No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

IGNACIA S. MORENO
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

CURTIS E. GANNON
Assistant to the Solicitor General

SAMUEL C. ALEXANDER
STEVEN E. MISKINIS
ELIZABETH ANN PETERSON
KATHRYN E. KOVACS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 07-2430-cv(L), 07-2548-cv(XAP),
07-2550-cv(XAP)

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

Argued: June 3, 2008
Decided: Aug. 9, 2010

Before: MCLAUGHLIN, LIVINGSTON, Circuit Judges, and GERSHON,[*] District Judge.

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[*] The Honorable Nina Gershon, of the United States District Court for the Eastern District of New York, sitting by designation.

Judge GERSHON concurs in part and dissents in part in a separate opinion.

DEBRA ANN LIVINGSTON, Circuit Judge:

We are once again called upon to consider the availability of relief to Indian nations alleged to have been deprived long ago of their ancestral lands by the State of New York in violation of federal law. We adjudicate these ancient claims, dating back over two hundred years, against the background of over thirty years of litigation here and in the Supreme Court. These earlier cases, involving both present plaintiffs and the Cayuga Indian Nation, frame the issue now before us and in large measure determine its outcome.

In 1970 the Oneida Indian Nation of New York ("New York Oneidas") and the Oneida Indian Nation of Wisconsin ("Wisconsin Oneidas") brought suit—a "test case"—seeking from the Counties of Madison and Oneida in New York State two years of fair rental value (for 1968 and 1969) for about 872 acres occupied by these counties. This land represented a small portion of certain land ceded by the Oneida Indian Nation, the plaintiffs' ancestors, to New York State in 1795 in alleged violation of both federal treaties and the Trade and Intercourse Act ("Nonintercourse Act"), Act of July 22, 1790, ch. 33, 1 Stat. 137 (1790) (codified as amended at 25 U.S.C. § 177), which prohibits sales of tribal land without the consent of the United States. The case reached the Supreme Court. The Court concluded that because the complaint asserted a current right to possession of the lands that existed as a matter of federal law, the plaintiffs had satisfied the well-pleaded complaint rule: "The claim may fail at a later stage for a variety of reasons; but for jurisdictional purposes, this is not a

case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation." *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 675, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974) ("*Oneida I*"). Subsequently, the Court determined *in County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985) ("*Oneida II*"), that the New York and Wisconsin Oneidas, along with the Oneida of the Thames Band Council (collectively, "the Oneidas"), could maintain a cause of action for violation of their possessory rights to these aboriginal lands based on federal common law. *See Oneida II*, 470 U.S. at 236, 105 S. Ct. 1245. In the very decision recognizing that such a cause of action could be maintained, however, the Court noted that "[t]he question whether equitable considerations should limit the relief available to the present day Oneida Indians" had not been addressed and that it expressed "no opinion as to whether other considerations may be relevant to the final disposition of [the] case," which it remanded for further proceedings. *Id.* at 253 n.27, 105 S. Ct. 1245. On remand, the district court awarded damages in the amount of $18,970 from Madison County and $15,994 from Oneida County, along with prejudgment interest, for a total judgment of about $57,000. *Oneida Indian Nation of N.Y. v. County of Oneida*, 217 F. Supp. 2d 292, 310 (N.D.N.Y. 2002).

The present case was brought in 1974, but lay dormant for the better part of 25 years while the parties explored settlement and the Oneidas pursued the preceding "test case" on its two separate trips to the Supreme Court. *See City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 209, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005) (noting that the present litigation,

"held in abeyance during the pendency of the test case," resumed only in 2000); *see also Oneida Indian Nation of N.Y. v. New York*, 194 F. Supp. 2d 104, 113 (N.D.N.Y. 2002). The instant case involves the Oneidas' claim not to 872 acres and to two years of rent, but to approximately 250,000 acres of ancestral lands, and to relief going back over two hundred years, to the period between 1795 and 1846 when these lands were conveyed in multiple transactions to the State of New York. During the intervening years from 1974 until today, moreover, a subsequent decision of the Supreme Court, *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386, and this Court's decision in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128, 126 S. Ct. 2021, 164 L. Ed. 2d 780 (2006), have explored in ways pertinent to our decision here the questions that remained undecided following *Oneida I* and *Oneida II*—namely, whether and in what circumstances equitable principles might limit the relief available to present day Indian tribes deprived of ancestral lands many years ago in violation of federal law.

