07-2430-cv(L),
07-2548-cv(XAP),
07-2550-cv(XAP)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ONEIDA INDIAN NATION OF NEW YORK, also known as Oneida Indians of New York, also known as Oneida Indian Nation of New York, ONEIDA INDIAN NATION OF WISCONSIN, also known as Oneida Tribe of Indians of Wisconsin, ONEIDA OF THE THAMES,

Plaintiffs-Appellees-Cross-Appellants,

UNITED STATES OF AMERICA,

Intervenor-Plaintiff-Appellee-Cross-Appellants,

NEW YORK BROTHERTOWN INDIAN NATION, by Maurice “Storm” Champlain, Vice Chief,

Intervenor-Plaintiff-Appellee,

v.

COUNTY OF ONEIDA, COUNTY OF MADISON,

Defendants-Cross-Appellees,

STATE OF NEW YORK,

Defendant-Appellant-Cross-Appellee.

ON APPEAL FROM JUDGMENTS OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT-CROSS-APPELLEE STATE OF NEW YORK

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JURISDICTION

These Indian land claims were brought by three Oneida tribal groups -- the Oneida Indian Nation of New York (New York Oneidas), the Oneida Tribe of Wisconsin (Wisconsin Oneidas), and the Oneida of the Thames (Thames Band), collectively the Oneidas -- against the Counties of Oneida and Madison, New York, and the State of New York. The Oneidas seek redress for allegedly unlawful transfers of former tribal lands that occurred more than a century and a half ago in a series of 26 transactions from 1795 to 1846. A fourth tribal group, the Brothertown Indian Nation of New York (Brothertown), intervened, claiming a right to possess some of these lands. The United States intervened to support the Oneidas' claims. The Oneidas and the Brothertown invoked subject matter jurisdiction in the district court under 28 U.S.C. §§ 1331, 1337, 1345 and 1362. The United States invoked jurisdiction in the district court under 28 U.S.C. § 1345.

In City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005), the Supreme Court rejected the New York Oneidas' claim of sovereign immunity from local real property taxes on former tribal lands that the New York Oneidas had recently acquired in the open market. The Court held that equitable doctrines of laches, acquiescence and impossibility barred the long-delayed assertion of sovereignty. See id. at 202-03, 221. Following Sherrill, in Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266 (2d Cir. 2005), cert. denied,

126 S.Ct. 2021, 2022 (2006), this Court recognized that "Sherrill's holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather . . . these equitable defenses apply to 'disruptive' Indian land claims more generally." Cayuga, 413 F.3d at 274. Based on "the same considerations that doomed the Oneidas' claim in Sherrill," this Court dismissed the Cayugas' and the United States' land claims seeking both possession and monetary relief stemming from ancient Cayuga conveyances to the State of New York. Id. at 277.

In light of Sherrill and Cayuga, the district court in this case granted defendants' motion for summary judgment dismissing all "possessory land claims." The court held, however, that the Oneidas had also stated a "non-possessory" contract-based claim against the State of New York for unconscionable consideration under federal common law, and permitted the Oneidas to proceed on that claim. This Court, on July 13, 2007, granted the State's petition pursuant to 28 U.S.C. § 1292(b), for leave to appeal the district court's interlocutory order, as well as the cross petitions of the Oneidas and the United States for leave to appeal the same order.

ISSUES PRESENTED

1. Whether the so-called contract-based claim for unfair compensation is barred by this Court's decision in Cayuga because it is grounded in the Oneidas' possessory claims.

2. Whether any claim that plaintiffs received unfair consideration under ancient treaties and transactions with the State of New York is cognizable under federal common law of contracts.

3. Whether, even if the Oneidas stated a cognizable contract-based claim for unfair compensation, it would be barred by the Eleventh Amendment where the United States has not asserted such a claim.

STATEMENT OF THE CASE

In support of its holding in Sherrill that laches barred the New York Oneidas' long-delayed assertion of sovereignty, the Supreme Court reviewed the history of the Oneida land transactions at issue here and also discussed the litigation, including this case, that the Oneidas have brought challenging the land transactions. See Sherrill, 544 U.S. at 203-12. This history, summarized below, establishes that laches also bars the Oneidas' long-delayed assertion of any non-possessory rights.

Historical Background

In the years preceding the Revolutionary War, the Oneida Indian Nation, one of the six Iroquois nations in northeastern

America, occupied some six million acres in what is now central New York. In 1788, New York State and the Oneida Nation entered into the Treaty of Fort Schuyler (SPA35-39). For payments in money and kind, the Oneida's ceded "all their lands" to the State, and the State set aside for the Oneidas an area of between 250,000 and 300,000 acres -- for the Oneidas' "use and cultivation" (SPA36).[1] See Sherrill at 203.

In 1790, Congress enacted the first Indian Trade and Intercourse Act, commonly known as the Nonintercourse Act (SPA59-60). Act of July 22, 1790, ch. 33, 1 Stat. 137. The Act provided:

> [t]hat no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right to pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the Authority of the United States.

(SPA60). Id. § 4, 1 Stat. 138. Subsequent versions of the Nonintercourse Act were enacted in 1793, 1796, 1799, 1802 and

[1] Citations appearing as "(SPA__)" are to the Special Appendix. Citations appearing as "(JA__)" are to the Joint Appendix. Citations appearing as "(E__)" are to the consecutively paginated Exhibit Volumes.

1834 (SPA61-101).[2] The current version (SPA103) is codified at 25 U.S.C. § 177.[3]

In 1794, the United States entered into the Treaty of Canandaigua with the Six Iroquois Nations (SPA41-44). Act of November 11, 1794, 7 Stat. 44. The Treaty of Canandaigua acknowledged the area set aside the Treaty of Fort Schuyler and for the Oneidas and provided that the United States would not interfere with the Oneidas' "free use and enjoyment" of that land (SPA42). Id. at 45, art. II. The Oneidas agreed that they would "never claim any other lands within the boundaries of the United States" (SPA42). Id., at 45, art. IV. See Sherrill at 204-05.

In 1795, the State of New York entered into the first of a series of transactions with the Oneida Nation (JA586). In that transaction, the Oneidas ceded to the State their interest in approximately 100,000 acres of the lands set aside in the Fort Schuyler treaty (JA215-217, 438, 586). See id. at 205. In a score of subsequent transactions, the Oneidas ceded their interest of

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[2] Act of March 1, 1793, 1 Stat. 329; Act of May 19, 1796, 1 Stat. 469; Act of March 3, 1799, 1 Stat. 743; Act of March 30, 1802, 2 Stat. 139; Act of June 30, 1834, 4 Stat. 729.

[3] 25 U.S.C. § 177 provides in pertinent part:

> No purchase, grant, lease or other conveyance of land, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or conveyance entered into pursuant to the Constitution.

most of the remaining lands to the State of New York in exchange for money and other lands (JA217-218, 438-443, 586). By 1846, the Oneidas retained an interest in only a few hundred acres of the lands that had been set aside for them in the Treaty of Fort Schuyler (JA586, 606-607). See id. at 206-207.

Beginning in the first decade of the 1800s, the United States pursued a policy designed to open reservation lands to white settlers and to remove Indian tribes from the eastern States to frontier regions then not populated by settlers. See Sherrill at 205, citing D. Getches, C. Wilkinson, & R. Williams, Cases and Materials on Federal Indian Law, 94 (4th ed. 1998). To that end "early 19th century federal Indian agents in New York 'took an active role . . . in encouraging the removal of the Oneidas . . . to the west.'" Sherrill at 205-06, quoting Oneida Nation of New York v. United States, 43 Ind. Cl. Comm'n 373, 390, 391 (1978) (noting that some federal agents were "deeply involved" in "plans . . . to bring about removal of the [Oneidas]" and in the State's acquisition of Oneida land). Thus, the federal government encouraged or actively assisted in many of these transactions.

In 1815, the New York Oneidas sought the assistance and the consent of the United States to their removal out west (SPA46), 7 Stat. at 550, and the federal government "accelerated" its efforts to remove the Indian tribes from the east coast. See Sherrill at 206. In 1821 and 1822, the United States helped the

Oneidas and other New York tribes purchase land in Wisconsin from the Menominee and Winnebago Tribes. Id.; see also Felix C. Cohen, Handbook of Federal Indian Law, 420 (1942 ed.). President Monroe approved both purchases, the first in full and the second in part. See New York Indians v. United States, 170 U.S. 1, 6-7 n.1, 14 (1898), rev'g, 30 Ct. Cl. 413 (1895), after remand, 40 Ct. Cl. 448 (1905). The New York Indians recognized that the Wisconsin lands were intended to serve as a new homeland for the Indians removing from New York:

> [I]n the treaties of 1821 and 1822, it was originally the intention of the tribes . . . and the policy of this Government, to relieve the State of New York of its entire Indian population, and to provide for the Six Nations and their confederates a home in the vicinity of Green bay [sic], which should belong to them and their posterity forever.

