07-2430-cv(L)

07-2548-cv(XAP) and 07-2550-cv(XAP)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees-Cross-Appellants,

UNITED STATES OF AMERICA,

Intervenor-Plaintiff-Appellee-Cross-Appellants,

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

REPLY BRIEF AND CROSS APPELLEE'S BRIEF FOR STATE OF NEW YORK

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TABLE OF CONTENTS

PAGE

TABLE OF CITED AUTHORITIES

PAGE

CASES

FEDERAL STATUTES

Table of Cited Authorities (cont'd)

PRELIMINARY STATEMENT

The Oneidas' arguments and those of the United States rest on their position that this Court wrongly decided Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266 (2d Cir. 2005), cert. denied, 126 S.Ct. 2021 (2006). While the Oneidas strive to distinguish Cayuga, there is no meaningful difference between the relief the Oneidas seek here and the compensatory relief that this Court rejected in Cayuga. "[A]ny remedy flowing from this possessory land claim, which would call into question title to over [250,000] acres of land in upstate New York, can only be understood" as a disruptive forward-looking remedy barred by laches. Cayuga at 275 (emphasis added). Moreover, this Court in Cayuga fully considered and rejected the arguments the Oneidas and the United States raise in response to the State's appeal, and those the United States raises in its affirmative argument that Cayuga was wrongly decided.

ARGUMENT

POINT I

THIS COURT'S DECISION IN CAYUGA REQUIRES DISMISSAL OF THE ONEIDAS' POSSESSORY CLAIM, REGARDLESS OF THE REMEDY THEY SEEK

A. The Oneidas and the United States Concede that the "Fair Compensation" Damages They Seek Are Premised on Their Possessory Claims.

The Oneidas concede that they seek "fair compensation" damages as a form of relief to vindicate their claim that the State illegally dispossessed them of their ancestral lands through

transactions that were not ratified by the federal government. Regardless of the form of relief they seek, however, the Oneidas' claim is possessory in nature. The Oneidas repeatedly acknowledge (Br. at 44; see also id. at 32-33) that their claim rests on the proposition that the "State's acquisition of Oneida land . . . violat[ed] . . . the Nonintercourse Act." The adjudication of that claim would necessarily require a determination that the transactions by which the State acquired the lands from the Oneidas violated the federal statute which, by its terms, would render the transactions invalid. Under Cayuga, such inherently disruptive claims -- even those seeking a remedy in the form of damages -- are barred by the equitable doctrines applied in City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005).

1. The Oneidas concede that they seek fair compensation as a remedy for a violation of their possessory rights.

The Oneidas and the United States do not deny that their claims are possessory. Rather, recognizing the distinction between the underlying "claim" of a violation of a substantive right and a "remedy" to vindicate that claim, the Oneidas seek what they term a "fair compensation remedy" because restoration of their possessory interest is unavailable. The Oneidas do not embrace the district court's reasoning that they have a federally cognizable contract-based claim, or as the district court put it, a "contract

claim that seeks to reform or revise a contract that is void for unconscionability" (SPA19). Instead, they continue to maintain that they brought this claim to void New York's allegedly unlawful dispossession of Indian lands, but argue that the remedy they now seek is "non-possessory." Cayuga rejected any such distinction.

Indeed, the Oneidas have largely abandoned the district court's nomenclature of "fair compensation claim" (SPA27, 29, 32) in favor of the phrase "fair compensation remedy." In their "Summary of Argument," the Oneidas state: "Judge Kahn correctly held that the Oneidas are entitled to at least a fair compensation remedy. It is equitable, and exactly what equity requires, to order fair compensation when possessory remedies are deemed inequitable." Br. at 28; see also Br. at 29 ("fair compensation is the remedy recognized by the common law when equity bars restoration of possession because of intervening transfers to third parties"). In their Argument, too, they make their position absolutely clear: "The Oneidas' fair compensation claim is a non-possessory remedy for the State's acquisition of Oneida land in violation of the Nonintercourse Act that is firmly grounded in the federal common law." Br. at 44. See also Br. at 47 ("Fair compensation is the remedy awarded when an unlawful transaction cannot be rescinded for equitable reasons."); Br. at 48 ("The Fair Compensation Claim is a Remedy for the State's Violation of the Nonintercourse Act.").

