the very same article of that treaty) the United States recognized and guaranteed their rights to the land in their respective claim areas; by transactions beginning in 1795, the aboriginal tribe lost possession of the land in the claim areas; that the transactions by which possession was lost violated the NIA and the Treaty of Canandaigua, and are void; and that as a result, the current tribal groups, as the same tribes as, or as successors to, the aboriginal tribe, have a current, unextinguished possessory interest in all the land in the claim area. See Roberts Aff. Ex. JJ, ¶¶ 4, 30, 34-50. Although the Cayugas' complaint named a defendant class of all landowners (and the Oneidas were unsuccessful in their attempt to amend to add such a class), the court in Cayuga refused to grant any relief against non-governmental defendants and refused to grant ejectment against any party, state or private. As a result the relief the Cayugas were awarded by the trial court (Judge McCurn) was actually somewhat narrower than what the Oneidas plead in their Complaint.

That decision also makes clear that the claims in this case are ripe for dismissal, and no further proceedings are necessary. Notably, when the Second Circuit in Cayuga reversed the district court's judgment in favor of the Cayugas, it found "no need to remand . . . for a determination of the laches question" and simply entered judgment for defendants. Cayuga, 413 F.3d at 280. Underscoring the point, the court stated that the claim could properly have been dismissed at the pleading stage under the rule it adopted: "if the Cayugas filed this complaint today, exactly as worded, a District Court would be required to find the claim subject to the defense of laches under Sherrill and could dismiss on that basis." Id. at 278 (emphasis added).

The appropriateness of dismissing possessory land claims on the basis of laches in this case without an evidentiary hearing was also recognized by Judge McCurn in his 2000 decision. There, Judge McCurn refused to "allow amendment and await further litigation" before deciding that laches and impossibility precluded the claim against non-state defendants. Oneida, 199 F.R.D. at 92. Discussing the court's own experience in Cayuga, Judge McCurn noted that the evidentiary hearing he conducted in that case on the availability of ejectment as a remedy had proven to be an "academic exercise." Id. The proof offered was largely "commonsense observations" and the reasons for not permitting ejectment "were self-evident." Id.

Here, the extensive factual record developed by the parties and the findings of the Supreme Court in Sherrill[12] conclusively demonstrate that the factors warranting dismissal of the Oneidas'

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[12] Although the Defendants do not rest this motion on an argument that the findings in Sherrill are preclusive under the doctrine of collateral estoppel, we believe that all of the factors necessary for collateral estoppel are present here. See Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A., 56 F.3d 359, 368 (2d Cir. 1995) ("Four elements must be met for collateral estoppel to apply: (1) the issues of both proceedings must be identical, (2) the relevant issues were actually litigated and decided in the prior proceeding, (3) there must have been 'full and fair opportunity' for the litigation of the issues in the prior proceeding, and (4) the issues were necessary

(continued...)

complaint are present.

1. The Oneidas' Claims Are Disruptive Indian Land Claims

The claims asserted by the Oneidas are indistinguishable from those before the Second Circuit in Cayuga. In both cases the starting point is the assertion that the tribes have an uninterrupted possessory interest in the land, and therefore a current right to possession. Although the Cayuga complaint named a defendant class of landowners and sought ejectment as to all, Judge McCurn determined that ejectment was not an available remedy against any defendant in that action, determined that potential damages consisted of fair rental value of the land during the period the Cayugas were out of possession plus current market value, and ultimately limited the damages remedy to an award against the State. See Cayuga, 413 F.3d at 271-72. In this case, Judge McCurn reached much the same result by refusing to allow the Plaintiffs to amend to add a defendant class of private landowners (and seek ejectment, declaratory relief, and damages against them). See Oneida, 199 F.R.D. at 95. As a result, the only claims currently at issue are ejectment, declaratory relief, and damages claims against the Counties and the State.