Memorial of the Delegates from the Stockbridge, Munsee, Brothertown, Oneida and St. Regis, to the President of the United States, January 20, 1831, printed in Senate Confidential Report on "A Treaty with the Menomonee [sic] Tribe of Indians": February 28, 1831, National Archives, M668 (Ratified Indian Treaties 1722-1869).[4]

[4] In 1830, Congress adopted the Indian Removal Act authorizing the President to set aside federal lands west of the Mississippi "for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there." Act of May 28, 1830, 4 Stat. 411-412.

With continued federal encouragement, the Oneidas sold more land to New York and used the proceeds to finance their emigration to Wisconsin.[5] During the 1830s it became apparent that further removal to Wisconsin was no longer feasible. In 1838, the United States and the New York Indians engaged in further negotiations to remove the Indians to other lands in Indian territory, in what was to become the State of Kansas. See Cohen (1942 ed.) at 420.

The Treaty of Buffalo Creek of 1838 (SPA46-56) was the result of two decades of the federal government's efforts to remove the New York Indians, including the Oneidas, from New York. The Treaty recited its purpose to carry out the "humane policy of the Government in removing the Indians from the east to the west of the Mississippi, within the Indian territory" (SPA47). 7 Stat. at 551. In the treaty, the Oneidas and the other New York Indians ceded to the United States nearly all the lands previously granted them in Wisconsin (excluding a tract that became the present-day Oneida reservation in Wisconsin) and received a new 1,824,000 acre reservation in modern-day Kansas "as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent

[5] See Report of the Special Committee to Investigate the Indian Problem of the State of New York (1889) at 287 (Treaty of August 26, 1824); at 291 (Treaty of February 13, 1829); at 293 (Treaty of October 8, 1829); at 296 (dated April 2, 1833); at 298 (Treaty of February 1, 1826); at 303 (Treaty of April 3, 1830); at 305 (Treaty of February 26, 1834).

homes . . .” (SPA47-48). Arts. 1, 2, 7 Stat. at 551-552. The new reservation was to be the “future home” of, among others, the 620 “Oneidas . . . [then] residing in the State of New York” (SPA47). Art. 2, 7 Stat. at 551. The Treaty gave the Oneidas the right to establish their own government on these lands, and the United States promised to protect and defend the Oneidas in the “peaceable possession and enjoyment of their new homes” (SPA48). Art. 4, 7 Stat. at 552.

Finally, the Treaty of Buffalo Creek addressed the disposition of the Oneida’s remaining lands in New York, providing that the Oneidas “hereby agree to remove to their new homes in Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida” (SPA50). Art. 13, 7 Stat. at 554. As a condition of ratification, the Senate directed that a federal commissioner “fully and fairly explain” the terms to each signatory tribe and band. See Sherrill at 206, quoting New York Indians v. United States, 170 U.S. 1, 21-22 (1898).

By the time the Treaty of Buffalo Creek was signed, the Oneidas had sold all but 5000 acres of their original reservation lands. Sherrill at 206. Six hundred of their members resided in Wisconsin, while 620 remained in New York (SPA52). 7 Stat. 556 (Sched. A). During the 1840s, the Oneidas sold most of their remaining lands to the State. Id. at 206-207, citing New York

Indians v. United States, 40 Ct. Cl. 448, 458, 469-71 (1905). A few hundred Oneidas moved to Canada in 1842, and by the mid 1840s, only about 200 Oneidas remained in New York. Id. at 207. By 1843, the New York Oneidas retained less than 1000 acres in New York. Id. That acreage dwindled to 350 in 1890. Ultimately, in 1920, the Oneidas continued to hold only 32 acres. Id.

As the Oneidas withdrew from the lands they ceded, the lands were occupied and developed by non-Indians (JA586, 607; E300, 304 [Docket No. 582, Exh. R at 221, 225]). In 1790, only one settler town with a population of 1891 abutted the Oneida reservation (SPA719; E172 [Docket No. 582, Exh. J at 143]). By 1800, there were 18 settler towns around the Oneida reservation with a population of 28,815 (SPA719; E172, 329-338 [Docket No. 582, Exh. J at 143, Exh. S at 284]). By 1810, the settler population reached 55,778 (SPA719; E172 [Docket No. 582, Exh. J at 143]). Today there are about 235,469 people living in Oneida County; only 0.2 % are identified as American Indian or Alaska Native persons (SPA719; E362 [Docket No. 582, Exh. Y at 1]). Madison County now has a population of 70,337, 0.6 % of which are recorded as American Indian and Alaskan Native persons (SPA719-720). Since the mid 1800s, the vast majority of Oneida Indians lived outside the original reservation (JA586, 608). Moreover, since 1800, the entire area has become predominantly non-Indian in character (JA586, 608). Non-Indians have engaged in “development of every

type imaginable" for more than two centuries (SPA720, quoting Oneida Indian Nation of New York v. County of Oneida, 199 F.R.D. 61, 92 (N.D.N.Y. 2000)).

Prior Litigation

1. Proceedings before the Indian Claims Commission

In 1951, the New York and Wisconsin Oneidas instituted proceedings against the United States under the Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946).[6] See Oneida Indian Nation of New York v. United States, 26 Ind. Cl. Comm'n 138 (1971). Claiming that they received unconscionable compensation in 25 treaties of cession concluded between 1795 and 1846, the Oneidas alleged that the United States breached its fiduciary duty under the Indian Trade and Intercourse Act of 1790 and its successors to protect the Oneida Nation from unfair dealings by third parties. As a remedy, they sought the fair market value of the lands that were allegedly transferred for unconscionable consideration.

The Indian Claims Commission found that the federal government had constructive knowledge of the treaties in issue and probably actual knowledge of most of them, and was therefore "liable under

[6] In 1893, with the United States' consent, the New York Indians sued the United States for monetary recompense for the Kansas lands the United States set aside for various Indian tribes in the Treaty of Buffalo Creek, but subsequently sold to settlers. The Oneidas in New York shared in the resulting award of damages. New York Indians v. United States, 170 U.S. 1 (1898), on remand, 40 Ct. Cl. 448 (1899) (identifying the tribes qualified to share in the damages award).

the Indian Claims Commission Act and the Trade and Intercourse Act if the Oneida Indians did not receive conscionable consideration" under any of the treaties involved in the case. Oneida Indian Nation of New York v. United States, 43 Ind. Cl. Comm. 373, 467, aff'd, 217 Ct. Cl. 45, 576 F.2d 870 (1978). Although further proceedings were anticipated in the Court of Claims to determine the extent of the United States's liability, the Oneidas requested that the proceedings be dismissed. The Court of Claims explained that the Oneidas instead wanted to pursue their claim to the land itself:

> In large measure, this has been caused by the present view of the claimants that their interests would not be served by obtaining any monetary compensation which might result from the conclusion of this litigation. Rather, plaintiffs now prefer to press litigation in other tribunals seeking a determination that they have present title to the land in New York State which is involved in these cases.

Oneida Indian Nation of New York v. United States, 231 Ct. Cl. 990, 991, 691 F.2d 1070 (1982) (per curiam).

2. The "Test Case" – Oneida I and Oneida II

In 1970, the New York and Wisconsin Oneidas commenced a "test case" against the Counties of Oneida and Madison, claiming that the Counties were in unlawful possession of about 900 acres of their lands. The Oneidas alleged that 1795 treaty ceding nearly 100,000 acres to the State of New York did not terminate the Oneida's right to possession of those lands because the treaty was not approved

by the United States as required under the Indian Trade and Intercourse Act. The remedy sought, however, was damages measured by the fair rental value of the 900 acres for the years 1968 and 1969. In 1974, the Supreme Court held that the federal courts had jurisdiction over the claim. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 675 (1974) ("Oneida I"). The Court emphasized that the Oneidas:

> asserted a present right to possession conferred by federal law based in part on their aboriginal right of occupancy that was not terminable except by action of the United States . . . . The claim is also asserted to arise from treaties guaranteeing their possessory rights . . . . Finally, the complaint asserts a claim under the Nonintercourse Act . . . .

Id. at 682.