The United States likewise acknowledges that it is asserting a "'non-possessory' theory of recovery" (e.g., Br. at 45-46), not a non-possessory claim. Although the United States in its amended complaint requested alternative relief in the form of monetary damages (as did the Oneidas) for violations of the Nonintercourse Acts, its underlying claim has always been grounded in an assertion of the Oneidas' possessory rights, as demonstrated in the State's opening brief at 37-39. Indeed the Oneidas' and the United States' claims are cognizable in the federal courts precisely because they seek to vindicate the Oneidas' possessory rights under the federal common law of trespass. See County of Oneida v. Oneida Indian Nation ("Oneida II"), 470 U.S. 226, 235-36 (1985).[1]

There is no basis in the Nonintercouse Act -- in its current version or its predecessors -- for any "fair compensation remedy." The Nonintercourse Act has always provided that "[n]o purchase, grant, lease or other conveyance of lands" from any Indian or Nation or Tribe of Indians "shall be of any validity in law or equity" unless made by treaty or convention entered pursuant to the Constitution. E.g., Act of 1793, 1 Stat. 330, § 8 (SPA63); Act of 1796, 1 Stat. 472, § 12 (SPA70); Act of 1799, 1 Stat. 746, § 12

[1] This is why the Oneidas try to distinguish (Br. 52-53) the cases the State cited in its opening brief (State Br. 51-52) that have rejected the notion of federal contract claims under the Nonintercourse Act. While contending that those cases are inapplicable to remedy determinations, the Oneidas' do not argue that their underlying claim is grounded in federal contract law.

(SPA 77); Act of 1802, 2 Stat. 143, § 12 (SPA86); Act of 1834, 4 Stat. 790, § 12 (SPA96).[2] Thus, a finding that the Nonintercouse Act has been violated amounts to a declaration that the transaction was invalid. This, the Cayuga Court recognized, dooms these types of ancient land claims.

2. The damages remedy the Oneidas seek in lieu of possession is not meaningfully distinguishable from the damages awarded in lieu of possession that this Court struck down in Cayuga.

The "fair compensation remedy" the Oneidas now seek is not meaningfully different from the damages relief this Court rejected in Cayuga. Whether the damages are calculated as the Oneidas now suggest based on the fair market value of the land at the time of the sales, adjusted forward to reflect today's dollars, or as the district court determined in Cayuga based on the current fair market value of the land plus fair rental value since 1795 with compound interest, the remedy derives from the Tribes' inherently disruptive possessory claim. And regardless of how the "damages" are labeled -- whether as "fair compensation damages" as the Oneidas propose, or as "trespass damages" as the Cayuga court

[2] The successive versions of the Nonintercourse Act provided that it was misdemeanor for persons not employed or authorized by the federal government of negotiate for the acquisition of Indian lands, but provided no civil remedy for a violation except to refuse to recognize the validity of the transactions.

labeled them, relief in the form of damages is barred by the equitable doctrines applied in Sherrill.

The Oneidas seek to obtain here precisely what the district court in Cayuga awarded and this Court rejected: "fair market value as a proper measure of damages" because "ejectment" had been rejected as an "available remedy." See Cayuga, 413 F.3d at 272; 79 F. Supp. 2d 78, 94 (N.D.N.Y. 1999). There is no meaningful 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.[3] In both cases, the determination that is the basis for liability – that the transaction violated the Nonintercouse Act and, as a result was invalid -- is inherently disruptive. Consequently, the Oneidas' request for a fair compensation remedy is foursquare within the rule of Cayuga.

In Cayuga, the district court awarded $35 million in current fair market value damages, as well as $3.5 million in fair rental value damages to which the court added prejudgment interest, and

[3] The only difference is the date the value of the property is measured. If this Court were to sustain the "fair compensation remedy," the Oneidas and the United States would undoubtedly seek an enormous interest award to bring the judgment forward to its present value.

credited the State with an offset of $1.6 million for payments the State had made to the Cayugas. This Court rejected the district court's attempt to devise a damages remedy that would overcome the equitable hurdles that doomed the Oneidas' claim in Sherrill. With regard to both aspects of the district court's damages award, this Court held that the "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. In its view, "any remedy flowing from this possessory land claim, which would call into question title to over 60,000 acres of land in upstate New York, can only be understood as a remedy that would similarly 'project redress into the present and future.'" Id. at 275, quoting Sherrill at n.14.

