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

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellees-Cross-Appellants,

UNITED STATES OF AMERICA,

Intervenor-Plaintiff-Appellee-Cross-Appellant,

– v. –

COUNTY OF ONEIDA, COUNTY OF MADISON,

Defendants-Cross-Appellees,

STATE OF NEW YORK,

Defendant-Appellant-Cross-Appellee.

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

BRIEF FOR DEFENDANTS-CROSS-APPELLEES
County of Oneida, County of Madison

NIXON PEABODY LLP
Attorneys for Defendants-Cross-Appellees
1100 Clinton Square
Rochester, New York 14604
(585) 263-1000

TABLE OF CONTENTS

Table of Authorities iii

INTRODUCTION 1

JURISDICTIONAL STATEMENT 2

ISSUE PRESENTED ON CROSS-APPEAL 2

COUNTER-STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. *Cayuga* Compels Dismissal of the Oneidas' Possessory Land Claims 7

a. The Supreme Court's Articulation of a Laches-Based Equitable Bar in *Sherrill* 12

b. This Court's Application of the *Sherrill* Formulation in *Cayuga* 18

c. Judge Kahn's Application of the *Sherrill* Formulation as Articulated by *Cayuga* 24

II. As a Matter of Sound Policy and Judicial Economy, this Court should Affirm Judge Kahn's Award of Summary Judgment to the Defendant Counties. 28

a. Reversing the District Court's Decision Would Create Uncertainty in the Law and Expose New York State and other Eastern States (and their Local Units) to an Array of Highly Disruptive Possessory Land Claims 28

b. Reversing the District Court's Decision Would Lead to Protracted and Complex Litigation in this Case involving Expert Testimony and Historical Evidence pertaining to the Treaty of Fort Schuyler 32

1. The Disestablishment Counterclaims 33

2. The Motion to Reconsider the Affirmative Defense regarding the Treaty of Fort Schuyler 36

CONCLUSION 38

TABLE OF AUTHORITIES

FEDERAL CASES

Anderson v. Recore, 317 F.3d 194 (2d Cir. 2003)..... 7

Cayuga Indian Nation of New York v. Cuomo, 1999 U.S. Dist. LEXIS 10579 (N.D.N.Y. 1999) 19

Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2021, 2022, 164 L. Ed. 2d 780 (2006) .....passim

Cayuga Indian Nation of New York v. Pataki, 165 F. Supp. 2d 266 (N.D.N.Y. 2001) 20, 21

City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) .....passim

City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 1057 (2005) (denial of petition for rehearing)..... 16

County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226 (1985) 4, 5, 18

Galliher v. Cadwell, 145 U.S. 368 (1892)..... 26

Oneida Indian Nation of New York, v. State of New York, 500 F. Supp. 2d 128 (N.D.N.Y. 2007).....passim

Oneida Indian Nation of New York v. City of Sherrill, 337 F.3d 139 (2d Cir. 2003)..... 33

Oneida Indian Nation of New York. v. United States, 43 Ind. Cl. Comm. 373 (1978)..... 26

Seneca Nation of Indians v. New York, 382 F.3d 245 (2d Cir. 2004) 37

Shinnecock Indian Nation v. State of New York, 2006 U.S. Dist. LEXIS 87516 (E.D.N.Y. Nov. 28, 2006) 29, 30, 31

Yankton Sioux Tribe v. United States, 272 U.S. 351 (1926) 27

FEDERAL STATUTES

28 U.S.C. § 1292(b) 2, 31

MISCELLANEOUS

George C. Shattuck, The Oneida Land Claims: A Legal History 26 (Laurence M. Hauptman, ed., Syracuse University Press 1991). 5

Restatement (Second) of Torts Section 936 (1977) 19

INTRODUCTION

The cross-appeals of the Oneida Plaintiffs[1] and the United States arise from the May 21, 2007 Memorandum Decision and Order of the United States District Court for the Northern District of New York (Kahn, J.) (the "Decision") which granted Defendants' motion for summary judgment with respect to Plaintiffs' possessory land claims. The Decision is reproduced in the Special Appendix at SPA 1 and is reported as *Oneida Indian Nation of New York. v. State of New York*, 500 F. Supp. 2d 128 (N.D.N.Y. 2007).

The Decision was based on the District Court's application of the specific criteria adopted by this Court in *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2021, 2022, 164 L. Ed. 2d 780 (2006) ("*Cayuga*"). These criteria were originally articulated by the Supreme Court of the United States in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) ("*Sherrill*"). In *Cayuga*, this Court concluded that the same

---

[1] Oneida Indian Nation of New York, Oneida Tribe of Indians of Wisconsin, and Oneida of the Thames ("Oneida Plaintiffs," "tribal Plaintiffs," or "Oneidas."). The "Oneida Nation," in contrast, refers to the historic tribe that once inhabited central New York.

considerations that "doomed the Oneidas' claim in *Sherrill*" required the dismissal of the Cayugas' possessory land claims. In the Decision, the District Court determined that the undisputed factual record developed in this case, which is substantially identical to the factual record in *Cayuga* and in *Sherrill*, required it to grant Defendants' motion for summary judgment and dismiss Plaintiffs' possessory land claims. 500 F. Supp. 2d at 136-137. The District Court correctly applied the controlling authority of *Cayuga* and *Sherrill*, and the dismissal of Plaintiffs' possessory land claims should be affirmed.

JURISDICTIONAL STATEMENT

This Court has jurisdiction in the appeal and the cross-appeals pursuant to 28 U.S.C. §1292(b) and pursuant to the Order of this Court granting leave to appeal the issues raised in the petitions of the State of New York and of the Plaintiffs. A807.

ISSUE PRESENTED ON CROSS-APPEAL

1. Whether the District Court correctly granted summary judgment in favor of the Defendants, State of New York and Counties of Madison and Oneida, dismissing the Plaintiffs' possessory land claims based on *Cayuga* and *Sherrill*.