The Oneidas, along with the United States, which intervened in this litigation in 1998, asserted a variety of claims before the district court. In an order dated May 21, 2007, the United States District Court for the Northern District of New York (Lawrence E. Kahn, District Judge), relying principally on this Court's decision in Cayuga, granted in part a motion for summary judgment filed by the State of New York and the Counties of Oneida and Madison on the ground that all but one of the plaintiffs' claims were barred by laches. *See Oneida Indian Nation of N.Y. v. New York*, 500 F. Supp. 2d 128, 137 (N.D.N.Y. 2007) ("*Oneida III*").

Based on the Supreme Court's decision in *Sherrill*, *Cayuga* had previously determined that equitable defenses apply to "disruptive" Indian land claims, and that possessory claims—claims premised on the assertion of a continuing right to possession of ancient tribal lands—are by their nature disruptive, in that they call into question settled land titles. *See Cayuga*, 413 F.3d at 274-75. The district court in the present case held that laches barred all the plaintiffs' possessory claims, but that the plaintiffs could proceed against the State of New York alone with what the district court termed a "nonpossessory," contract-based claim for unconscionable consideration in connection with the original land transfers. This Court granted New York's petition pursuant to 28 U.S.C. § 1292(b) for leave to appeal, as well as the cross petitions of the Oneidas and the United States.

Here, the Oneidas and the United States assert primarily that the district court erred in dismissing any of the Oneidas' claims, contending both that this Court's decision in *Cayuga* was incorrectly decided and that, even accepting that *Cayuga* is controlling here, the defendants failed to establish the necessary elements of a laches defense. The United States defends the district court's decision to the extent it permitted plaintiffs to proceed with a "nonpossessory" claim, while at the same time it articulates an alternative claim to that recognized by the district court, grounded not in federal common law but in the Nonintercourse Act.[1] Meanwhile, New York State argues principally that the district

[1] The Oneidas assert that both federal common law and the Nonintercourse Act provide a basis for asserting "nonpossessory" claims that are not subject to *Cayuga*'s equitable defense.

court erred in permitting a claim to proceed on the theory that New York paid unconscionably inadequate consideration for the subject lands and that reformation of the original agreements to provide for appropriate compensation is an available remedy. It contends, *inter alia*, that this claim, as well as the alternative claim pressed by plaintiffs on appeal, falls within *Cayuga*'s recognition that equitable considerations bar the adjudication of disruptive Indian land claims. New York contends, in addition, that its sovereign immunity bars the contract-based claim on which the district court permitted the Oneidas to proceed.

For the reasons articulated below, we conclude that the district court correctly determined that *Cayuga* is controlling here, and that all claims dependent on the assertion of a current possessory interest in the subject lands are barred by equitable defenses. We further conclude, however, that the purportedly nonpossessory claim identified by that court is also barred, both by New York's sovereign immunity and by the equitable principles applied in *Cayuga*. In light of *Cayuga*'s holding that equitable defenses apply to disruptive Indian land claims, we finally conclude that the alternative nonpossessory claim articulated on appeal by the plaintiffs, premised on a violation of the Nonintercourse Act, is also barred.

BACKGROUND

Because both this Court and the Supreme Court have repeatedly considered this case and other related cases involving the Oneidas, the historical events that form the basis for the plaintiffs' claims have been described extensively elsewhere, including in *Oneida I*, *Oneida II*,

Sherrill, this Court's decision in *Oneida Indian Nation of New York State v. County of Oneida*, 719 F.2d 525 (2d Cir. 1983), *aff'd in part, rev'd in part by Oneida II*, 470 U.S. 226, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985), and the opinion of the district court below. Accordingly, we outline these events only briefly here, providing a somewhat more extended recounting of the case's procedural history.