The Oneidas try to distinguish the damages in Cayuga by arguing that the "trespass damages" awarded there "proceed[ed] from the recognition . . . of a continuing tribal possessory right, while fair compensation damages proceed from a judicial determination that possession cannot be challenged." Br. at 30. To the contrary, the damages that the district court awarded in Cayuga were not predicated on some ongoing possessory right. The district court expressly rejected the Cayugas' claim that they had any right to enforce their possessory interest and awarded damages as a substitute for possession. Likewise here, the Oneidas'

request for damages as an alternative to possession derives from the underlying possessory claim, which is itself inherently disruptive.

The Oneidas similarly cannot distinguish Cayuga by arguing (Br. at 62) that there is no evidence that their possessory claims have in fact adversely affected real estate prices. Neither the district court opinion in Cayuga denying ejectment nor this Court's decision overturning the district court's damages award rested on a finding that the Cayugas' claim had a demonstrable adverse impact on land values. Neither court found it necessary to conduct an evidentiary analysis or to parse precisely how specific kinds of damages awards might be disruptive. It is the possessory nature of the underlying claim itself that renders the claims disruptive.

The Oneidas also contend (Br. at 34) that their request for fair compensation does not depend on their demand for ejectment. But that is different from saying that the request for relief is not dependent on their underlying possessory claim. Indisputably, the crux of the Oneidas' claim is that the State acquired the lands in violation of the Nonintercourse Act because it did so without the approval of the federal government. If the Oneidas are correct in their assertion, then the statute provides that the transactions are invalid, and "fair compensation" is not relevant.

Finally, we cannot leave unanswered the Oneidas' contention (Br. at 34) that they have "always sought damages, not ejectment"

in this action, and that their request for "disgorgement" of the State's profits does not "depend on" any demand for ejectment. As we pointed out in our opening brief (pp. 33-43),[4] the opposite is true. This is and always has been a claim to vindicate possessory rights. The Oneidas commenced this action in 1974 against the Counties only, which were not alleged to be and could not have been liable for the State's proceeds from these ancient transactions. The Oneidas did not even join the State as a defendant until 1998, when they expressly sought both ejectment and disgorgement. Although the district court rebuffed the Oneidas attempt to assert ejectment claims against 20,000 private citizens, the Oneidas in their amended complaint specifically reserved their right to seek ejectment (JA206). Indeed the amended complaint continues to seek ejectment as a remedy for lands still owned by the State and County defendants (JA229).[5] Only after Sherrill and Cayuga made their

[4] As we explained there, 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 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."

[5] Even after Judge McCurn refused to permit the Oneidas to amend their complaint to assert claims for ejectment against private landowners, one of the tribal plaintiffs, the Oneida

possessory claim untenable did the Oneidas argue that, in the alternative, the court could award fair compensation instead of rescinding the land sales.

B. The Cases Upon Which the Oneidas Rely Do Not Support Their Request for A "Fair Compensation Remedy" for a Violation of the Nonintercourse Act.

The Oneidas rely on a trio of cases to support their argument that when equity bars restoration of possessory rights, equity requires the Court to award relief in the form of damages: United States v. Minnesota, 270 U.S. 181 (1926); Felix v. Patrick, 145 U.S. 317 (1892); and Yankton Sioux Tribe of Indians v. United States, 272 U.S. 351 (1926). This Court was aware of these cases when it decided Cayuga. See 413 F.3d at 277 (citing Yankton Sioux); id. at 286-88 (Hall, D.J., dissenting) (repeatedly citing United States v. Minnesota); id. at 285, 289 (Hall, D.J., dissenting) (discussing Felix v. Patrick). Nevertheless, the Court rejected the proposition that damages could or should be awarded when restored possession is barred in these kinds of ancient land claims cases.