COUNTER-STATEMENT OF THE CASE

Defendants-Cross-Appellees the County of Madison and the County of Oneida (the "Counties") respectfully invite the Court's attention to the Statement of the Case in the Opening Brief of Defendant-Appellant-Cross-Appellee State of New York ("State Brief") for a description of the historical background and prior litigation. State Brief at 3 - 26.

In addition, and of particular importance to the Counties, the Counties invite the Court's attention to the facts found by the Supreme Court in *Sherrill* based on a record that is essentially identical to the factual and historical record in this case. The lands in question were once contained within the Oneidas' historic reservation but were last possessed by the Oneidas as a tribal entity in the late 18th and early 19th centuries.

> Generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation. And at least since the middle years of the 19th century, most of the Oneidas have resided elsewhere. Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and 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, in whole or in part, over the parcels at issue.

544 U.S. at 202-203.

The record shows that the Oneidas never sought judicial relief for land claims against the Counties until 1970, and then sought only damages for two years' rent on 872 acres owned and possessed by the Counties. 544 U.S. at 216 ("The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's."). There is no evidence in the record that the Oneidas ever sought any other form of relief against the Counties prior to that time.

It is worth pointing out that even the so-called "test case" in 1970, *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 229-233 (1985) ("*Oneida II*"), was intentionally kept small – with the Oneidas seeking only about $16,000 for two years' rent – to avoid provoking a strong defense. It also was limited to a single treaty (1795) to avoid implicating other historical land transactions and tens of thousands of current non-Indian titleholders with landholdings within the historic reservation. As counsel for the Oneidas explained in his book, *The Oneida Land Claims: A Legal History*, "[i]t seemed to me best

to select just one state treaty and a couple years' rent as an objective in order to keep a low profile." George C. Shattuck, The Oneida Land Claims: A Legal History 26 (Laurence M. Hauptman, ed., Syracuse University Press 1991).

By contrast, the present case involves the Oneidas' claim seeking possession of approximately 250,000 acres of land sold by the Oneidas in 26 transactions over a 50-year period (1795-1846). Here, the Oneidas seek a broad array of equitable and legal remedies based on a claim of current possessory rights. These claims carry enormous potential consequences for the people and governments within the State of New York. Accordingly, *Oneida II* is of no help in analyzing the disruptiveness of the Oneidas' current claims.

Quoting an earlier decision of the District Court (McCurn, J.), the Supreme Court noted that in the two centuries since the alleged wrongs, "development of every type imaginable has been ongoing." 544 U.S. at 210-211 (internal cite omitted). "The properties here involved have greatly increased in value since the Oneidas sold them 200 years ago." *Id*. at 215. "The wrongs of which OIN complains . . . occurred during the early years of the Republic. For the past two centuries, New

York and its county and municipal units have continuously governed the territory." *Id*. at 216.

Based on the historical record in *Sherrill*, the Supreme Court held that the Oneida Indian Nation of New York was precluded from gaining the relief it sought. This Court subsequently held, based on the same considerations, that the Cayugas were precluded from gaining the relief they sought in their land claim litigation. The same considerations apply to the Oneida Plaintiffs' land claims against the Counties in this case, and preclude Plaintiffs from gaining the disruptive remedies they seek here.

SUMMARY OF ARGUMENT

Cayuga is the controlling law in the Second Circuit, and *Cayuga* correctly applied the analysis and factors articulated by the Supreme Court of the United States in *Sherrill*. The District Court carefully and correctly followed *Cayuga* and *Sherrill* in the Decision and properly dismissed the Plaintiffs' possessory land claims against the Counties (and the State).

Affirmance of the District Court's Decision (adherence to *Cayuga*) makes for sound policy and judicial economy. Reinstating the dismissed

possessory land claims would create uncertainty in the law, encourage disruptive land claims throughout the Second Circuit (and beyond), and lead to protracted and complex litigation in this case, including evidentiary hearings with expert testimony concerning the impact of the Treaty of Fort Schuyler.

ARGUMENT

I. *Cayuga* Compels Dismissal of the Oneidas' Possessory Land Claims.

Realizing that *Cayuga* "dooms" their possessory land claims in this action, Plaintiffs begin and end their arguments on appeal with the contention that *Cayuga* was wrongly decided. Brief of Appellee-Cross-Appellant United States ("U.S. Brief") at 19 (Point I); Brief of Appellees-Cross-Appellants Oneida Indian Nation of New York, et al. ("Oneida Brief") at 64 (Point III). Of course, this panel is obligated to follow and apply *Cayuga* as the controlling law in the circuit. *See Anderson v. Recore*, 317 F.3d 194, 201 (2d Cir. 2003) ("We will follow a precedent from this circuit unless a Supreme Court decision or an en banc holding of this court implicitly or explicitly overrules the prior decision"). The District Court correctly determined that *Cayuga* was in fact the

controlling law in this circuit. *See*, Decision, 500 F. Supp. at 133 (noting that between *Cayuga* and *Sherrill*, "the controlling law has been effectively transformed").

The brief of the United States is particularly instructive in its frontal attack on *Cayuga*. The United States repeats point-by-point the arguments rejected by this Court in *Cayuga*, while it directs no criticism to the District Court's reading and application of *Cayuga* in this case. By necessary implication, the United States agrees that if *Cayuga* was correctly decided, there was no error below.[2]

---

[2] The Counties believe this Court's decision in *Cayuga* is sound in all respects, representing a faithful application of the laches-based equitable considerations articulated in *Sherrill*. The Oneidas' possessory land claims purport to assert a current right of possession with respect to approximately 250,000 acres in central New York – including at one time seeking ejectment of 20,000 innocent landowners and at all times calling current title into question for all affected landowners. These claims are equally or more disruptive than the tribal claims to sovereignty rejected in *Sherrill*. In any event, *Cayuga* is the law in this circuit and that decision specifically held 204-year-old land claims were barred based on the equitable factors articulated in *Sherrill*. In broadly attacking *Cayuga* and its reasoning, Plaintiffs oddly fail to acknowledge that the Supreme Court denied their respective petitions for certiorari in *Cayuga* on May 15, 2006, one year after *Sherrill* was decided. *Cayuga*, 126 S. Ct. 2021, 2022. Plaintiffs' briefs never once indicate "*cert den*." after citing *Cayuga*. If this Court had misread *Sherrill* to apply to possessory land claims, as Plaintiffs claim, that would have been an easy mistake for the Supreme Court to correct. Although the denial of certiorari is not a substantive determination, one reasonably would have expected the Supreme Court to grant "cert" if this Court had committed the profound error claimed by Plaintiffs.