The Oneidas are direct descendants of the Oneida Indian Nation, one of six nations of the Iroquois with an aboriginal homeland that "[a]t the birth of the United States . . . comprised some six million acres in what is now central New York." *Sherrill*, 544 U.S. at 203, 125 S. Ct. 1478. Under pressure to open this land for settlement in the years after the Revolutionary War, New York State in 1788 concluded the Treaty of Fort Schuyler with the Oneida Indian Nation pursuant to which New York purchased the majority of the Nation's land in New York, leaving the Nation with a reservation of approximately 300,000 acres. *Id.* The legitimacy of this initial transfer is not at issue in the present case. Some two years after the Treaty of Fort Schuyler, the United States Congress enacted the Nonintercourse Act, which "bars sales of tribal land without the acquiescence of the Federal Government." *Id.* at 204.[2] In 1794, the United

[2] The Nonintercourse Act was renewed and revised several times and remains codified today at 25 U.S.C. § 177. The version of the Act in effect in 1793 provided in relevant part:

> [N]o purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in nego[t]iating such

States entered into the Treaty of Canandaigua, Act of Nov. 11, 1794, 7 Stat. 44, with the six Iroquois nations: "That treaty both 'acknowledge[d]' the Oneida Reservation as established by the Treaty of Fort Schuyler and guaranteed the Oneidas' 'free use and enjoyment' of the reserved territory." *Sherrill*, 544 U.S. at 204-05, 125 S. Ct. 1478 (alteration in original) (quoting Treaty of Canandaigua, Art. II, 7 Stat. 45).

Despite the passage of the Nonintercourse Act and the conclusion of the Treaty of Canandaigua, New York continued to purchase land from the Oneida Indian Nation in a series of transactions from 1795 to 1846. *Id.* at 205, 125 S. Ct. 1478. The Washington Administration objected to the first of these transactions involving 100,000 acres, but later administrations made no attempt to interfere with New York's continued acquisition of land reserved to the Oneida Nation. *See id.* Indeed, as the Supreme Court recognized in *Sherrill*, "early 19th-century federal Indian agents in New York State did not simply fail to check New York's land purchases, they 'took an active role . . . in encouraging the removal of the Oneidas . . . to the west.'" *Id.* (quoting *Oneida Nation of N.Y. v. United States*, 43 Ind. Cl. Comm'n 373, 390 (1978)). By 1838, six hundred members of the Oneida Nation resided in Wisconsin, while 620 remained in New York State, and the United States was actively pursuing a plan, through the Treaty of Buffalo Creek, to remove all of the remaining New York

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> treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians . . . for the title or purchase of any lands by them held, or claimed.

Act of Mar. 1, 1793, ch. 19, § 8, 1 Stat. 329, 330.

Oneidas, as well as other New York Indians, to Kansas.[3] *Id.* at 206, 125 S. Ct. 1478. "The Oneidas who stayed on in New York . . . continued to diminish in number and, during the 1840's, sold most of their remaining lands to the State." *Id.* at 206-07, 125 S. Ct. 1478.

The New York and Wisconsin Oneidas first instituted court proceedings seeking recompense in connection with these transactions with New York State in 1951, when they brought suit against the United States pursuant to the Indian Claims Commission Act ("ICCA"), ch. 959, 60 Stat. 1049 (1946). They asserted then that they had received unconscionable compensation in connection with "lands that New York had acquired through 25 treaties of cession concluded between 1795 and 1846," that the United States had breached its fiduciary duty to them under the Nonintercourse Act, and that they should receive the fair market value of the transferred lands. *Sherrill*, 544 U.S. at 207, 125 S. Ct. 1478. The Indian Claims Commission determined that the United States in fact had actual or constructive knowledge of these treaties and that it "would be liable if the Oneidas had not received conscionable consideration." *Id.* at 208, 125 S. Ct. 1478 (citing *Oneida Nation of N.Y. v. United States*, 43 Ind. Cl. Comm'n 373, 375, 406-07 (1978)). At the request of the New York and Wisconsin Oneidas, however, the case then pending before the Court of

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[3] The Treaty of Buffalo Creek, which was entered into between the Oneidas and the United States in 1838, "envisioned removal of all remaining New York Indians, including the Oneidas, to Kansas." *Sherrill*, 544 U.S. at 206, 125 S. Ct. 1478. "In Article 13 of the . . . Treaty, the Oneidas agreed to remove to the Kansas lands the United States had set aside for them as soon as they could make satisfactory arrangements for New York State's purchase of their lands at Oneida." *Id.* (internal quotation marks and alteration omitted).