Moreover, these cases do not stand for the broad proposition that plaintiffs assert. None of these case involved centuries-old

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Tribe of Wisconsin, filed actions against scores of private landowners seeking just that remedy and threatened to file more such actions until Judge Kahn enjoined them from doing so. See Oneida Tribe of Indians of Wisconsin v. AGB Properties, Inc., 2002 W.L. 3105165 (N.D.N.Y. Sept. 5, 2002).

land claims brought under the Nonintercourse Act. Nor did they involve a vast swath of lands now owned by thousands of innocent third parties. Recognizing in Cayuga that the Supreme Court's decision in Sherrill changed the legal landscape with respect to land claims like those asserted by the Cayugas and the Oneidas, the Court held that equitable considerations bar possessory land claims, including those seeking damages.

In United States v. Minnesota, the Supreme Court held that the United States was entitled either to a decree cancelling its erroneous patent to the State of 706 acres that the United States had previously reserved to the Chippewa Indians, or, if Minnesota had sold any the land, to recover its value. 270 U.S. at 206. The case is inapposite. First, the Court did not address laches or any other equitable doctrine relating to land claim remedies. Second, the delay involved there is not comparable to the two centuries of delay here, that this Court in similar circumstances in Cayuga held barred possessory claims in their entirety. Third, the 706 acres involved there is trivial compared to the more than quarter-million acres at stake here. Finally, Minnesota did not involve a suit against the State under the Nonintercourse Act. That case simply did not involve centuries-old land claims such as that which is involved here, where these equitable doctrines have now been held to bar possessory claims in their entirety.

In Felix v. Patrick, plaintiffs tried to bar the defendant from establishing a constructive trust over land their Indian ancestor had conveyed in violation of a federal statute. 145 U.S. at 326. The Supreme Court dismissed the claim on the ground of laches because of the 30-year delay in bringing the lawsuit during which the land was subdivided, developed and purchased by third parties. Id. at 335. While the Court acknowledged that plaintiffs might be able to demand repayment of the value of the illegally conveyed scrip, id. at 334, it did not award damages for the fair market value of the land. In fact, the Court awarded no damages whatsoever, but affirmed the lower court's decree dismissing bill. Id. at 335. Thus this case does not support plaintiffs' position.

Nor does Yankton Sioux[6] stand for the proposition the Oneidas espouse. In that case, the Tribe brought suit pursuant to special Congressional legislation claiming that under a series of treaties between the Tribe and the United States, the Tribe retained title

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[6] The Oneidas had previously disavowed that this case is in the mold of Yankton Sioux and the concept of awarding damages in lieu of possessory relief (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 . . . .

The Oneidas' new-found reliance on them only underscores the possessory nature of their claims.

to a tract of land containing red pipestone quarries. Although the Supreme Court held that the Tribe was indeed the rightful owner of the land, it did not require the United States to pay just compensation for the parts of the tract that the United States had taken but that were then "in possession of innumerable innocent purchasers." 272 U.S. at 357, 359. Thus, Yankton Sioux does not support the Oneidas' position.

C. In Cayuga, this Court Rejected Arguments that Applying Laches or Related Equitable Defenses Is Inconsistent with Oneida II, 28 U.S.C. § 2415, and the United States' Intervention.

The Oneidas and the United States continue to assert that barring a damages remedy on the ground of laches is inconsistent with the Supreme Court's decision in Oneida II; is inconsistent with Congress's alleged intent to permit these ancient claims to be prosecuted as expressed in 28 U.S.C. § 2415; and is inconsistent with case law holding that laches does not apply to claims brought by the United States. In Cayuga, these very same arguments were raised in the appellate briefs, but were rejected by this Court. These arguments were also unsuccessful in persuading any member of this Court to hear that case en banc. See Cayuga, Orders Denying Rehearing and Rehearing En Banc (2d Cir. Sept. 8, 2005). The arguments were also raised in the petitions for certiorari, which were denied. See Cayuga, 126 S.Ct. 2021 (2006).

The Oneidas in their response to the State's appeal continue to argue (Br. at 34-38) that the application of laches to their claim for a damages remedy is inconsistent with the Supreme Court's decisions in Oneida II, 470 U.S. 226 (1985), and Sherill, 544 U.S. 197 (2005). The United States recognizes that this Court rejected this very argument in Cayuga, but in the context of its cross appeal maintains (Br. at 33-36) that this Court erred in deciding Cayuga. There is no question that in Cayuga this Court fully considered and rejected the argument, 413 F.3d at 276-77, over a strong dissent on this very point, see 413 F.3d at 285 (Hall, D.J. dissenting). Moreover, the argument was raised both in the Cayugas' petition for rehearing en banc and the United States' petition for rehearing en banc (Cayuga Rehg. Pet. at 5; United States Rehg. Pet. at 11-12), and again in both parties' petitions for certiorari (Cayuga Cert. Pet. at 16-24; United States Cert. Pet. at 14-21).