In 1985, the test case again reached the Supreme Court. The Court held the Oneidas could maintain their claim to be compensated "for violation of their possessory rights based on federal common law." County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 236 (1985) ("Oneida II"). The Court noted but did not address the issue whether equitable considerations such as laches might limit the relief available to the present day Oneidas. Id. at 253, n.27. On remand, the district court awarded damages in the amount of $15,994 from Oneida County and $18,970 from Madison County, plus

prejudgment interest. Oneida Indian Nation of New York v. County of Oneida, 217 F. Supp. 2d 292, 310 (N.D.N.Y. 2002).[7]

Proceedings Below

1. The Original Pleadings Against the Counties.

In the meantime, the New York and Wisconsin Oneidas commenced this action in 1974 against the Counties of Oneida and Madison, seeking damages for the Counties' allegedly illegal occupation of reservation land since 1951 and into the future (JA85). The Oneidas based their claim on the alleged violation of their possessory rights resulting from the State of New York's allegedly unlawful acquisition of lands acknowledged in federal treaties (JA85-86). They sought relief limited to the fair rental value of such occupied lands since 1951 and into the future (JA86). The Oneidas asserted no claim for unconscionable or inadequate compensation for the lands they ceded in the series of treaties with the State of New York. Indeed, they could not then have made such a claim because the State of New York was not yet a party to the action and the Counties were not parties to the cession

[7] In addition to the test case and this case, the Oneidas commenced a third lawsuit against the State of New York and others seeking damages and recovery of land the Oneidas sold to the State in 1785 and 1788. This Court affirmed the dismissal of that action, holding that the treaties between the Oneidas and New York while the Articles of Confederation were operative did not require Congressional consent. Oneida Indian Nation of New York v. New York, 860 F.2d 1148, 1167, 1183, n.1 (1988).

treaties. For nearly 25 years, the Oneidas' claims were held largely in abeyance pending resolution of the "test case."[8]

2. The United States Intervenes.

In 1998, this action was revitalized. With the permission of the district court, the United States intervened in the Oneidas' action against the Counties to vindicate the federal interest in protecting Indian land rights (JA122-136). The complaint in intervention alleged that, beginning in 1795 and extending to 1846, New York executed 22 transactions whereby the Oneidas deeded most of their lands without federal consent or ratification as required by the Indian Trade and Intercourse Act (JA128-133). The United States alleged that as a result of these treaties, the Counties of Madison and Oneida were in wrongful possession of parts of the Oneida's reserved lands (JA135). For the benefit of the Oneidas, the United States sought damages for the Counties' wrongful possession of a portion of the allegedly wrongfully conveyed lands (JA135).

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[8] In 1979, Madison County moved for summary judgment on the ground that the Indian Claim Commission's holding in Oneida Indian Nation of New York v. United States constituted Congressional consent to or ratification of the treaties in which the Oneidas ceded the reservation lands to the State of New York. The district court denied the motion but certified for immediate appeal the question whether Indian Claims Commission decision constituted Congressional consent or ratification of the treaties. This Court dismissed the appeal as improvidently granted because the issue of the United States' liability had not been finally resolved through the appellate process (JA110-120).

3. The Oneidas and the United States Amend Their Pleadings, Adding the State as a Defendant.

In 2000, the Oneidas and the United States sought to amend their pleadings to name the Oneida of the Thames as an additional plaintiff, to add the State of New York as a defendant, and to seek damages for the unlawful possession of all 250,000 acres of former reservation lands. Vastly expanding the scope of the relief they requested, the Oneidas and the United States also sought to join as defendants approximately 20,000 private landowners who now lived on the former reservation lands (JA143-149). The Oneidas demanded recovery of the land they had not occupied since the 1795-1846 conveyances, a declaration that would allow ejectment of the current landowners, and damages far in excess of those sought in their original complaint, including the fair market rental value of the subject lands, damages for pollution or destruction of the subject lands, and the value of resources removed from the lands, all going back 200 years (JA145-146). In the proposed amended complaint, the Oneidas also sought an accounting from the State and an order requiring the State to disgorge the benefits it received from the sale and possession of the lands (Docket No. 64).

The district court granted the amendment to the extent of adding the Thames Band as a plaintiff and the State as a defendant and allowing plaintiffs to seek relief going back 200 years (JA138-203). Oneida Indian Nation of New York v. County of Oneida, 199 F.R.D. 61 (N.D.N.Y. 2000). But the court refused to allow the

Oneidas and the United States to alter so drastically the nature of their claim by adding the current landowners as defendants so late in the day. The court rested its decision in part on a finding that the Oneidas acted in bad faith in seeking to add private parties after giving prior assurances to the contrary (JA170-179). The district court also found that any amendment seeking ejectment or monetary relief from such private landowners would be futile (JA186-201). Thus refusing to authorize such a "radical shift" from the original pleadings, the district court excluded the assertion of any claim against the private landowners (JA201-202).

The Oneidas amended their pleadings accordingly (JA185-234). The third paragraph of their amended complaint again emphasized the continued possessory nature of their claim (JA206-207):

> Under the 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," [quoting Oneida II at 236], and seek, in vindication of those rights, damages for unlawful possession of the subject lands from the time each portion of the subject lands was wrongfully acquired or transferred from the Oneida Indian Nation to the present time; disgorgement of the amounts by which defendants have been unjustly enriched by reason of the illegal taking of subject lands; an accounting; and a declaration that New York State acquired and/or transferred the subject lands from the Oneida Indian Nation in violation of the [federal laws] and that the purported agreements and letters patent by which the subject lands were acquired or transferred . . . were void ab initio.

After listing a "Series of Illegal Transactions" (JA215-219), the Oneidas' amended complaint alleged three "counts" against the "State of New York as Initial Tortfeasor and for Subsequent Third Party Trespasses," based on federal common law, the Nonintercourse Act, and the Treaty of Canandaigua. Each of these counts asserts that the Tribes "have a continuing right to title and possession of the subject lands," and that as a result of the State's willful violation of the federal laws, the Oneidas have been "unlawfully dispossessed of the subject lands," and that the "unlawful dispossession of the subject lands continues to the present day" (JA221-225). The Oneidas' fourth through sixth counts, which also allege violations of the federal common law, the Nonintercourse Act and the Treaty of Canandaigua against all defendants, assert that the Oneidas have been excluded from their "rights" to "unlawfully severed" resources and chattels formerly attached to the subject lands, as well as from the "rightful possession" of the subject lands (JA226-228).

In their prayer for relief, the Oneidas ask for a declaration that there has been no termination of their possessory right and the transactions transferring the lands to the States were unlawful and void ab initio, that the subject lands have been in the unlawful possession of trespassers, and that all interests of any defendant in the subject lands are null and void, and injunctive relief "as necessary to restore plaintiffs to possession of those

lands to which defendants claim title" (JA228-229). Plaintiffs also seek damages "in the amount of the fair market value of the subject lands, as improved;" damages "in the amount of fair market rental value" since the subject lands were unlawfully transferred; and damages in an amount equal to the diminution in value of the subject lands due to extraction of resources or other harm to the lands (JA229). Finally, the Oneidas seek the State's "disgorgement" of benefits received from its "purported purchases," including but not limited to "the difference in value between the price at which the State acquired each portion of the subject lands and its value" (JA230).

The United States also amended its pleadings to "seek[] monetary and other relief from the State of New York for its denial of the Plaintiff Tribes' enjoyment of their rights to the Subject Lands under federal law and for trespasses to the Subject lands that originated with the State's illegal transactions" (JA237-238). After itemizing the series of transactions claimed to be illegal under federal common law, the Nonintercourse Act, and the Treaty of Canandaigua, the United States asserted two claims for relief, entitled "Federal Common Law Trespass Claim" (JA249) and a "Trade and Intercourse Act Claim" (JA250), both of which hinged on allegations that the State as initial tortfeasor is liable for continuing third party trespasses on the subject land. In its prayer for relief, the United States sought "damages, including

prejudgment interest, against the State of New York as primary tortfeasor, for causing the violation of the Plaintiff Tribes' enjoyment of their rights under federal law and for the trespasses to the Subject Lands that originated with the State's illegal transactions" (JA251). The United States further sought a determination that the "26 Agreements and Letters Patent Transfers are void" and declaratory relief and/or ejectment with regard to lands that the State and Counties claim title (JA251).

4. The Brothertown Intervene.

In 2001, the district court also permitted a fourth tribal group, the Brothertown Indian Nation of New York to intervene and file a complaint, claiming a possessory interest in approximately 100,000 acres of the lands claimed by the Oneidas (JA286-304). The Brothertown claim that their interest arises from a 1774 treaty in which the Oneida Indian Nation granted them a tract of land 12 miles by 13 miles in size, an interest that the Brothertown allege was acknowledged in the Treaty of Canandaigua (JA305-337). The Brothertown similarly claim that the State wrongfully acquired their lands in violation of federal common law and the Nonintercourse Act in a series of transactions that occurred between 1791 and 1827 (JA319-323, 330-332).