There is no question that the Oneidas' claims constitute "disruptive" claims under Cayuga. The Oneidas seek, inter alia, a declaration of their current possessory interest, ejectment of the Counties and State from the Subject Land and the same damages award that Judge McCurn granted in Cayuga. The Second Circuit held in the clearest terms that ancient Indian possessory land claims such as this one that "call into question title" to thousands of acres of land long settled by non-Indians

[12] (...continued)
to support a valid and final judgment on the merits").

are inherently disruptive, and are subject to the equitable doctrines cited in Sherrill. Cayuga, 413 F.3d at 275. As stated by the court:

> Under the Sherrill formulation, this type of possessory land claim – seeking possession of a large swath of [land] and the ejectment of . . . landowners – is indisputably disruptive. Indeed, this disruptiveness is inherent in the claim itself – which asks this Court to overturn years of settled land ownership – rather than an element of any particular remedy which would flow from the possessory land claim.

Id.[13]

The fact that the Plaintiffs do not seek ejectment of current, private landowners does not diminish the disruptiveness of the claim. A decision that the Tribal Plaintiffs are the owners of rights and interests in the claim area would call into question title to the entire area. Such a declaration is itself "a remedy that would . . . project redress into the present and future." Id. (internal citations omitted). Indeed, in Cayuga the Court of Appeals dismissed the complaints which sought declaratory relief as well as ejectment and damages. The Court expressly rejected the plaintiff's assertion that their claim for damages could survive even if their claim for equitable relief might be barred. Id. at 278.

In this case, of course, the Oneidas do seek to eject the Counties and State from public lands to which they assert title, and that remedy would clearly be disruptive. Among other things, the Oneidas evidently seek to eject the State from the road bed of the New York State Thruway (which is owned by the State), relief that, as Judge McCurn has found, would have "unthinkable" consequences. See Cayuga Indian Nation of New York v. Cuomo, Nos. 80-930 & 80-960, 1999 WL

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[13] In support of their motion to amend, the Oneidas emphasized the possessory nature of their claims. "[T]he Tribal plaintiffs reprise a point which they stressed during oral argument: because they 'hold a *federal common law right to current possession* of the subject lands,' their claim is 'for possession of the land." Oneida, 199 F.R.D. at 89.

509442, at *29 (N.D.N.Y. July 1, 1999) (Attachment D) ("[E]jectment would mean that transportation systems . . . would have to be rerouted at great expense. Putting aside costs, rerouting the Thruway would have almost unthinkable consequences in terms of intrastate and interstate commerce.").

2. The Transactions At Issue Took Place Over 150 Years Ago

The land sales at issue in this case took place beginning in 1795 when the State acquired approximately 132,000 acres (over 50% of the claim area) from the OIN. See Sherrill, 544 U.S. at 204-05. By 1810, the bulk of the subject land had been transferred. The most recent of the transactions at issue in this case allegedly took place in 1846, 160 years ago. "Generations have passed" since each of the challenged transactions. See Cayuga, 413 F.3d at 277 (quoting Sherrill, 544 U.S. at 202).

3. Most of the Tribe Has Resided Elsewhere Since the Middle of the Nineteenth Century

The migration of the OIN from New York and the claim area began early in the 1800's, when the federal government instituted efforts to "remove Indian Tribes from their east coast homelands." Sherrill, 544 U.S. at 206. By 1825 some 150 of the OIN had moved to approximately 500,000 acres of land purchased from the Menominees and Winnebago Nations in Wisconsin. Oneida Indian Nation of New York v. City of Sherrill, 145 F. Supp. 2d 226, 234 (N.D.N.Y. 2001). The OIN was thus "splintered into three distinct bands, the New York Oneidas, the Wisconsin Oneidas, and the Thames Oneidas." Id. at 235. The migration of the OIN only increased after 1825. By 1890, only a small number of the OIN remained in the claim area. Roberts Aff. Ex. M at MOC023849. Today, the vast majority of Oneida Indians reside outside New York. See discussion supra pp. 10-11.

4. Generations Have Passed During Which Non-Indians Owned and Developed the Area

The land sold by the OIN in the late eighteenth and early nineteenth centuries passed into non-Indian hands promptly following the transactions. As the Supreme Court expressly found, the land has been developed, dramatically changed and greatly increased in value by non-Indians in the scores of years since the land transfers at issue. See Sherrill, 544 U.S. at 210 ("[F]or in the two centuries since the alleged wrong, development of every type imaginable has been ongoing" (internal quotations omitted)); id. at 199 ("[T]he properties here involved have greatly increased in value since the Oneidas sold them 200 years ago"); id. at 216-217 (there have been "dramatic changes in the character of the properties"). In the Supreme Court's words, "[g]enerations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation." Id. at 202.