Likewise, the Oneidas and the United States continue to argue here that the application of laches to these Indian land claims conflicts with Congressional policy expressed in 28 U.S.C. § 2415. Again, this Court in Cayuga fully considered and rejected this argument, 413 F.3d at 279, over a strong dissent to the contrary, see 413 U.S. at 288 (Hall, D.J. dissenting). The Cayugas and the United States again argued that the panel's ruling conflicts with § 2415 in their petitions for rehearing en banc (Cayugas Rehg. Pet. at 11-13; United States Rehg. Pet. at 13), and in their petitions

to the Supreme Court for certiorari (Cayugas Cert. Pet. at 27-28; United States Cert. Pet. at 21-24).

Finally, the United States in the context of its cross appeal, and the Oneidas in their response to the State's appeal, continue to argue that laches does not apply when the United States brings suit on behalf of a tribe to vindicate a violation of the Nonintercourse Act. But of course, the United States also intervened in Cayuga, and made the same argument. This Court acknowledged that the United States has not traditionally been subject to the defense of laches, but it held nevertheless that the equitable defense should be invoked in suits such as these. Like the arguments regarding the conflict with Oneida II and 28 U.S.C § 2415, this Court rejected the argument that laches does not apply to suits brought by the federal government, 413 F.3d at 278, despite the contrary and lengthy discussion of this issue by the dissent, see 413 F.3d at 286-88 (Hall, D.J. dissenting). And once again the parties raised this argument in their petitions for rehearing en banc (Cayuga Rehg. Pet. at 13-15; United States Rehg. Pet. at 10-13), and in the petitions for certiorari (Cayugas Cert. Pet. at 24-27; United States Cert. Pet. at 25-28).

In short, these arguments were squarely presented to this Court in Cayuga, and the Court rejected them. Thus, as we discuss below, this case presents no occasion to reconsider these arguments.

POINT II

THE DISTRICT COURT PROPERLY DISMISSED ALL POSSESSORY LAND CLAIMS

A. Cayuga Is Law of the Circuit.

Both the Oneidas (Br. at 64) and the United States (Br. at 19-37) argue that Cayuga was wrongly decided. In fact, the United States devotes a large portion of its brief to this argument. Both the Oneidas and the United States recognize, however, that this Court's decision in Cayuga is law of the Circuit, and they do not seriously argue that a panel of this Court can or should overrule it. Instead, they seek to preserve the issue for review by this Court en banc or the Supreme Court.

The Court is "bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court en banc.'" New York v. National Service Industries, 460 F.3d 201, 207 (2d Cir. 2006), quoting BankBoston, N.A. v. Sokolowski, 205 F.3d 532, 534-35 (2d Cir. 2000); see United States v. Wilkerson, 361 F.3d 717, 732 (2d Cir.), cert. denied, 543 U.S. 908 (2004). Neither the Oneidas nor the United States contend that, since Cayuga, there has been an intervening decision of the Supreme Court or this court en banc which would warrant departure from the panel's decision and rationale in Cayuga. Thus there is no occasion for this Court to reexamine its decision in Cayuga.

B. There is No Question of Fact Warranting Remand to Determine Whether Equitable Doctrines such as Laches Should Be Invoked to Bar the Oneidas' Trespass Claims.

The district court in this case properly found no basis for holding a factual hearing before determining that equitable principles bar all "possessory claims." As the district court noted, "the facts that would be considered as part of a laches inquiry, especially with regard to the potential prejudice that would result to Defendants, are generally self-evident and further discovery regarding these matters would, in any event, be counterproductive" (SPA14-15, n.2). Accordingly, the court properly granted summary judgement on all possessory claims.