5. Prior Motions

The State and Counties answered, asserting various affirmative defenses, cross-claims, and counterclaims (JA257-285, 338-355,

Docket Nos. 195-201). In 2002, the district court addressed the defendants' motions to dismiss the complaints on various grounds, as well as motions by plaintiffs and intervenors to strike certain defenses and dismiss counterclaims (JA356-426). Oneida Indian Nation of New York v. New York, 194 F. Supp. 2d 104 (N.D.N.Y. 2002). In particular, the district court granted plaintiffs' motion to strike the defense of laches (JA380-382). With regard to the State's assertion of Eleventh Amendment immunity, the court recognized that the State should retain its immunity to the extent the Oneidas' claims varied from the claims of the United States, but held it too early in the proceedings to determine whether there was a "conflict" between the plaintiffs' claims and those of the United States (JA391-392).

6. The United States Amends its Complaint for a Second Time.

In 2002, the district court granted the United States permission to file a second amended intervenor's complaint (JA427-431). In this most recent complaint, the United States clarified that it represents the interests of the original Oneida Indian Nation under the Treaty of Canandaigua, and not the rights of the tribal groups specifically. The United States continued its "Federal Common Law Trespass Claim" and "Trade and Intercourse Claim" against the State of New York, but dropped all claims against the Counties (JA434-435). The United States clarified its prayer for relief, asking for "a declaratory judgment . . . that

the Oneida Nation has the right to occupy the lands . . . currently occupied by the State;" for monetary and possessory relief, including ejectment where appropriate, against the State; and for mesne profits, i.e., the "fair rental value of the entire claim area from the time when the State attempted to acquire each separate parcel of the Subject lands . . . until the present," or other "appropriate monetary relief for all lands within the claim area," on the ground that the State "was the initial trespasser of the claim area and all injury to the Oneida Nation flowed from the State's tortious actions, including subsequent trespasses by private landowners" (JA446-447).[9]

The State of New York then filed amended answers to all amended pleadings, denying any and all allegations that the State acquired the former reservation lands in violation of federal law (JA539-564 [Amended Answer to Oneidas' Amended Complaint]; JA507-537 [Answer to United States' Second Amended Complaint in Intervention]; JA482-505 [Amended Answer to Brothertown Complaint]). In each, the State preserved the defenses of laches and the Eleventh Amendment (JA492, 497, 511, 548, 553).

[9] On March 23, 2003, the district court granted the Oneidas motion to strike two other defenses raised by the State: election of remedies and lack of notice (JA566-572). And on August 20, 2003, the district court denied the defendants' motion to reconsider its prior order with respect to their statute of limitations and Eleventh Amendment defenses against the Brothertown (JA574-580).

7. The Instant Summary Judgment Motion

In 2006, after the Supreme Court decided Sherrill and this Court decided Cayuga, the State and Counties moved for summary judgment dismissing the Oneidas' claims, the United States intervenor's complaint in intervention, and the Brothertown intervenor's complaint, asserting that in light of Sherrill and Cayuga the defense of laches was available to defendants and that the federal doctrine of laches precluded all plaintiffs' claims (JA582-593). The plaintiffs and intervenors opposed the motion, arguing for the first time that their pleadings assert a non-possessory claim to compel the State to pay fair compensation for the Oneida's land based on its value when the State acquired it; and that further factual development was necessary to determine whether their remaining "possessory" claims were barred by laches.

The District Court's Decision

On May 31, 2007, the district court issued its Memorandum Decision and Order granting the defendants' motion for summary judgment with respect to plaintiffs' "possessory land claims," and denying it with respect to what the court viewed as a "fair compensation claim" (SPA2-33). The district court recognized that after Cayuga, all possessory claims, whether for ejectment or damages, are subject to the equitable defense of laches. The court examined the record here in light of the factors supporting the application of laches in Sherrill and Cayuga and found that the

possessory claims would indisputably cause such a degree of disruption that they should be barred by laches. See SPA14-15 ("[C]laims based on the Oneida' possessory rights are disruptive to Defendants' rights and might also call into question the rights of tens of thousands of private landowners and their legitimate reliance interests to continue in the undisturbed use and enjoyment of their property.")

The district court held, however, that plaintiffs adequately pled a non-possessory "contract claim that seeks to reform or revise a contract that is void for unconscionability," noting that this type of claim "is not disruptive" (SPA19). Scrutinizing the Oneidas' 25-page amended complaint, the court isolated three sentences that in the court's view amounted to a non-possessory contract-based "fair compensation" claim cognizable under federal common law. These included a sentence at the end of paragraph 31 (describing the 1795 transaction) alleging that the State sold the land for seven times the amount it paid the Oneidas; an allegation in paragraph 35 under the heading "THE AFTERMATH OF THE ILLEGAL TRANSACTIONS" that the State substantially benefitted from the transactions; and a request in the ad damnum clause that the State disgorge the benefits it received as a result of the illegal transactions, including the difference between the price it paid for the land and its value (SPA18).

In support of its conclusion that federal common law recognized an unfair compensation claim against the State, the district court relied on cases brought under a federal statute authorizing tribes to bring similar claims against the United States (SPA20-26). Specifically, the court cited cases brought under the Indian Claims Commission Act enacted in 1946, formerly codified at 25 U.S.C. §§ 70 et seq. (1976). See, e.g., Osage Nation of Indians v. United States, 97 F. Supp. 381 (Ct. Cl.), cert. denied, 342 U.S. 896 (1951); and Miami Tribe of Oklahoma v. United States, 281 F.2d 202 (Ct. Cl. 1960), cert. denied, 366 U.S. 924 (1961). That statute created the Indian Claims Commission and conferred upon it jurisdiction to hear a variety of claims for money damages brought by tribal groups against the federal government including:

> claims which would result if the treaties, contracts or agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether in law or fact, or any other ground cognizable by a court of equity.

ICCA § 2(3), 25 U.S.C. § 70a(3) (1976) (repealed). The district then remarked, without discussion, that "Plaintiffs and the United States' claim for fair compensation and to revise and reform the agreements with the State is consistent with federal law" (SPA26), although it had nowhere addressed the United States' pleadings.

Accordingly, the district court granted defendants' motion for summary judgment with respect to all possessory land claims; denied the defendants' motion with respect to plaintiffs' fair compensation claim "as explained above;" dismissed all claims against the Counties; dismissed other motions as moot; and certified the order for interlocutory appeal (SPA32-33). The court did not expressly address the defendants' motion to dismiss the claims of the intervenors United States and the Brothertown in its final decretal paragraphs.

On July 13, 2007, this Court granted the State's petition pursuant to 28 U.S.C. § 1292(b) for leave to appeal the district court's interlocutory order, as well as the cross petitions of the Oneidas and the United States for leave to appeal (JA807).

STANDARD OF REVIEW

This Court reviews the determination of a district court on a motion for summary judgment de novo. Rivkin v. Century 21 Teran Realty LLC, 494 F.3d 99, 103 (2d Cir. 2007). Summary judgment will be granted if the moving party shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also Fed. R. Civ. P. 56(c). Questions of law or mixed questions of fact and law are reviewed de novo. Beth Israel Medical Center v. Horizon Blue Cross and Blue Shield of New Jersey, Inc., 448 F.3d 573, 580 (2d Cir. 2006).

SUMMARY OF ARGUMENT

This Court should reverse that portion of the district court's order that permitted the Oneidas to proceed with a claim to recover "fair compensation." This Court's decision in Cayuga bars any such claim. As in Cayuga, plaintiffs' entire claim is possessory and inherently disruptive -- "plaintiffs have asserted a continuing right to immediate possession as the basis of all their claims," and also have "sought ejectment of the current landowners as their preferred form of relief." Cayuga, 413 F.3d at 274 (emphasis added). For three decades, the Oneidas have pursued this action to vindicate their possessory interest in over 250,000 acres of their former reservation lands, which they claim the State of New York wrongfully acquired from them by treaties and other transactions that are void ab initio. All the remedies they seek, including damages for the allegedly inadequate consideration, are firmly grounded in this claim of wrongful dispossession. Indeed, the Oneidas admit that the so-called "fair compensation" claim rests on their assertion that the land transactions with New York were invalid. The district court's attempt to sidestep the holdings of Sherrill and Cayuga by transforming this case into a non-possessory "contract claim that seeks to reform or revise a contract that is void for unconscionability" is baseless.