The tribal Plaintiffs take a different approach, recognizing that a frontal attack on *Cayuga* cannot succeed under stare decisis principles. Instead the Oneidas attempt to create an argument that the District Court erred in its reading and application of *Cayuga*. The tribal Plaintiffs' strategy is understandable, but their assignment of error to the lower court makes no sense at all.

The Oneidas fabricate an argument from whole cloth – belied by the language of both *Cayuga* and *Sherrill*. Reduced to its essence, the Oneidas make the following four contentions:

- The Supreme Court in *Sherrill* rejected the Oneidas' claims to sovereign status over land recently acquired in central New York based on "equitable considerations" distinct from the defense of laches.[3]

[3] Oneida Brief at 59 ("The Court in *Sherrill* did not apply laches . . . ."); Oneida Tribal Plaintiffs' Answer to Petition of the State of New York for Permission for Appeal and Conditional Cross-Petition for Permission to Cross-Appeal ("Cross-Petition") at 8 (*Sherrill* "manifestly did not hold" that "laches . . . barred the claim stated or relief sought.").

- This Court in *Cayuga* rejected the Cayugas' possessory land claims based on laches, rather than the equitable considerations announced in *Sherrill*.[4]

- Laches is a fact-intensive defense that requires detailed findings by the District Court with respect to the dual elements of unreasonable delay and prejudice.[5]

- By improperly relying on the equitable considerations announced in *Sherrill*, the District Court here incorrectly granted summary judgment without proof to support the dual elements of laches, as required by *Cayuga*.[6]

The common thread running throughout the Oneidas' assignment of error is a false and meaningless dichotomy between the defense of laches and the "equitable considerations" articulated in *Sherrill*. As we

---

[4] Oneida Brief at 60 (claiming that this Court in *Cayuga* recognized *Sherrill* overruled prior authority in this circuit treating laches as categorically inapplicable to tribal land claims); at 59 (claiming this Court in *Cayuga* proceeded to affirm district court's laches findings regarding the Cayugas' delay, which would have been unnecessary if the decision was based on equitable considerations).

[5] Oneida Brief at 57.

[6] Oneida Brief at 59-61; Cross Petition at 16-18.

explain below, the Supreme Court in *Sherrill* fashioned a particular laches-based equitable limitation to address the "extraordinary passage of time"[7] between the alleged wrongful land transactions – "ancient wrongs"[8] dating back more than 200 years to "the early days of the Republic"[9] – and the present-day claims by the Oneidas. Under the "*Sherrill* formulation" of laches,[10] the passage of time alone, when measured in centuries and coupled with an historical record showing dramatic changes and development of every kind by non-Indians making the area and its inhabitants "distinctly non-Indian,"[11] bars disruptive remedies – and it does so without any need to show unreasonable failure to pursue claims at an earlier time or particularized prejudice beyond the obvious and enormous disruptiveness of projecting such ancient wrongs into the present and future.

---

7 544 U.S. at 219.

8 *Id*. at 216 n.11.

9 *Id*. at 216.

10 413 F.3d at 275.

11 544 U.S. at 202.

a. The Supreme Court's Articulation of a Laches-Based Equitable Bar in *Sherrill*

Sherrill is unequivocally grounded in the long passage of time and the practical realities engendered by such passage of time:

> Today, we decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns. ***Generations have passed*** during which non-Indians have owned and developed the area that once composed the Tribe's ***historic reservation***. And at least ***since the middle years of the 19th century***, most of the Oneidas have resided elsewhere. Given the ***long-standing***, distinctly non-Indian character of the area and its inhabitants . . . and 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, in whole or in part, over the parcels at issue.

Sherrill, 544 U.S. at 202-03 (emphasis added). *Sherrill* clearly precluded relief because of the long passage of time since the events giving rise to the claim. *See id.* at 216-17 ("This **long lapse of time** . . . and the **attendant dramatic changes in the character of the properties**, preclude [the Oneidas] from gaining the disruptive remedy it now seeks. * * * The principle that the **passage of time** can preclude relief has deep roots in our law, and this Court has recognized

this prescription in various guises. It is well established that **laches**. . . may bar long-dormant claims for equitable relief.") (emphasis added).

Accordingly, the equitable considerations that barred the Oneidas' claims in *Sherrill* are rooted in the doctrine of laches and its elements of unreasonable delay ("the Oneidas' ***long delay*** in seeking equitable relief against New York or its local units") and prejudice (relief sought "would **seriously burde[n]** the administration of state and local governments and would **adversely affect** landowners neighboring the tribal patches") (emphasis added and internal quotes omitted). [12]

Particularly damaging to the Oneidas' argument here, the Supreme Court in *Sherrill* made broad findings with respect to the passage of time, holding that the Oneidas' centuries-long delay barred their unilateral claim to sovereignty over the lands in question, without regard to the question of fault for the delay. *Id*. at 214-217. Quite simply, too much time had passed with too many changes to the land

---

[12] The Supreme Court also found support in the related equitable doctrines of acquiescence and impracticability/impossibility for barring the relief sought by the Oneidas. 544 U.S. at 216-219. It is the combination of laches and these other equitable doctrines that constitutes the "*Sherrill* formulation" applicable to ancient Indian land claims.

during generations of non-Indian possession to permit the Oneidas' claims to go forward.