5. The Area Has Long Had a Distinctly Non-Indian Character

In reaching its decision in Sherrill, the Supreme Court emphasized the "longstanding, distinctly non-Indian character of the area and its inhabitants . . . ." Id. As the OIN vacated the land, it was acquired and occupied by non-Indians. The population of non-Indians in the area increased dramatically in the early to mid-nineteenth century, rapidly transforming the character of the area. By the mid-1840's, only 200 of the OIN remained in New York. Id. at 207. Throughout the twentieth century the predominance of non-Indians in the population continued. See id. at 216. "According to the 2000 census, over 99% of the population in the area is non-Indian: American Indians represent less than 1% of the city of Sherrill's population and less than 0.5% of Oneida County's population." Id. at 216 (citations omitted). "The city of Sherrill and Oneida County are

today overwhelmingly populated by non-Indians." Id. at 219; see also Roberts Aff. Ex. Y. The population of Madison County is also overwhelmingly non-Indian. Roberts Aff. Ex. Y.

6. The Oneidas Long Delayed In Seeking Relief

It is undisputed that the Oneidas commenced no judicial action to seek redress for the transactions at issue in the case from any party other than the United States until the 1970's. See id. at 202-03 ("Given the . . . Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty."). That fact is clearly reflected in the Complaint itself. The Tribal Plaintiffs allege that they "have sought redress of the wrongs herein described from the executive and legislative branches of the government of New York State . . . [and] from the President of the United States and other Federal officials." Roberts Aff. Ex. A at ¶ 37. Nowhere do the Plaintiffs allege that they initiated a judicial action challenging the validity of the transactions at issue here or seeking relief from the State, Counties or private citizens before the 1970 action. The reason for that omission is simple: there were no such actions. The only legal actions that preceded the 1970 action challenging the 1795 transaction were brought against the United States and are of relatively recent origin. In 1951, the New York and Wisconsin Oneidas initiated proceedings before the ICC to obtain further compensation from the United States with respect to 25 treaties at issue between the State and the OIN. Sherrill, 544 U.S. at 207.[14]

The Oneidas may argue that they could not have brought a judicial action earlier because the federal courts would not have entertained jurisdiction, and the federal government failed to take any action on their behalf. Such arguments are unavailing. The Cayugas also argued that they had no

[14] In the 1890's the OIN also sought monetary relief from the United States for land set aside for them in Kansas pursuant to the Buffalo Creek Treaty but later sold by the United States. See Sherrill, 544 U.S. at 207.

ability to seek redress by way of a possessory land claim until the mid-20th century because "no federal or state court could have asserted jurisdiction over" such a claim (Cayuga, 165 F. Supp. 2d at 357), and the United States had failed to commence any action on the tribe's behalf. See id. at 365-66. The court of appeals nonetheless held that the district court's findings, made in the context of an application for prejudgment interest, that the Cayugas were "not responsible for any delay in bringing this action" and the delay "was not unreasonable" as to them, were not dispositive on whether laches barred the underlying possessory claim. See Cayuga, 413 F.3d at 279. Similarly the New York Oneidas made essentially the same argument in their petition for rehearing in Sherrill, but the Supreme Court was unmoved by it. See Oneida Indian Nation of New York's Petition for Rehearing, Sherrill, 2005 WL 959687, at *3-4 (2d Cir. April 25, 2005) (Attachment E); City of Sherrill v. Oneida Indian Nation, 544 U.S. 1057 (2005) (denying reconsideration).

POINT II.

THE CLAIMS OF THE UNITED STATES ARE SIMILARLY BARRED BY LACHES

In Cayuga, as in this case, the United States, in response to the State's Eleventh Amendment defense, moved to intervene "on behalf of itself and on behalf of plaintiffs." See Cayuga, 413 F.3d at 270-71; Roberts Aff. Ex. B at ¶ 4. The Second Circuit in Cayuga specifically addressed the issue of whether laches applied to the United States' claims and ruled that it did. Cayuga, 413 F.3d at 278.