Even if Cayuga did not bar such a claim, there is no contract-based federal common law cause of action against New York State for

unfair consideration, and any such claim would itself be barred by laches in the circumstances of this case. Finally, even if such a cause of action existed, the United States has not asserted it and thus the Eleventh Amendment would bar the Oneidas from asserting it against the State of New York.

ARGUMENT
POINT I

THIS COURT'S DECISION IN CAYUGA REQUIRES DISMISSAL OF THE SO-CALLED "FAIR COMPENSATION" CLAIM BECAUSE IT IS GROUNDED IN THE ONEIDAS' POSSESSORY CLAIMS

The district court should have dismissed the Oneidas' complaint and those of the intervenors in their entirety. From the beginning, the Oneidas grounded this case in their claimed right of possession to lands that they allege the State illegally acquired in transactions that were not ratified by the federal government. From the Oneidas' initial complaint in 1974 (which was not even filed against the State of New York), to their abandonment in 1982 of efforts to recover fair compensation from the United States before the Indian Claims Commission, to their attempt in 2000 to add 20,000 private landowners to this case and seek their ejectment, to the current set of pleadings, the Oneidas have repeatedly insisted that these claims are brought to vindicate their possessory rights. Although the Oneidas seek various forms of relief, including damages for the State's alleged ill-gotten gains, all the relief they seek derives from their claimed right of

possession. The Oneidas' claims are indistinguishable from those in Cayuga: a ruling granting them any relief would necessarily involve a finding that the transactions violated federal law and thus would disrupt 200 years of non-Indian ownership and development.

The Supreme Court has already reviewed this historical record and found that the Oneidas' sovereignty claim is barred by laches. In City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005), the Supreme Court held that the New York Oneidas, and other tribal plaintiffs, having been out of possession of former reservation lands since the early 1800s, were barred by equitable principles from reestablishing sovereignty over parcels of land within the boundaries of former reservation lands simply by purchasing the land on the open market. A number of factors weighed heavily in the Court's decision: the "distance from 1805 to the present day," the Oneida's "long delay" in seeking equitable relief against the local and State governments, 544 U.S. at 221, the fact that "[g]enerations have passed during which non-Indians have owned and developed the land that once composed the Tribes' historic reservation," the fact that for more than the past century and one half the Oneidas have lived elsewhere, id. at 202, "the impracticability of returning to Indian control land that generations earlier passed into numerous private hands," id. at 219, and the fact that "the properties . . . involved have greatly

increased in value since the Oneidas sold them 200 years ago," id. at 215. Thus the Court concluded that the relief sought by the Oneidas would be so "disruptive" that it was barred by the federal equitable doctrines of laches, impossibility and acquiescence. Id. at 221. These same factors preclude all the relief the Oneidas seek here.

Following Sherrill, this Court held that the equitable principle of laches barred all possessory claims brought by the Cayugas and the United States to redress allegedly unlawful transfers of the Cayugas' former reservation lands, whether the relief sought was ejectment or damages. See Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266 (2d Cir. 2005), cert. denied, 126 S.Ct. 2021, 2022 (2006). The facts in Cayuga closely parallel the facts here. Plaintiffs in Cayuga alleged that, in two transactions in 1795 and 1807, the State of New York illegally acquired their right to possess a 64,000-acre tract that the State had set aside for the Cayugas' use in a 1789 treaty and that the United States had acknowledged in the Treaty of Canandaigua. Plaintiffs alleged that the transactions violated the Nonintercourse Act and the Treaty of Canandaigua. As here, the Cayugas maintained that the treaties ceding this land to the State were void from the beginning and therefore never extinguished the Cayugas' possessory interest in the lands. The Cayugas asked the Court to declare that the Cayugas have legal and equitable title

and the right to possession of such lands, to restore plaintiffs to immediate possession, and to eject any landowner claiming title derived from the illegal treaties. The Cayugas also sought an accounting of all tax funds paid by the possessors of the lands; trespass damages in the amount to the fair rental value of the lands since they were unlawfully dispossessed of the lands; all future proceeds from the removal or extraction of natural resources; and costs and attorneys' fees, and such other relief as the court may deem proper. 413 F.3d at 269.

The district court concluded that the State entered into the treaties without the presence of federal commissioners and without ratification pursuant to the Constitution in violation of the Nonintercourse Act, and rejected all defenses raised by the State. 413 F.3d at 270. The district court also determined, nineteen years after the filing of a complaint seeking immediate possession, that ejectment was not the proper remedy and that monetary damages would afford satisfactory alternative relief. Id. at 271. Following lengthy trials on damages and prejudgment interest, the jury awarded $35 million in current fair market value damages and about $1.9 million in fair rental damages (after crediting the State's payments to the Cayugas). The district court added prejudgment interest of $211,000,326.80 and entered a judgment of $247,911,999.42 in the Cayugas' favor. Id. In particular, in its decision to award prejudgment interest, the district court found

that the State exhibited bad faith and profited substantially when it resold the Cayuga lands. See Cayuga Indian Nation of New York v. Pataki, 165 F. Supp. 2d 266, 346-51 (N.D.N.Y. 2001).

This Court reversed the damages judgment and dismissed the complaint. The Court held that the Cayugas' claims all rested on the assertion of a continuing right to possession and were inherently disruptive because they called into question title to a wide swath of land long settled by non-Indians. 413 F.3d at 274, 275. The Court further held that the disruptive nature of the claim was unaffected by the fact that the district court eventually awarded only monetary damages. "[T]his 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. at 275; see also id. ("[A]ny remedy flowing from this possessory land claim, which would call into question title to over 60,000 acres of land in upstate New York," would be subject to laches) (footnotes and internal quotations omitted).

Cayuga requires dismissal of the complaints in their entirety. The Oneidas' complaint asserts only claims based on the alleged violation of their right to possession, and they have repeatedly so characterized their claim. There is no difference between the possessory claim asserted in Cayuga and the possessory claim asserted here. The Oneidas' allegations of unfair compensation do

not state a separate, non-possessory claim, but are at most an additional measure of damages for violation of their claimed possessory right or, as in Cayuga, evidence of the State's alleged bad faith. Because any unfair compensation allegations require a finding that the Oneida treaties violated federal law, they "call into question title to over" 250,000 acres of land in upstate New York, and are "disruptive" claims precluded by Cayuga.

A. As in Cayuga, the Plaintiffs and Intervenors in This Case Assert Possessory Claims, and Possessory Claims Only.

The Oneidas' amended complaint asserts only possessory claims. Any relief they seek is rooted in their claimed right to possession of the lands. The complaints of the intervenors United States and the Brothertown likewise assert only possessory claims. Under Cayuga, the Oneidas' complaint and those of the intervenors should have been dismissed in their entirety.

1. The Oneidas' amended complaint asserts only possessory claims.

Like the Cayugas, the Oneidas assert possessory land claims, and seek, in addition to declaratory and injunctive relief, damages to remedy the alleged violation of their possessory rights.[10] The

[10] It is equally clear that, like the Cayugas, the Oneidas' preferred remedy has always been recovery of possession of land. The complaint asks for "declaratory judgment and injunctive relief as necessary to restore Plaintiff Tribes to possession of those portions of the subject lands to which defendants claim title" (JA228-229), and leaves no doubt that but for the district court's denial of their request for leave to amend to add claims

very first paragraph of the Oneidas' amended complaint unambiguously describes the possessory nature of their claims (JA205-206):

> [Plaintiffs] bring this action to vindicate tribal rights in approximately 250,000 acres of land . . . that the [Oneidas] occupied since time immemorial, that were guaranteed in 1794 to the Oneida Indian Nation by the United States in the Treaty of Canandaigua, and that thereafter were wrongfully acquired or transferred from the Oneida Indian Nation by the State of New York in violation of the Indian Trade and Intercourse Act . . ., the Treaty of Canandaigua and Federal common law.

All of the relief the Oneidas seek is "in vindication" of their "possessory rights," as they make perfectly clear two paragraphs later (JA206-207 (emphasis added)):

> Under the 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," [quoting Oneida II at 236], and seek, in vindication of those rights, damages for unlawful possession of the subject lands from the time each portion of the subject lands was

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against private landowners, the Oneidas would seek to recover possession of the lands from other landowners as well. See JA206 ("This amended complaint is filed in accordance with this Court's decision and is not a waiver of any rights or claims . . . [plaintiffs] bring [t]his amended complaint against New York State and Madison and Oneida Counties only, but seek damages and other relief for dispossession of all the subjection lands." As Judge McCurn noted in his decision on the motion to amend, "although the words "ejectment" or "eviction" do not appear anywhere in the Oneidas' amended complaint, plainly that is the end result which they hope to obtain through a declaratory judgment." Oneida Indian Nation v. County of Oneida, 199 F.R.D. 61, 68 (N.D.N.Y. 2000).