In this case, the Oneidas repeatedly assert that *Sherrill* was not decided "on the basis of the laches doctrine." Oneida Brief at 21; *see also*, Oneida Brief at 59. They portray *Sherrill* as involving "equitable considerations" that are distinct from laches. *Id.* In an attempt to support this claimed distinction, the Oneidas cite several cases from outside the context of Indian law, all involving non-Indian litigants and garden variety disputes where the plaintiff's delay was measured in months or years, not centuries. *Id.* at 57. Based on these non-Indian pre-*Sherrill* cases, the Oneidas conclude the traditional laches defense has two elements: (1) unreasonable delay and (2) prejudice resulting from that delay. *Id.*

The Oneidas contend that "[t]he Court in *Sherrill* did not apply laches and cannot be read to 'mandate' the application of laches here without regard to the fact-bound elements of laches." *Id.* at 59. Rather, they contend, based on "equitable considerations" the Court "was able to foreclose the particular remedy before it in the absence of an evidentiary proceeding . . . ." *Id.* at 58-59.

However, in their Petition for Rehearing in *Sherrill,* a copy of which is attached as an addendum)[13] the Oneidas recognized that the Supreme Court applied "laches" (or "laches-related grounds") to bar their claims. Petition at 1, 7-8 ("The court has never before applied **laches** to an Indian tribe. . . [a]pplying **laches** to a sovereign tribe is a drastic step. . . .") (emphasis added). The Oneidas criticized the Supreme Court's application of laches on a record that they argued was not developed with respect to the traditional elements of laches. *Id.* at 3-5 (no findings with respect to unreasonable delay) at 8 (no findings with respect to prejudice). The Oneidas decried both the reasoning and the result, arguing that the Supreme Court had adopted a new "laches-related" equitable limitation for ancient Indian claims, a formulation of laches that represented a departure from the "traditional laches doctrine." *Id.* at 8.

The Oneidas specifically argued in their petition for rehearing in *Sherrill* (as they do here) that the traditional laches defense required the Supreme Court to consider whether the Oneidas had unreasonably

---

[13] The Petition is available on the website of the Native American Rights Fund, http://www.narf.org/sct/caseindexes/2004/sherrill.html (last visited February 6, 2008).

delayed in seeking judicial relief. *Id*. at 3-5. The Oneidas argued there (as they do here) that the historical record shows they had not unreasonably delayed in bringing their claims – just as the district court in *Cayuga* had specifically found with respect to the Cayugas. *Id*. at 3-4.

The Supreme Court in *Sherrill* disagreed and denied the Oneidas' petition for rehearing. 544 U.S. 1057 (2005).

In deciding *Sherrill* without requiring particularized proof of the Oneidas' role in the 150-year delay, and then specifically rejecting the Oneidas' points of error set forth in the petition for rehearing, the Supreme Court necessarily held that the findings of delay and prejudice were categorical in nature and rested on largely self-evident historical facts. In other words, the evidence that the Oneidas sought to introduce via their petition for rehearing in *Sherrill* – and in opposition to Defendants' summary judgment motions in the District Court below – is irrelevant inasmuch as it does not alter the application of *Sherrill*'s delay-based equitable bar. As the Oneidas noted, that equitable bar

may be viewed as a "doctrine of prejudice as a matter of law." Petition at 8.[14]

In the final analysis, it does not matter how the Oneidas characterize *Sherrill* or how this Court ultimately views the doctrinal underpinnings of the *Sherrill* formulation. The fact remains that the Supreme Court in *Sherrill* articulated a "laches-related" formulation that looks to the elements of delay and prejudice, as informed by the related doctrines of acquiescence and impossibility. That formulation provides the relevant standard against which to judge disruptive Indian land claims premised on ancient wrongs. In *Cayuga*, this Court correctly applied the *Sherrill* formulation (as we explain below) and in this case the District Court correctly applied *Cayuga* (and the same *Sherrill* formulation) in dismissing the Oneidas' possessory land claims (as we also explain below).

---

[14] The Oneidas' Petition for Rehearing reads in full sentence: "Second, in eliminating the Oneidas' tax immunity without a factual record on the prejudice component of the traditional laches doctrine, the Court necessarily announced a doctrine of prejudice as a matter of law." Here, the Oneidas argue the exact opposite, saying *Sherrill* did not change the rules governing the laches defense. Oneida Brief at 60 & n.21 ("There is nothing in *Cayuga* even hinting that *Sherrill* changed the rules governing the laches defense.").

b. This Court's Application of the *Sherrill* Formulation in *Cayuga*

The record in *Cayuga* addressed the history of the Cayuga tribe in New York, which is remarkably similar to that of the Oneidas. Both belonged to the Six Nations of the Iroquois[15] and entered into similar 18th and 19th century land transactions and treaties with the State of New York. *Oneida II*, 470 U.S. 226 (1985); *Cayuga*, 413 F.3d at 268. Both tribes also first brought claims against New York 200 years after those events. *Sherrill*, 544 U.S. at 208; *Cayuga*, 413 F.3d at 269-270. As a result of the parallel history between the Oneidas and Cayugas, the Oneidas – at least at one time – viewed the record in *Cayuga* as closely related and instructive. *See* Petition for Rehearing at 3-4 (observing that the district court in *Cayuga* had found the Cayugas were not at fault for the two-century-long delay in seeking redress for the allegedly unlawful land transactions).

Even so, the Cayugas' path to the courthouse was not identical to the Oneidas' (arriving on the courthouse steps 10 years after the Oneidas) and the Cayugas' legal strategy and claims did not always

---

[15] "This Confederation included the Cayugas, the Oneidas, the Mohawks, the Senecas, the Onondagas, and the Tuscaroras." 413 F.3d 268-269 & n.1.

track those of the Oneidas. *Compare, Sherrill*, 544 U.S. at 208-211 *with Cayuga*, 413 F.3d at 269-273.

After the Supreme Court decided *Sherrill* in March 2005 – a decision that "substantially altered the legal landscape in this area"[16]– this Court had to determine how to apply the *Sherrill* formulation to the record in *Cayuga* that was created over two decades under prior law.