The Supreme Court has already reviewed this same historical record and found that the Oneidas' claim of sovereignty is barred by equitable principles. In Sherrill, the Supreme Court based its conclusion that the New York Oneidas were barred by equitable principles from asserting sovereignty over land within the boundaries of their former reservation on facts that cannot be disputed, including the "distance from 1805 to the present day;" the Oneidas' "long delay" in seeking equitable relief against the local and State governments; 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; "the impracticability of returning to Indian control

land that generations earlier passed into numerous private hands," and the fact that "the properties . . . involved have greatly increased in value since the Oneidas sold them 200 years ago." 544 U.S. at 217-20. In Cayuga, this Court found that the "same considerations that doomed the Oneidas' claim in Sherrill apply with equal force here." 413 F.3d at 277. These identical considerations doom the Oneidas' claim here and require dismissal of all possessory claims, whatever the remedy.

Indeed, the district court below found support in the wisdom of Judge McCurn's earlier decision in this very case denying, without permitting further factual development, the plaintiffs' and the United States' motions to amend their pleadings to seek ejection of 20,000 innocent landowners (SPA14, n.2, quoting Oneida Indian Nation of New York v. County of Oneida, 199 F.R.D. 61, 92 (N.D.N.Y. 2000). Judge McCurn recalled that in Cayuga he had, in an abundance of caution, conducted an evidentiary hearing to consider the availability of ejectment as a remedy. Analogizing himself to a Monday morning quarterback with the advantage of hindsight, Judge McCurn found himself "convinced that that hearing can be fairly described as an academic exercise" because "[m]uch of the proof adduced therein fell into the category of commonsense observations." 199 F.R.D. at 92. Thus, he concluded, "The court

gained little if any insight -- either factually or legally -- from that hearing; it only needlessly prolonged the Cayuga litigation." Id.

This Court's decision in Cayuga confirms that no further factfinding is warranted here and would only needlessly prolong this litigation. Closely paralleling the facts in this case, plaintiffs in Cayuga claimed 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. This Court found no need for further fact-finding to determine whether the elements of laches and the other equitable doctrines discussed in Sherrill "mandate[d]" dismissal of the Cayugas' possessory claims for ejectment and damages. 413 F.3d at 277.

In particular, Sherrill and Cayuga dispose of the Oneidas' argument that they were not responsible for any unreasonable delay in bringing their lawsuit. It is undisputed that "[t]he Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's." Sherrill, 544 U.S. at 216. Their "failure to reclaim ancient prerogatives earlier," id., n.11, precluded the Oneidas' disruptive claim in Sherrill. That decision, as well as this Court's decision in Cayuga, preclude the Oneidas' assertion that laches should not be invoked.

This Court rejected the Cayugas' similar argument, writing:

> The District Court itself, as discussed above, found that laches barred the Cayugas' preferred remedy of ejectment. Indeed, the District Court noted that "[r]egardless of when the Cayugas should have or could have commenced this lawsuit, the court cannot overlook the prejudicial consequences which the defendants would sustain if the court were to order ejectment," and found that the "prejudice factor" was "a factor which is far too important to ignore."

413 F. 3d at 279-80. "In light of these findings, and the Supreme Court's ruling in Sherrill," the Court saw no need "to remand to the District Court for a determination of the laches question." Id. at 280. Indeed, this Court held that the Cayugas' claim "was subject to dismissal ab initio" and "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." Id. at 277-78.

Under Cayuga and Sherrill, the district court in this case properly determined that no further factfinding was necessary. Those cases mandate that all possessory claims, regardless of the remedy, be dismissed in their entirety. While the Oneidas and the United States seek damages which they characterize as non-possessory, they concede that their complaint asserts claims based only on the alleged violation of their right to possession. There is no meaningful difference between the possessory claim asserted in Cayuga and the possessory claim asserted here. As in Cayuga,

the Oneidas' request for a "fair compensation" remedy does not state a separate, non-possessory claim, but an additional measure of damages for violation of their claimed possessory right. Because any claim for "fair compensation" requires a finding that the Oneida treaties violated federal law, it would "call into question title" to over 250,000 acres of land in upstate New York. Such "disruptive" claims are precluded by Cayuga.

CONCLUSION

The complaints should have been dismissed in their entirety.

Dated: Albany, New York
February 8, 2008

Respectfully submitted,

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