> wrongfully acquired or transferred from the Oneida Indian Nation to the present time; disgorgement of the amounts by which defendants have been unjustly enriched by reason of the illegal taking of subject lands; an accounting; and a declaration that New York State acquired and/or transferred the subject lands from the Oneida Indian Nation in violation of the [federal laws] and that the purported agreements and letters patent by which the subject lands were acquired or transferred . . . were void ab initio.

After alleging a "series of illegal transactions," the Oneidas' amended complaint asserts three causes of action, or "counts," against the State of New York, denominated "Federal Common Law Claim Against New York State as Initial Tortfeasor and for Subsequent Third Party Trespasses," "Nonintercourse Act Claim Against New York State as Initial Tortfeasor and for Subsequent Third Party Trespasses," and "Canandaigua Treaty Claim Against New York State as Initial Tortfeasor and for Subsequent Third Party Trespasses" (JA221-225). Each of these counts, and each of the other three counts "against all defendants," rests on an allegation that the transactions in which the Indian Nations "purportedly" ceded their lands to the State violated federal law and were "illegal" and "void ab initio" (JA221-228); thus all subsequent persons owning and occupying the lands are trespassers on the Oneidas' current possessory rights to the lands.

The two sentences the district court extracted from the Oneidas' 25-page complaint alleging that the State paid the Oneidas

less than what their lands were worth do not plead a contract-based claim for inadequate consideration that is independent of the Oneidas' possessory claims. Instead, those sentences merely provide a basis for the Oneidas' request for damages as a partial remedy for their possessory claims. The first sentence referenced by the district court alleges that the State paid 50 cents per acre and resold the lands to white settlers for seven times that amount. But placed in context, that sentence appears at the end of paragraph 31 which describes the irregularities in the 1795 agreement by which the State "purported to purchase" 100,000 acres (JA216-217). The second sentence isolated by the district court alleges that the State made substantial profits on its "purported sales" of the subject lands. That sentence appears in paragraph 35 in the section of the amended complaint labeled "THE AFTERMATH OF THE ILLEGAL TRANSACTIONS" (JA220).

Thus, when the amended complaint in its ad damnum clause seeks "disgorgement of the value of the benefits" obtained by the State, measured as the difference between the price at which the State acquired the parcels and their value (JA230), the Oneidas are seeking a remedy for the State's illegal purchase and possession of the lands by instruments that they claim are void in their inception. Nowhere in the Oneidas' amended complaint is there an alternative and independent contract-based claim for unconscionable consideration.

2. The United States' second amended complaint likewise asserts only possessory claims on behalf of the Oneidas.

The district court, in the decretal paragraphs of its Memorandum Decision and Order, did not expressly address defendants' motion for summary judgment dismissing the United States' claim. While the court referred to plaintiffs' "and the United States' claim for fair compensation" (JA734), it did not scrutinize the United States' complaint to support its reference. Had the district court done so, it would have been required to conclude that the United States asserted a claim only in support of the Oneidas' alleged possessory interests. Accordingly, the United States' complaint should have been dismissed in its entirety.

The United States' second amended complaint unmistakably describes the claims that it brings on behalf of the Oneidas against the State as possessory (JA434):

> This case arises from 26 transactions between the Oneida Nation and the State of New York, and certain other transactions between the State and third parties, by which the State purported to acquire and/or transfer the Subject lands without complying with the Trade and Intercourse Act, which is now codified at 25 U.S.C. § 177. 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.
>
> The United States seeks monetary and other relief from the State of New York for its

> denial of the Oneida Nation's enjoyment of its rights to the Subject Lands under federal law and for trespasses to the Subject lands that originated with the State's illegal transactions.

The United States' first claim, entitled "Federal Common Law Trespass Claim," alleges that "New York interfered with the Oneida Nation's enjoyment of its rights to Subject Lands under federal law and caused trespasses to the Subject lands that originated with the State's illegal transactions" (JA445). In its second claim, entitled "Trade and Intercourse Claim," the United States alleges that "New York State asserted control and assumed possession of the Subject Lands in violation of the Nonintercourse Act . . . and continues to assert control over some of the Subject Lands. . . . By purporting to sell or otherwise grant the Subject Lands to third parties, New York State intended to, and did, authorize and cause Third Party Trespasses" in violation of the federal statute (JA446).

In its prayer for relief, the United States asks for "a declaratory judgment . . . that the Oneida Nation has the right to occupy the lands . . . currently occupied by the State;" for monetary and possessory relief, including ejectment where appropriate, against the State; and for "mesne profits" or "fair rental value of the entire claim area from the time when the State attempted to acquire each separate parcel of the Subject lands . . . until the present," or other "appropriate monetary relief for

all lands within the claim area," on the ground that the State "was the initial trespasser of the claim area and all injury to the Oneida Nation flowed from the State's tortious actions, including subsequent trespasses by private landowners" (JA446-447).

Nothing in United States' pleadings even hints at a claim against the State for redress under contract law for unconscionable consideration paid to the Oneidas. Thus, contrary to the statement in the district court's decision, the United States has not asserted a fair compensation claim. Under this Court's decision in Cayuga, the United States' complaint also should have been dismissed in its entirety.

3. The Brothertown have likewise asserted only possessory land claims.

Although the court dismissed all possessory land claims, it did not specifically refer to the Brothertown's claims. The district court should have expressly granted defendants' motion for summary judgment dismissing the Brothertown's complaint in intervention. Even a cursory examination of that complaint discloses that the Brothertown asserted only that they have a current possessory interest in land they allege the Oneida Nation conveyed to their ancestors in 1774. All the relief the Brothertown seek is rooted in that claim. Thus their claim is likewise barred under Cayuga by laches.

The Brothertown describe the "nature" of their action as follows (JA306-307):

> Plaintiff-in-Intervention, under Federal common law, the Nonintercourse Act, and the Treaty of Canandaigua, seeks repossession of the 99,840 acres of land it inherited and is entitled to possess, damages for defendants' unlawful possession, an accounting and disgorgement of the full amount of money by which defendants have been unjustly enriched as a result of their intentional and illegal taking of the 99,840 acres . . . .

Their complaint in intervention repeatedly asserts that the Brothertown have a right of possession and that defendants are in wrongful possession of these lands (e.g., JA310, 311, 312, 321, 323, 324, 330-332). The relief they request is tied to their claimed right of possession of their ancestral lands, including "repossession of its land, together with damages, or if repossession or its land is not possible, compensation in the form of substitute lands" together with damages measured by the fair rental value of the lands, compensation for extraction or diminution of resources on said lands, and "disgorgement of profits and any other benefits [defendants] received from the illegal acquisition . . . or other wrongful possession of the subject land, with interest" (JA332-333).

In short, there is simply no view of the Brothertown's complaint that would support a finding that they are asserting a contract-based claim for fair compensation that is independent of their claimed right to possession. To the extent that the district

court did not, this Court should dismiss the Brothertown's complaint in its entirety.

B. For Over Thirty Years, Plaintiffs Have Repeatedly Characterized Their Claim as One to Vindicate Their Possessory Interest in Their Ancestral Lands.

From the outset of this case, the Oneidas have insisted that this case is about their current right to possession of their ancestral lands and their quest to vindicate their wrongful dispossession of them. Indeed, for 26 years after it was filed in 1974, the complaint was only against the Counties, asserting that they illegally occupied portions of the Oneidas' reservation lands wrongfully acquired by the State in violation of federal law, without recompense to the Oneidas (JA80-86). The complaint did not seek and could not have sought damages due based on a quasi-contractual claim for inadequate consideration because the State, which purchased the lands from the Oneidas, was not then a party to the lawsuit.

Moreover, in 1982, the Oneidas expressly abandoned their claim before the Indian Claims Commission seeking fair compensation from the United States for violating its fiduciary duty under the Nonintercouse Act to ensure that the Indians received fair and adequate compensation in the same 26 transactions they claim were void ab initio in this case. The Oneidas made a deliberate choice to abandon this claim based on their view "that their interests

would not be served by obtaining any monetary compensation which might result from the conclusion of this litigation," and that they instead "prefer[red] to press litigation in other tribunals seeking a determination that they have present title to the land in New York state which is involved in these cases." Oneida Indian Nation of New York v. United States, 231 Ct. Cl. 990, 991, 691 F.2d 1070 (1982) (per curiam).