This Court noted in particular two district court rulings that addressed the Cayugas' delay in bringing suit. 413 F.3d at 271-72. First, the district court had applied a seven-factor balancing test, as set forth in the Restatement (Second) of Torts Section 936 (1977) (governing injunctive relief in trespass actions) in determining whether or not to permit the Cayugas to pursue their claim of ejectment directed to 20,000 innocent landowners. *Cayuga Indian Nation of New York v. Cuomo,* 1999 U.S. Dist. LEXIS 10579, *61 (N.D.N.Y. 1999). The district court noted that one of the Restatement's equitable factors is "unreasonable delay," or "laches." *Id*. at *82. The district court applied all seven equitable factors including the elements of the traditional

[16] 413 F.3d at 279.

laches defense. *Id*. *75-99 ("unreasonable delay committed by the plaintiff and prejudicial consequences suffered by the defendant"). *Id*. at 82. The district court found that the claim for ejectment was inequitable under the Restatement's seven-factor test. The district court specifically found that "the delay factor tips decidedly in favor of the defendants" in light of the enormous prejudice to defendants from ejectment. *Id*. at *86.[17]

Second, the district court in *Cayuga* considered the Cayugas' delay as a factor in determining how much prejudgment interest to award following a trial on damages and a separate hearing on interest. *Cayuga Indian Nation of New York v. Pataki*, 165 F. Supp. 2d 266, 293, 356-358 (N.D.N.Y. 2001). The district court applied a distinct body of law specific to discretionary awards of prejudgment interest and found that certain equitable factors, including the long passage of time, warranted a reduction in the award of interest. *Id*. at 293, 356-358. Of particular note – as the Oneidas pointed out in their Petition for Rehearing in *Sherrill* – the district court in *Cayuga* concluded at this

---

[17] The district court reached this conclusion even though it found "some delay on the part of the Cayugas is explainable . . . ." *Id*. at *86.

stage of the proceedings that the Cayugas had acted reasonably and were not at fault for the delay. *Id*. at 357 ("this delay was not unreasonable, insofar as the actions of the Cayuga are concerned.").

This Court in *Cayuga* considered these underlying findings in applying the *Sherrill* formulation, even though the district court's mixed findings on the Cayugas' delay had been rendered years before, under prior law, for separate reasons. This Court clearly and expressly applied the "*Sherrill* formulation" (even coining that phrase) and found the long passage of time, attendant dramatic development of the land, and justifiable expectations of non-Indians for generations, rendered the Oneidas' possessory land claims disruptive for the reasons stated in *Sherrill*. 413 F.3d at 275. This Court considered the historical evidence of the Cayugas' delay as stated in the district court's findings with respect to its dismissal of the ejectment remedy. *Id*. at 277. "Taking into account the considerations identified by the Supreme Court in *Sherrill* and the findings of the District Court *in the remedy stages of the case*, we . . . conclude that plaintiffs' claim is barred by laches." *Id*. at 268.

The procedural history in *Cayuga* makes clear that this Court did not apply a traditional laches defense, with the need for discovery and specific evidence supporting the dual elements of unreasonable delay and resulting prejudice. Rather, this Court fully embraced the *Sherrill* formulation which looks broadly to the "historical reality" of such "ancient" claims (*Sherrill*, 544 U.S. at 217 n.11) and the "inherent" disruptiveness of the remedies sought. 413 F.3d at 275.[18] This Court properly concluded the possessory land claims were subject to dismissal based on the existing record, without the need for any further development of the record. 413 F.3d at 277. Indeed, the Court noted that possessory Indian land claims could be subject to a motion to dismiss *without any discovery*, given the largely self-evident facts about the extraordinary passage of time, the non-Indian development, governance and ownership for the past 200 years, and the "inherent"

---

[18] In *Sherrill*, the Supreme Court focused on the disruptive practical consequences that the Oneidas' unilateral reestablishment of present and future Indian sovereign control would have over the lands in question there. Even the lone dissenter in *Sherrill*, Justice Stevens, recognized that if the State's interest in zoning were involved, the balance of interests would obviously support the retention of state jurisdiction. 544 U.S. at 227 n.6. How much more disruptive, then, is the assertion of tribal claims to current possession which attempt to invalidate the titles of 20,000 landowners? This Court in *Cayuga* correctly applied the holding of *Sherrill* in dismissing the land claims.

disruption of permitting such claims. 413 F.3d at 278 ("To frame this point a different way: 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.").

Had this Court in *Cayuga* required defendants in Indian land claim litigation to present particularized proof that tribal plaintiffs unreasonably delayed in filing suit – as the Oneidas contend – this Court never would have endorsed motion practice directed to the pleadings. Moreover, if the Oneidas were correct that the traditional elements of a laches defense applied under *Sherrill*, this Court in *Cayuga* logically would have said that rather than articulate, adopt and apply the *Sherrill* formulation. Finally, this Court's dismissal of the Cayugas' land claims *in the face of evidence showing the Cayugas had not unreasonably delayed* (413 F.3d at 279-280), proves that a tribe's freedom from fault for the delay in filing suit is *not* relevant to dismissing possessory land claims under the *Sherrill* formulation.

This Court's decision in *Cayuga* therefore does not stand for the proposition that a district court must permit discovery as to the

traditional laches elements of unreasonable delay and prejudice, and render detailed findings as to each element, before finding a 200-year old tribal claim is barred by the extraordinary passage of time. To the contrary, this Court's decision in *Cayuga* shows *Sherrill* applies to all disruptive tribal claims that rest on claims of ancient wrongs, with the court looking to largely self-evident historical facts about Indian land transactions during "the early years of the Republic" and the "dramatic changes" that occurred during the past 200 years.

c. Judge Kahn's Application of the *Sherrill* Formulation as Articulated by *Cayuga*

The District Court correctly followed *Cayuga* in dismissing the land claims against the Counties. The Decision shows how carefully the District Court analyzed the claims to current possession asserted by the Plaintiffs and their request for equitable relief restoring them to possession. 500 F. Supp. 2d at 133-134. The District Court then held that Plaintiffs' possessory land claims were subject to the equitable defense of laches and applied the specific criteria articulated in *Sherrill* as adopted and applied by this Court in *Cayuga*. *Id.* at 134-137. The District Court's application of the *Sherrill* formulation (whether labeled

a "laches defense" or "laches-related" equitable bar) to Plaintiffs' possessory land claims involved the very same considerations that were applied by the Supreme Court in *Sherrill* and "doomed" the Oneidas' claim in that case. Following a detailed examination of *Cayuga* and *Sherrill,* the District Court concluded it was required to grant Defendants' motion for summary judgment and dismiss Plaintiffs' possessory land claim to prevent disruption. The District Court observed that "claims based on the Oneidas' possessory rights are disruptive to the 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." 500 F. Supp. 2d at 137.