Claims was dismissed prior to any determination of the scope of the United States' liability. *Id.* The Court of Claims noted at the time that this was as a result of the plaintiffs' view "that their interests would not be served by obtaining any monetary compensation," and that they "prefer[red] to press litigation . . . seeking a determination that they have present title to the land in New York State. . . ." *Oneida Nation of N.Y. v. United States*, 231 Ct. Cl. 990 (Ct. Cl. 1982) (per curiam).

Commenced by the New York and Wisconsin Oneidas some eight years before they abandoned their case before the Indian Claims Commission, the instant litigation represents the alternative venue in which the Oneidas elected to pursue their claims. As originally pled in 1974, this case sought recompense for the illegal occupation of Oneida land by the Counties of Madison and Oneida from 1951 onwards.[4] The plaintiffs asserted no claim for unconscionable consideration in connection with the original transfers to New York State and, indeed, could not have done so because New York State was not a party to the litigation and the Counties were not parties to the various sale agreements between New York and the Oneida Indian Nation. After decades during which the suit lay dormant, the United States intervened in the litigation against the Counties in 1998. In 2000, both the original plaintiffs and the United States amended their pleadings to add the Oneida of the Thames as an additional plaintiff and, for the very first

[4] As noted previously, the New York and Wisconsin Oneidas at the time this litigation was initiated were seeking damages from the United States in the Court of Claims proceeding for the period prior to 1951. *See Oneida Indian Nation v. County of Oneida*, 199 F.R.D. 61, 68 (N.D.N.Y. 2000).

time, to name the State of New York as a defendant. Both the Oneidas and the United States also sought to join as defendants 20,000 private landowners. The district court prohibited the assertion of any claims against private landowners, finding: (1) that the Oneidas had acted in bad faith in that for thirty years they "[had] steadfastly maintained that they were *not* seeking to disrupt the current landowners," only to abandon this position in an effort to dispossess these landowners and also to obtain money damages from them; and (2) that the United States had likewise failed to act in good faith by "vacillating on the critical issue of the private landowners' role . . . in this litigation." *Oneida Indian Nation v. County of Oneida*, 199 F.R.D. 61, 81, 87 (N.D.N.Y. 2000).

The district court did permit the Oneidas significantly to amend their complaint against the present defendants to expand both the claims asserted and the scope of the relief sought so that the litigation came to encompass the 250,000-some acres and the 200-plus year history now at issue. The Oneidas filed an amended complaint, noting that it was "filed in accordance with [the district court's] decision" with regard to the private landowners and therefore was "not a waiver of any rights or claims." Oneida Am. Compl. ¶ 2. As amended, the Oneidas' complaint states that:

> Under Federal common law, the Nonintercourse Act and the Treaty of Canandaigua, Plaintiff Tribes . . . have "possessory rights" in the subject lands . . . 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 the 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 Nonintercourse Act and other Federal law and that the purported agreements and letters patent by which the subject lands were acquired or transferred . . . were void ab initio.

Id. ¶ 3. The Oneidas' prayer for relief seeks a declaration: (1) that the Oneidas "have possessory rights to the subject lands . . . and there has been no termination of those possessory rights"; (2) that the subject lands were "conveyed unlawfully"; (3) that the various agreements pursuant to which the lands were conveyed "were void ab initio"; (4) that "the subject lands have been in the unlawful possession of trespassers"; and (5) that "all interests of any defendant in the subject lands are null and void." *Id.* at 24. The Oneidas seek injunctive relief "as necessary to restore [them] to possession of those portions of the subject lands to which [the] defendants claim title." *Id.* at 25. They also seek damages: (1) "in the amount of . . . the fair market value of the subject lands, as improved"; (2) in the amount of the lands' fair market rental value from the date of transfer to the present; (3) in an amount equal to the lands' diminution in value due to any extraction of resources or "damage, pollution or destruction" to the property; and (4) in an amount equal to the value of any of these resources, whether taken from the lands by the defendants or those "purporting to act with defendants' permission." *Id.* The Oneidas also seek benefits received by New York

State "from its purported purchases and sales of the subject lands," including "the difference in value between the price at which New York State acquired or transferred each portion of the subject lands from the Oneida Indian Nation and its value." *Id.* at 26.