Although noting that the United States "has traditionally not been subject to the defense of laches" the court adopted the position of the Seventh Circuit that "in appropriate circumstances, laches can apply to suits by the federal government." Cayuga, 413 F.3d at 278. The court enumerated three circumstances in which laches may be available against the United States: (1)

"egregious" instances of laches; (2) suits in which there is no statute of limitations; and (3) suits brought on behalf of private parties that are a matter of private rights. Id. at 279.

> We need not decide which of these three possibilities might govern because this case falls within all three. First, given the relative youth of this country, a suit based on events that occurred two hundred years ago is about as egregious an instance of laches on the part of the United States as can be imagined; second, though there is now a statute of limitations, see 28 U.S.C. § 2415(a), there was none until 1966 – i.e., until one hundred and fifty years after the cause of action accrued; and third, the United States intervened in this case to vindicate the interest of the Tribe, with whom it has a trust relationship. Accordingly, we conclude that whatever the precise contours of the exception to the rule against subjecting the United States to a laches defense, this case falls within the heartland of the exception.

Id. (internal citations omitted).

This case also falls within each of the three categories and is within the "heartland" of the exception. First, the initial OIN land transaction, in which over 100,000 acres were transferred, took place in 1795 – the same year as the first Cayuga land transfer at issue. There is no question that the United States knew about that transaction; and there is no issue that the United States was also aware of subsequent land transactions. Despite its knowledge, the United States did nothing to challenge the transactions at issue in this case until it intervened in 1998.[15]

As the ICC found in 1978, 1795 "was the last time the Federal Government would make even a pretense of interfering with New York State's attempt to negotiate treaties for land cessions with any of the New York Indians, and certainly with Oneida Indians." Roberts Aff. Ex. II at p. 385.

> The record also indicates that the United States had no desire to take any action to prevent New York from doing what would otherwise have been the Government's job, i.e., buying lands from the New York Indians in order to persuade them to move

[15] As the Sherrill court noted, the action brought by the United States on behalf of certain Oneida Indians in the early 1900's, United States v. Boylan, 265 F.165 (2d Cir. 1920), involved land the OIN "never left" and concerned "the 1885 conveyances by individual Oneida Indians of a 32-acre tract" to non-Indians. Sherrill, 544 U.S. at 210 n.3.

> west. The Federal Government's removal policy applied not just to New York State, but to the entire Atlantic seaboard. In New York State the state was carrying out policy with very little Government help and that evidently was much to the liking of the Federal Government.

Id. at p. 409. The United States' failure to act is every bit as "egregious" as it was in Cayuga.

Secondly, just as in Cayuga, there was no federal statute of limitation until 1966 (see 28 U.S.C. § 2415(a)), over a century after the cause of action accrued.

Third, the circumstances of the United States' intervention in this case are the same as in Cayuga. As in Cayuga, the United States is essentially acting on behalf of the Tribal Plaintiffs. The United States' motion to intervene stated that the United States was seeking "to protect the rights of the Oneida Indian Nation to lands that were once their aboriginal homeland and to enforce the restrictions on alienation of the [NIA and the Treaty of Canandaigua]." See Roberts Aff. Ex. KK at p. 2. The United States explained that "[t]he policy to protect unauthorized extinguishment of Indian title or occupancy stems from the United States' fiduciary obligation [to prevent unfair, improvident or improper disposition by Indians of lands]." Id. at p. 5 (citation omitted). The United States further emphasized that its role in this lawsuit is to sue on behalf of the Oneidas, thereby demonstrating that the federal government's role was as fiduciary to the descendants of the historic Oneida. See id. at Ex. LL, p. 2. In seeking to protect the rights of the OIN, the United States acts in the role of a fiduciary to enforce the alleged violations of the NIA. See id. at Ex. KK at p. 2; see also Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975) ("That the [NIA] imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act seems to us beyond question . . .").

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court grant summary judgment dismissing, with prejudice, the Tribal Plaintiffs' Amended Complaint, the United States' Amended Complaint-in-Intervention, and the Brothertown's Amended Complaint-in-Intervention, in their entirety.

Dated : Albany, New York
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