The District Court also stated that "[u]nder the factors to be considered in a laches analysis, as set forth in *Cayuga*, it is not necessary to determine whether Plaintiffs unreasonably delayed in pursuing their claims." *Id. Cf. Sherrill*, 544 U.S. at 217-218 ("[L]aches is not . . . a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded

upon some change in the condition or relations of the property or the parties.") (*quoting Galliher v. Cadwell*, 145 U.S. 368, 373 (1892)).[19]

Similarly, in an impossibility analysis (as discussed by the District Court at 500 F. Supp. 2d at 136 and by the Supreme Court in *Sherrill*,

---

[19] Citing the dissent in *Cayuga*, the United States argues that "no court has considered the extent to which the [Oneidas'] delay in commencing this action 'may be excused.' " U.S. Brief at 23. Whatever may have been the situation regarding the Oneidas' delay (which the Supreme Court found to preclude the disruptive remedy sought in *Sherrill*, 544 U.S. at 216-217), there can be no excuse for the United States' delay of 200 years in bringing an action challenging the Oneidas' sale of their lands. As found by the Indian Claims Commission, the United States knew of those sales at or about the time they occurred, and breached its fiduciary duties to protect the Oneidas in regard to them. *See* Opinion of the Commission, Indian Claims Commission ("ICC"), 43 Ind. Cl. Comm. 373, 405 (1978). The Commission specifically found the federal government was complicitous in the removal of the Oneidas from New York State:

> [the] record indicates that the Federal Government was fully aware of New York's negotiations with the New York Indians at all times. 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 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.

43 Ind. Cl. Comm. 373, 405 (1978).

The Supreme Court in *Sherrill* likewise placed heavy blame on the United States, noting the federal government had "largely accepted, or was indifferent to New York's governance of the land in question and the validity *vel non* of the Oneidas' sales to the State." *Sherrill*, 544 U.S. at 214.

544 U.S. at 219-220), it is not necessary to determine whether Plaintiffs unreasonably delayed in pursuing their claims. The Supreme Court in *Sherrill* quoted *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926), in which it initiated the impossibility doctrine, as follows: "It is impossible . . . to rescind the cession and restore the Indians to their former rights because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers . . . ." 544 U.S. at 219. It is the passage of decades, indeed centuries, and the non-Indian settlement, development, governance and character of the lands that makes the Plaintiffs' possessory land claims unacceptably disruptive and renders remedies based on claims of current possessory rights impossible.

Accordingly, the District Court correctly followed the teachings of *Cayuga* and *Sherrill* and was compelled to dismiss the Plaintiffs' possessory land claims. [20]

---

[20] The Oneidas claim that "the usual form of prejudice" (i.e., impairment of title and decrease in property value) does not exist here. Oneida Brief at 62. The Oneidas rely on affidavits claiming title insurance is available in the land claim area containing provisions regarding Indian land claims. The record, however, is substantially incomplete with respect to Plaintiffs' contention that there is no deleterious impact from the Oneidas' pending possessory land claims. First,

(Footnote continued on next page)

II. As a Matter of Sound Policy and Judicial Economy, this Court should Affirm Judge Kahn's Award of Summary Judgment to the Defendant Counties.

a. Reversing the District Court's Decision Would Create Uncertainty in the Law and Expose New York State and other Eastern States (and their Local Units) to an Array of Highly Disruptive Possessory Land Claims.

The Oneidas' possessory land claims involve "only" 250,000 acres or so in central New York. Indian land claim litigation in New York State is not so limited, as this Court's decision in *Cayuga* makes clear. In another recent decision, which applied *Cayuga* and *Sherrill* to possessory land claims of the Shinnecocks on Long Island, the United States District Court for the Eastern District of New York applied the

---

(Footnote continued from previous page)

Plaintiffs failed to include a complete title policy including exceptions and exclusions, and the record does not show how many of the tens of thousands of landowners actually have owners' policies of title insurance. Oneida Brief at 62, A620-634. Likewise, Plaintiffs failed to show that even if the properties were *insurable*, a title insurer would provide meaningful coverage against the Oneidas' claims, or if a current non-Indian titleholder could transfer good and marketable title with or without such insurance. The Oneidas' evidence also is insufficient with respect to price trends in the land claim area. The Oneidas concede that "[a]dditional data would be required to complete this analysis." A627. The District Court concluded that "further discovery regarding these matters would . . . be counterproductive." 500 F. Supp. 2d at 136-137 & n.2. The court observed that in this and other ancient Indian land claim cases, "the facts that would be considered as part of a laches inquiry . . .are generally self-evident." *Id*.

Sherrill formulation in the same manner as the District Court in this case. The *Shinnecock* court found laches to have been established on the pleadings and granted the defendants' motion to dismiss without delving into a fact-specific inquiry relative to the tribe's fault. *See, Shinnecock Indian Nation v. State of New York*, 2006 U.S. Dist. LEXIS 87516, *14-17 (E.D.N.Y. Nov. 28, 2006).

The Shinnecocks' land claims exceed the Oneidas' land claims in dollar value. The Shinnecocks sued the State of New York, the Town of Southampton, the Long Island Railroad, Long Island University, and several private defendants including golf clubs and real estate developers. According to an Associated Press report, "Shinnecocks turn up heat for casino; multibillion-dollar land claim as leverage," F. Eltman, June 15, 2005, "A statement issued by the tribe noted the assessed value of real estate in the land claim was $1.709 billion for last year alone. In addition, 150 years of past rent and interest is being sought." *See also*, "Tribe tees up suit for rich Hamptons land," Daily News, June 16, 2005 ("property that is worth more than $1.7 billion").