The United States also amended its complaint in 2000. The 2000 United States complaint asserted both a "Federal Common Law Trespass Claim" and a "Trade and Intercourse Claim." U.S. Am. Compl. at 14, 15. In its prayer for relief, the United States sought "damages, including prejudgment interest, against the State of New York as the primary tortfeasor . . . for the trespasses to the Subject Lands that originated with the State's illegal transactions." *Id.* at 16. The United States also sought a determination that the State's "purported acquisitions" of the property violated federal law, that the various agreements pursuant to which these acquisitions took place were void, and an award of appropriate "declaratory relief and/or ejectment" with regard to lands to which New York State and the Counties claimed title. *Id.* The United States amended its complaint again in 2002 to drop its claims against the Counties. In its prayer for relief, the 2002 amended complaint seeks, *inter alia*, a declaratory judgment "that the Oneida Nation has the right to occupy the [subject] lands . . . currently occupied by the State." It seeks "monetary and possessory relief," including ejectment against the State, where appropriate, along with mesne profits or the fair rental value for all the subject lands "from the time when the State attempted to acquire each separate parcel . . . until the present," on the theory that the State "was the initial trespasser . . . and all injury to the Oneida Nation flowed from the

State's tortious actions, including the subsequent trespasses by private landowners." U.S. Second Am. Compl. at 14-15. The complaint seeks a judgment against New York "awarding appropriate monetary relief for those lands . . . over which the State no longer retains title or control." *Id.* at 15. It also seeks "such other relief as [the] Court may deem just and proper." *Id.*

After the Supreme Court's decision in *Sherrill* and this Court's decision in *Cayuga*, New York and the Counties moved for summary judgment on both the Oneidas' and the United States' claims on the theory that the doctrine of laches precluded them. Noting that the Supreme Court in *Sherrill* had "held that equitable principles barred the New York Oneidas from reasserting tribal sovereignty over land they had purchased that was within the boundaries of the Oneidas' former reservation area," and that this Court had determined in *Cayuga* "that disruptive possessory land claims are subject to the equitable doctrines, specifically laches, applied in *Sherrill*," *Oneida III*, 500 F. Supp. 2d at 131-32, the district court concluded that claims "predicated on [the Oneidas'] continuing right to possess land . . . and seek[ing] relief returning that land and damages based on . . . dispossession" were subject to the laches defense, *id.* at 134. The district court elaborated:

> The Court is compelled to take this action to prevent further disruption: Plaintiffs seek to eject Defendants from their land and obtain trespass damages related to Defendants' unjust possession of the land. . . . [C]laims based on the Oneidas' 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. Past injustices suffered by the Oneidas cannot be remedied by creating present and future injustices.

Id. at 137. The district court determined, however, that the Oneidas had adequately pled a claim for disgorgement by the State of New York of the difference in value between the price at which New York acquired the subject lands pursuant to the twenty-six agreements at issue and the lands' value at the time of these transactions. The court determined that this claim "[was] best styled as a contract claim that seeks to reform or revise a contract that is void for unconscionability" and determined that such a claim was not disruptive because it "only seeks retrospective relief in the form of damages, is not based on Plaintiffs' continuing possessory right to the claimed land, and does not void the agreements," but rather reforms them "through an exercise of [the court's] equitable power[s]." *Id.* at 140. Accordingly, the court granted the defendants' motion in part and denied it in part, noting that its decision "permits the Oneidas to reform and revise the twenty-six (26) agreements with the State and to receive fair compensation for lands transferred by their ancestors." *Id.* at 147. The instant appeal and cross appeal followed.