Even when the Oneidas in December of 1998 sought to amend their complaint to add the State and a class of 20,000 landowners, the Oneidas sought to assert their right to possession of the 250,000 acres of land at issue in this case. With respect to that motion, the Oneida Indian Nation of New York and the Oneidas of the Thames represented, "The simple and stark fact of this case is this case has always been a suit for the enforcement of present and continuing possessory rights" (E4867 [Docket No. 606, Exh. NN at 2]). As the district court put it (JA191), the Tribal plaintiffs both stressed in their papers and reprised at oral argument on the motion that "because they 'hold a federal common law right to current possession of the subject lands,' their claim is 'for possession of the land, not . . . for historically adjusted damages'" (E4897 [Docket No. 606, Exh. OO at 7]).

Moreover, in response to the defendants' arguments, the Oneidas disavowed that this case is in the mold of cases in which Indian tribes asserted fair compensation claims, such as Yankton

Sioux Tribe v. United States, 272 U.S. 351 (1926), and United States v. Minnesota, 270 U.S. 181 (1926) (E4767-4768 [Docket No. 606, Exh. MM at 12-13]):

> [I]t is a fundamental aspect of this case that the eastern land claims, in general, and the Oneida claim, in particular, are not the sort of claims . . . in the Yankton Sioux case which basically holds that the federal government, when it takes lands, must compensate the tribes . . . .

And although the district court rebuffed the Oneidas' attempt to assert possessory claims against private landowners, the subsequent amended complaint made it unmistakably clear that they were asserting "possessory rights" based on federal common law, and were seeking "in vindication of those rights, damages for unlawful possession of the subject lands from the time each portion was wrongfully acquired;" "disgorgement of the amounts by which the defendants have been unjustly enriched by reason of the illegal taking;" an accounting; and a declaration that the State acquired the lands in violation of federal law by treaties, agreements or letters patent that "were void ab initio" (JA206-207).

It was not until more than 30 years after this action was initiated, after the defendants moved for summary judgment on the basis of Sherrill and Cayuga, that the plaintiffs attempted to divorce themselves from the possessory claims that they had asserted for three decades. As in Cayuga, this Court should reject the Oneidas' belated attempt to minimize the disruptiveness of

their possessory claims by recasting them as "fair compensation" claims.

C. The "Fair Compensation Claim" Proferred by the Oneidas in Opposition to the Motion for Summary Judgment Is Premised on Invalid Conveyances and Thus Is Inherently Disruptive.

The fair compensation claim that the Oneidas conjured up in opposition to defendants' motion for summary judgment is unquestionably possessory, in the sense that it is brought to enforce or vindicate a possessory right, and is inherently disruptive. As described in their opposition papers that novel claim, like the claims in Cayuga and the other Oneida claims that the district court dismissed, is rooted in federal restrictions on alienation that were codified in the Nonintercourse Act. "The Nonintercourse Act and federal common law restrict the sale of tribal lands, and the Oneidas' claims are solidly grounded on both." Oneida Plaintiffs' Opposition To Defendants' Motion for Summary Judgment, dated December 14, 2006 (Docket No. 599), at 6. Those restrictions on alienation allegedly invalidate transactions effected without federal consent. The point is set forth in the clearest possible terms in the Supreme Court's decision in Oneida II: "The pertinent provision of the 1793 [NIA], . . . merely codified the principle that a sovereign act was required to extinguish aboriginal title and that a conveyance without the

sovereign's consent was void ab initio." 470 U.S. at 245. See also Oneida Indian Nation of New York v. County of Oneida, 719 F.2d 525, 529 (2d Cir. 1983) ("This statute, inter alia, voided all land transactions in which Indians were a party that were consummated without federal approval").

Thus, a claim "grounded" on federal restrictions on alienation necessarily rests on the premises that the challenged conveyances are void and that the tribe's possessory interest in the land was never validly extinguished. The Oneidas' description of their purported fair compensation claim recognizes this reality. As described by the Oneidas, under a fair compensation claim the damages are awarded in substitution for restoration of the land invalidly transferred. See Oneida Plaintiffs Opposition to Defendant's Motion for Summary Judgment, Docket No. 599 at 6 ("[W]hen a defendant has obtained a plaintiff's land in violation of law but the passage of time and changed circumstances bar its restoration, equity assures the plaintiff at least that he will have fair compensation for his lands . . ."). See also id. at 7 ("Equity's bar to restoration of the land and equity's provision for fair compensation are two parts of the very same rule").

In Cayuga, this Court rejected the argument that laches did not bar relief where the district court refused to restore plaintiffs to possession and instead limited relief to damages. See 413 F.3d at 277-78; see also United States v. Mottaz, 476 U.S.

834, 842 (1986) (Supreme Court recognized that although plaintiff dropped her claim for rescission of improper sales by the United States of her interest in Indian allotments, her demand for damages equal to their current fair market value amounted to "a declaration that she alone possesses valid title to her interests in the allotments and that the title asserted by the United States is defective"). This Court ruled that the limitation of relief to damages against the State did not affect the possessory, disruptive nature of the claim, or the claim's vulnerability to laches. "The fact that . . . the District Court substituted a monetary remedy for plaintiffs' preferred remedy of ejectment cannot salvage the claim, which was subject to dismissal ab initio." Cayuga, 413 F.3d at 277-78. See also id. at 275 (noting that a claim that calls into question title to thousands of acres of long settled land is inherently disruptive – the "disruptiveness is inherent in the claim itself. . . ").

There is no principled difference between an award of damages measured by the current value of land in dispute awarded in substitution of a right of possession, which was among the damages the district court awarded in Cayuga, and the recovery the Oneidas suggest as "fair compensation damages" – damages measured by the historic value of the land given in substitution for the same right of possession. A damages award based on the value of the land at the time of the challenged transactions is just as "possessory" as

an award of damages based on current market value. This is because, in both cases, the determination that is the basis for liability – the invalidity of the challenged transaction – calls into question current title, and is thus inherently disruptive under Cayuga. Consequently, the fair compensation claim newly articulated by the Oneidas is foursquare within the rule of Cayuga.

Indeed, the district court recognized that as framed by the Oneidas the fair compensation claim could not survive Cayuga. Thus the court disclaimed reliance on the Nonintercourse Act in light of the fact that the implied right of action under that act recognized by this Court in the test case "closely corresponds to the common law action for ejectment in which a plaintiff need only establish his right to possession," observing such a claim "would likely" be subject to a laches defense under Cayuga (JA725 n.4 (internal quotations and citations omitted)). And, elsewhere, the district court remarked that this Court's "reasoning suggests that any award of damages that is predicated on possession of the land in question, however remotely, is too disruptive and must be barred by laches. Plaintiffs' and the United States' reliance on the Court's equitable powers to compensate them for the loss of the land necessarily implicates the Oneidas' historical claim to the land in question" (JA735 n.8). Because the Oneidas' so-called "fair compensation" claim is inseparable from their possessory claim, the district court erred when it held that Cayuga did not

bar them.

POINT II

IN ANY EVENT THERE IS NO CONTRACT-BASED CAUSE OF ACTION FOR DAMAGES COGNIZABLE UNDER FEDERAL LAW

Even if Cayuga did not bar a claim for unfair compensation damages here and even if the Oneidas and the United States had separately pleaded such a claim, which they did not, the claim would have to be dismissed because there is no such federal common law cause of action against the State. The only federal common law cause of action recognized in this area is the possessory claim.

In Oneida II, the Supreme Court recognized that the Indian nations and tribes have long had "a federal common-law right to sue to enforce their aboriginal land rights." 470 U.S. 226, 235. The Court pointed to a number of cases where tribal groups had been permitted to invalidate purchases made without the sovereign's consent; for an accounting of all rents and profits against trespassers; and to bring other actions to sue for trespasses. Id. at 235-36. In these cases, the Court observed that, absent federal statutory guidance, the "governing rule of decision would be fashioned in the mode of the common law." Id. at 236. Thus, the Court held, "[i]n keeping with these well-established principles, we hold that the Oneidas can maintain this action for violation of their possessory rights based on federal common law." Id.[11]

[11] In recognizing an implied right of action under the Nonintercourse Act, this Court also analogized such a claim to a possessory action for ejectment: "[T]he Oneidas are entitled to

The Supreme Court in Oneida II did not ground the Oneidas' right of action in the Nonintercourse Act. It held, however, that the Oneidas' right of action under federal common law was not pre-empted by the passage of the Nonintercourse Acts. Id. at 236-40. In reaching its conclusion, the Court observed that the Act contains no remedial provisions, id. at 238-39, but merely "put in statutory form what was or came to be the accepted rule -- that the extinguishment of Indian title required the consent of the United States." Id. at 240 (quoting Oneida I at 678).