The complaint in *Shinnecock* sought broad relief for alleged violations of the so-called federal Indian Non-Intercourse Act, including

damages for lands acquired from the tribe or transferred for a period of over 140 years, a declaration that the tribe has possessory rights to the lands, immediate ejectment of all defendants from the lands, other declaratory and injunctive relief as necessary to restore the tribe to possession of the lands, and (from the Town of Southampton) an accounting and disgorgement of the value of benefits received from each purported purchaser of the tribe's interest in the lands, including the value of the benefits received from the subsequent resale of the lands. *Id*. at *3, *9-10.

The district court in *Shinnecock* recognized that "[t]he claims the [tribe] brings and the nature of relief sought pose the same type of 'pragmatic concerns' that guided the Supreme Court and Second Circuit recently to deny relief in [*Sherrill*] and [*Cayuga*]. These concerns permeate here and warrant dismissal based on equitable considerations, including laches." *Id*. at *4. After a detailed discussion and analysis of *Cayuga*, the court concluded, "Based on the foregoing, we find that plaintiffs' possessory land claim is subject to laches, and dismiss on that basis. Further, because the rest of plaintiffs' claims are

'predicated entirely upon plaintiffs' possessory land claim,' they are also dismissed." *Id.* at *19.[21]

As made clear in *Shinnecock* and the District Court's opinion below, the equitable bar adopted in *Sherrill* and applied by this Court to posssessory land claims represents a critically important practical restraint against highly disruptive land claims. Under *Cayuga* and *Sherrill* such land claims are properly dismissed based on the long passage of time and the disruption inherent in recognizing such claims. There is no need to inject uncertainty into the legal standards for dismissing ancient Indian land claims by engrafting onto the *Sherrill* formulation a requirement that defendants plead and prove the elements of a traditional laches defense. Imposing that requirement would be "counterproductive" in light of the self-evident historical facts that compel dismissal of these claims as a matter of law. A traditional laches defense was never intended to address the "extraordinary

---

[21] The District Court in this case, in certifying its Order for immediate appeal pursuant to 28 U.S.C. § 1292(b), took note of the *Shinnecock* decision as reaching a different conclusion insofar as *Shinnecock* dismissed all of plaintiffs' claims as predicated entirely on the possessory land claim, and did not recognize a "non-possessory" fair compensation claim. Decision, 500 F. Supp. 2d at 147.

passage" of time inherent in 200-year-old Indian land claims. The *Sherrill* formulation specifically addresses ancient Indian land claims, as this Court held in *Cayuga*.

This Court therefore should affirm the District Court's decision granting summary judgment to the Defendants, dismissing the Oneidas' possessory land claims.

b. Reversing the District Court's Decision Would Lead to Protracted and Complex Litigation in this Case involving, among other things, Expert Testimony and Historical Evidence pertaining to the Treaty of Fort Schuyler.

The District Court dismissed as moot the Counties' various counterclaims as well as a pending motion by the Counties requesting the court to reconsider its order striking their affirmative defense regarding the Treaty of Fort Schuyler. Decision, 500 F. Supp. 2d at 146. The Counties' counterclaims and defenses raise substantial legal issues regarding the Oneidas' claims to approximately 250,000 acres in central New York, and will be fully litigated (as necessary) given their critical importance to the State, the Counties and the affected landowners.

1. The Disestablishment Counterclaims

The Counties seek a declaration that the former Oneida reservation has been disestablished and that the lands reserved to the Oneidas in the Treaty of 1788 are neither Indian Country nor part of an Indian reservation. *See* A279-A283 (Counties' counterclaim against the Plaintiff tribes); A471-A478 (Counties' first counterclaims against the United States).[22] Because these disestablishment counterclaims were drafted in 2001 and 2002, respectively, several years before the 2005 *Sherrill* decision's holding that the lands are subject to State and local jurisdiction and that the Oneida Indian Nation of New York may not exercise sovereignty over them in whole or in part, they would need (or should be deemed) to be amended to include allegations based on changes in the law.[23]

---

[22] The Counties' Second and Third Counterclaims against the United States assert claims sounding in contribution should the Plaintiffs' possessory land claims result in an award against the Counties. The counterclaims are in keeping with the historical reality that the United States breached its responsibilities to the Oneidas. If New York State is found liable for doing the Federal Government's bidding in removing the Oneidas (and other New York Indians) from New York, the Federal Government will pay its fair share and reimburse New York and the Counties, accordingly.

[23] In this Court's 2003 decision, *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 165 (2d Cir. 2003), this Court concluded that neither the text nor the circumstances surrounding the passage of the 1838 Treaty of

(Footnote continued on next page)

The Counties do not agree with the District Court that their disestablishment counterclaims are moot at this juncture. These counterclaims may need to be litigated to address ongoing disruption and uncertainty caused by the Oneidas' present and future claims that approximately 250,000 acres in central New York are Indian reservation lands and that the Oneidas have rights to exercise Indian governance and sovereignty over them, despite the Supreme Court's decision in *Sherrill* and its repeated references to the "former" or "historic" Oneida reservation. These challenges to New York State's sovereignty and jurisdiction persist separately from the Oneidas' challenge to possession and title of particular land. In addition, because the Oneidas' land claims rest on the premise that all of the challenged land transactions with New York State are void under the so-called

---

(Footnote continued from previous page)

Buffalo Creek establish a clear congressional purpose to disestablish or diminish the historic Oneida reservation. The Supreme Court's 2005 decision in *Sherrill* casts doubt on this conclusion despite the statement in footnote 9 that, "The Court need not decide today whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation, as Sherrill argues." 544 U.S. at 215, n.9. The disestablishment issue and whether the status of the lands in issue constitute a present-day Oneida reservation of several hundred thousand acres in central New York is pending before this Court in the consolidated appeals *Oneida Indian Nation of New York v. Madison County, New York and Oneida County, New York*, 05-6408-cv(L), 06-5168-cv(CON), 06-5515-cv(CON).