Nowhere in Oneida II did the Supreme Court recognize that Indians have a cognizable federal common law claim for contract reformation for inadequate compensation in transactions involving the States or other parties. Accordingly, here, to find such a common law cause of action, the district court turned to cases brought by tribal groups against the federal government for redress of claims of unconscionable consideration in their dealings with the United States. But these cases are inapposite, as they could be brought only because Congress bestowed special jurisdiction over such claims against the United States. See Oneida II at 236 n.5.

The cases upon which the district court relied were brought under the Indian Claims Commission Act ("ICCA"). Act of Aug. 13,

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enforce the Nonintercourse Act's voiding of the 1795 purchase . . . . Their suit closely corresponds to the common law action for ejectment in which plaintiff need only establish his right to possession . . . ." Oneida Indian Nation v. County of Oneida, 719 F.2d 525, 540 (2d Cir. 1983).

1946, ch. 959, 60 Stat. 1049 (formerly codified as amended at 25 U.S.C. § 70 et seq. (1976)). That statute authorized the Indian Claims Commission to hear a variety of claims for money damages brought by tribal groups against the federal government. Specifically, the ICCA authorized the Commission to hear

> claims which would result if the treaties, contracts or agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether in law or fact, or any other ground cognizable by a court of equity.

ICCA § 2(3), 25 U.S.C. former § 70a(3) (1976) (repealed when the Indian Claims Commission was terminated in 1978). In addition, the United States waived the defense of laches. See id. Thus there was specific statutory authority for the tribal groups to bring contract claims for unconscionable consideration against the United States without regard to any time bar. Absent such statutory jurisdiction, whether conferred under the ICCA or other special legislation, the Indians would have had no right of action against the United States. See Klamath and Moadoc Tribes v. United States, 296 U.S. 244, 249-52 (1935); Navajo Tribe of Indians v. State of New Mexico, 809 F.2d 1455, 1460-61 (10th Cir. 1987). Thus, the case law developed under the ICCA or other special legislation provided no basis for the district court to recognize a federal common law right of action to reform unconscionable contracts between tribal groups and the States or other entities, or to

provide fair compensation to redress any such contract-based claim.

Nor does a federal common law cause of action for contract reformation or unfair compensation arise because the contract relates to subject matter that is governed by a federal statute enacted under the Indian Commerce Clause. This Court has rejected the proposition that the fact that there are federal statutory requirements requiring federal approval of certain transactions between Indians and non-Indians means that any disputes about those contracts are to be governed by federal common law. United States ex. rel. St. Regis Mohawk Tribe v. President R.C.- St. Regis Management Co., 451 F.3d 44, 51, n.6 (2d Cir. 2006) (no federal common law governs contracts entered into under the Indian Gaming Regulatory Act); see also Gila River Indian Community v. Henningson, Durham & Richardson, 626 F.2d 708, 714-15 (9th Cir. 1980), cert. denied, 451 U.S. 911 (1981); Peabody Coal Co. v. Navajo Nation, 373 F.3d 945, 951 (9th Cir. 2004), cert. denied, 543 U.S. 1054 (2005); cf. Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 999 F.2d 503, 507 (11th Cir. 1993) (no jurisdiction under 28 U.S.C. § 1331 to hear breach of contract claim).

Thus, in Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians, 94 F.3d 747, 753 (2d Cir. 1996), this Court rejected the notion that federal common law governs contracts that must be approved under the Nonintercourse Act. Although plaintiff

there alleged that correspondence from the tribe called into question the validity of a franchise agreement subject to approval under the Nonintercourse Act, the Court found that there was no "substantial" disagreement over the validity of the franchise agreement under the Act. Id. at 752. This Court affirmed the dismissal of the case for lack of subject matter jurisdiction. The Court noted that allegations that one of the parties was acting in violation of the agreement sounded "in contract," a claim which does not provide a basis for federal jurisdiction. Id. at 753.

Here, the district court specifically stated that it was not treating the Oneidas' claim as one brought under the Nonintercourse Act (SPA17 n.4) or relying on the court's power to compensate the Oneidas for their "loss of land" (SPA27 n.8). Under Niagara Mohawk, there is no federal common law contract claim in these circumstances.

Finally, even if federal law recognized a common law contract-based fair compensation cause of action against the State, any such claim here would be barred by laches. After more than 150 years, it is manifestly unfair to require the State to defend the equities of the compensation paid to the historic Oneida Nation, including both monetary and in kind consideration. This is especially true where, as here, normal principles of contract law are of doubtful application because the "contracts" at issue were treaties of cession between tribal plaintiffs and a sovereign State.

POINT III

ANY CONTRACT-BASED CLAIM FOR COMPENSATION WOULD BE BARRED BY THE ELEVENTH AMENDMENT

Even if the Oneidas had raised a non-possessory contract-based cause of action governed by federal common law, which is not barred by Cayuga or laches, the Eleventh Amendment would preclude the assertion of that claim against the State. The Eleventh Amendment bars suits by Indian tribes against States without their consent. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991). Congress has not abrogated the States' sovereign immunity under the Nonintercourse Acts, nor could it have since it was enacted under the Indian Commerce Clause. Despite the intervention of the United States, the State retains the right under the Eleventh Amendment not to be subject to claims raised by the tribal plaintiffs that diverge from those raised by the United States. Here, the United States' second amended complaint is unambiguously limited to possessory land claims. See supra, pp. 37-39. Accordingly, the State's Eleventh Amendment immunity remains intact for any other claim.

In Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55 (1996), the Supreme Court stated that Congressional abrogation of the State's sovereign immunity requires that Congress both unequivocally express its intent to abrogate the immunity and act pursuant to a valid exercise of power. The Court held that

Congress has no such authority under the Indian Commerce Clause or any other Article I power. 517 U.S. at 72-73. There is no unequivocal language in the Nonintercourse Act expressing Congressional intent to abrogate the States' sovereign immunity. Ysleta Del Sur Pueblo v. Loney, 199 F.3d 281, 287-88 (5th Cir.), cert. denied, 529 U.S. 1131 (2000). And even if there were, the Nonintercourse Act was enacted under Congress's Article I powers, so it could not have abrogated the State's sovereign immunity. Id. at 208; see New York v. Shinnecock Indian Nation, 400 F. Supp. 2d 486, 495 n. 5 (E.D.N.Y. 2005); Seneca Indian Nation of New York v. New York, 206 F. Supp. 2d 448, 482-83 n.19 (W.D.N.Y. 2002), aff'd on other grounds, 382 F.3d 245 (2d Cir. 2004), cert. denied, 126 S.Ct. 2351 (2006).

To be sure, the United States is not barred by the Eleventh Amendment from bringing suits against the States. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 71 n.14; Arizona v. California, 460 U.S. 605, 614 (1983); United States v. Missippi, 380 U.S. 128, 140 (1965). Where, as here, the United States has intervened, the Eleventh Amendment does not bar tribal plaintiffs also from bringing claims against the State, but those claims must be identical to those brought by the United States. See Arizona v. California, 460 U.S. at 614 (granting tribes leave to intervene in suit commenced by United States against the States does not violate the Eleventh Amendment where "[t]he Tribes do not seek to bring new

claims or issues against the states").

Thus in a similar case brought by the Senecas to vindicate their possessory rights to lands they claimed were acquired in violation of the Nonintercourse Act and federal treaties, this Court held that "the State of New York retains its Eleventh Amendment immunity to the extent that the Seneca Nation of Indians or the Tonawanda Band of the Seneca Nation of Indians raise claims or issues that are not identical to those made by the United States." Seneca Nation of Indians v. New York, 178 F.3d 95, 96 (2d Cir. 1999) (per curiam), aff'g, 26 F. Supp. 2d 555 (W.D.N.Y. 1998), cert. denied, 528 U.S. 1073 (2000). Accord Canadian St. Regis Band of Mohawk Indians v. New York, 278 F. Supp. 2d 313, 335 (N.D.N.Y. 2003). In fact, the district court fully recognized this principle in its earlier decision in this very case (JA391-392). See Oneida Indian Nation of New York v. New York, 194 F. Supp. 2d 104 (N.D.N.Y. 2002) (recognizing that the State should retain its immunity to the extent the Oneidas' claims varied from the claims of the United States). Consequently, even if the Oneidas had asserted a cognizable contract-based claim, it would be barred by the State's Eleventh Amendment immunity, because the United States has not asserted such a claim.

CONCLUSION

The complaints should have been dismissed in their entirety.

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Respectfully submitted,

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