Non-intercourse Act, this litigation, at its core, is highly disruptive. This remains true even as the Oneidas, at the eleventh hour, have sought to re-cast their claim in terms of "fair compensation" to avoid the rule of *Cayuga* and *Sherrill*. If that re-tooled claim is allowed, it will necessarily endorse the Oneidas' central assertion under the so-called Non-intercourse Act that the underlying land transactions are void, with highly disruptive implications for current landowners.[24] Accordingly, the Counties may need to proceed with their disestablishment counterclaim, and otherwise seek relief, in the District Court to address issues that are not resolved on appeal.[25]

---

[24] The Oneidas suggest the court can ratify the transactions that allegedly violated the so-called Non-Intercourse Act and thereby eliminate the challenge to current ownership and thousands of titles inherent in their claim. (Oneida Brief at 62). Whether a court has the power to ratify the allegedly void transactions so as to truly settle current ownership and title issues is not a question presented on this cross-appeal. But even that relief would not be sufficient to resolve all of the Oneidas' persistent claims to sovereignty and jurisdiction with respect to the historic Oneida reservation lands in central New York.

[25] The District Court's mootness rulings are not part of these interlocutory appeals and cross-appeals. The Counties wish to make clear that they preserve all rights to appeal from a final order dismissing their counterclaims and defenses as moot.

2. The Motion to Reconsider the Affirmative Defense Regarding the Treaty of Fort Schuyler

The Counties' affirmative defense regarding the 1788 Treaty of Fort Schuyler was stricken by the District Court in an Order dated March 29, 2002. *See*, A356, A375-376, A402-403, A410-412. The Treaty of Fort Schuyler defense is related to the disestablishment defenses and counterclaims. In its March 29, 2002 Order, the District Court recognized that the Plaintiffs put in issue the status of the disputed lands, i.e., whether they are within an Indian reservation or not, and stated, "These issues cannot be determined as a matter of law at this time. Defendants' disestablishment counterclaim presents a substantial controversy appropriately determined in connection with the other legal issues in this action." A410. Since the lands in issue lie within the Counties, the Counties have a vital interest in the determination of the land status and jurisdictional issues, quite apart from the determination of the land claims and title issues.

On October 21, 2004, the Defendants filed a Motion to Reconsider the District Court's interlocutory order of March 29, 2002 striking their affirmative defense regarding the 1788 Treaty of Fort Schuyler

(hereafter "Motion to Reconsider"). The Motion to Reconsider is based on (1) an intervening change in controlling law, namely this Court's decision in *Seneca Nation of Indians v. New York*, 382 F.3d 245 (2d Cir. 2004), which dealt with a pre-Constitution treaty found to extinguish Seneca title to the land in question, the effects of the Revolution on title passing to New York, and the 1794 Treaty of Canandaigua as not divesting New York of title to the land in question, and other issues applicable to this case; (2) the availability of newly discovered historical evidence and expert reports and testimony produced in this case that support Defendants' position; and (3) the need to thoroughly analyze all available law and evidence to prevent manifest injustice in this case which is of such great public importance and will profoundly affect the future of central New York. The Motion to Reconsider was never decided and remained pending when the District Court ordered the Motion dismissed as moot. Defendants' Motion to Reconsider may be properly dismissed as moot now, but remains to be decided should this Court reverse the District Court and permit the Oneidas' possessory land claims to proceed.

CONCLUSION

Based on the foregoing, this Court should affirm the judgment in favor of the Counties and the State dismissing the land claims based on the controlling authority of *Cayuga* and *Sherrill*. If the dismissal of the land claims against the Counties is reversed, then this Court must also reverse the dismissal of the Counties' affirmative defenses and counterclaims based on mootness.

Dated: February 8, 2008

Respectfully submitted,

Nixon Peabody LLP

By: _____
David M. Schraver
David H. Tennant
Attorneys for Defendants-Cross-Appellees County of Oneida, New York and County of Madison, New York
1100 Clinton Square
Rochester, New York 14604-1792
(585) 263-1000

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT EXPRESS**
COUNTY OF NEW YORK)		**MAIL**

I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On February 8, 2008

deponent served the within**:** **Brief for Defendants-Cross-Appellees**

upon:

See Attached Service List

the address(es) designated by said attorney(s) for that purpose by depositing **2** true copy(ies) of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Overnight Express Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

Sworn to before me on February 8, 2008

ROBIN M. ZUCKERMAN
Notary Public State of New York
No. 01ZU5007194
Qualified in Orange County
Commission Expires Jan. 25, 2011

Job #213762

Service List:

Michael R. Smith
Zuckerman, Spaeder, Goldstein,
Taylor & Kolker LLP
1800 M Street, NY
Washington, D.C. 20036
msmith@zuckerman.com

Carey R. Ramos
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of Americas
New York, NY 10019-6064
cramos@paulweiss.com

Arlinda Locklear
4113 Jennifer Street, NW
Washington, D.C. 20015
alockesq@comcast.net

Denise Hartman
Office of the Solicitor General
Department of Law
The Capital
Albany, NY 12224
denise.hartman@oag.state.ny.us

Dwight A. Healy
White & Case LLP
1155 Avenue of the Americas
New York, NY 20036
dhealy@ny.whitecase.com

Kathryn E. Kovacs
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 23795, L'Enfant Plaza Station
Washington, D.C. 20026
Kathryn.kovacs@usdoj.gov

Marilyn Ward Ford
Quinnipiac College of Law School
275 Mount Carmel Avenue
Hamden, CT 06518
marilyn.ford@quinnipiac.edu

ANTI-VIRUS CERTIFICATION FORM
Pursuant to Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: Oneida Indian Nation of New York, et al. v. County of Oneida, County of Madison, et al.

DOCKET NUMBER: 07-2430-cv (L), 07-2548 (XAP) and 07-2550 (XAP)

I, Maria Piperis, certify that I have scanned for viruses the PDF version of the

_____ Appellant's Brief

___XX__ Appellee's Brief

_____ Reply Brief

_____ Amicus Brief

that was submitted in this case as an email attachment to <briefs@ca2.uscourts.gov> and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used:

Trend Micro AntiVirus version 8.0 was used.

_____
Maria Piperis

Date: February 8, 2008