DISCUSSION

At the start, both the Oneidas and the United States urge us to repudiate this Court's earlier decision in *Cayuga*. This we cannot do. This panel is bound to adhere to the earlier precedent of this Court in the absence of a decision by the Supreme Court or an *en banc* panel of this Court calling that precedent into question. *See*

Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 274 (2d Cir. 2005). Nothing of the sort has occurred here. Accordingly, we must and we will follow *Cayuga* to the extent it is controlling. We thus begin with the Supreme Court's decision in *Sherrill* and this Court's decision in *Cayuga*, which explained *Sherrill*'s import for the proper adjudication of ancient tribal land claims. We then proceed to consider both the possessory claims dismissed by the district court on the authority of *Cayuga* and the purportedly nonpossessory claims that plaintiffs contend they are entitled to pursue.

I. *Sherrill* and *Cayuga*

This Court's decision in *Cayuga*, upon which the district court relied in dismissing the bulk of the plaintiffs' claims, was itself based on the Supreme Court's 2005 decision in *Sherrill*, which the *Cayuga* panel found fundamentally to have changed the background legal standards for assessing ancient tribal land claims. *Cayuga*, 413 F.3d at 273. *Sherrill* involved about 17,000 acres scattered throughout the Counties of Madison and Oneida that were once part of the plaintiffs' ancestral lands and that were purchased on the open market by the New York Oneidas in 1997 and 1998. The New York Oneidas, citing *Oneida II*, argued that upon reacquiring this land, which represented less than 1.5% of the Counties' total area, the Oneida Indian Nation's ancient sovereignty over each individual parcel was revived, barring the City of Sherrill or the Counties of Madison and Oneida from requiring the plaintiffs to pay property taxes. The New York Oneidas sought equitable relief in the form of a declaration "prohibiting, currently and in the future, the imposition of property taxes" on the lands they had reacquired. *Sherrill*, 544 U.S. at 212, 125

S. Ct. 1478. The Court determined that such relief could not be granted:

> [W]e decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns. 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, 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. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.

Id. at 202-03, 125 S. Ct. 1478.

The Court addressed a number of factors in reaching this conclusion. Although the United States appeared as amicus curiae on behalf of the New York Oneidas in *Sherrill*, the Supreme Court noted that "[f]rom the early 1800's into the 1970's, the United States 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." *Id.* at 214, 125 S. Ct. 1478. Indeed, national policy through much of the early 1800's "was designed to dislodge east coast lands from Indian possession." *Id.* at 214-15, 125 S. Ct. 1478. The Court found

it relevant that the Oneidas "did not seek to regain possession of their aboriginal lands by court decree until the 1970's" and that the Oneidas for generations had predominantly sought relief "not [from] New York or its local units" but from the United States. *Id.* at 216, 219 n.12, 125 S. Ct. 1478. During this long lapse of time, the properties had greatly increased in value and there had been dramatic changes in their character. *Id.* at 216-17, 125 S. Ct. 1478. The Court recognized the "disruptive practical consequences" that would flow from "[a] checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at [the plaintiffs'] behest." *Id.* at 219-20, 125 S. Ct. 1478. Evoking the doctrines of laches, acquiescence, and impossibility, the Court concluded that equitable considerations—considerations arising out of the Oneidas' long delay in seeking relief, the attendant development of justified societal expectations relating to the governance of the lands in question, and the potential of the sought-after relief to disrupt those expectations—precluded the Oneidas from obtaining their sought-after declaration. *See id.* at 214-21, 125 S. Ct. 1478.

This Court concluded shortly after *Sherrill* was decided that because its claims were likewise "indisputably disruptive," the Cayuga Indian Nation was barred by similar equitable considerations from seeking recompense for the ancient deprivation of its ancestral lands, even though these claims, unlike those in *Sherrill*, sounded primarily in law rather than equity, and even though only money damages were at issue. *Cayuga*, 413 F.3d at 275. *Cayuga* involved the Cayuga Indian Nation's claim to 64,015 acres of land that were ceded to New York in 1795 and 1807, allegedly in violation of both the Nonintercourse Act and the Treaty of Canandaigua.

The Cayugas sought, *inter alia*, both ejectment of the current residents and trespass damages. The district court ruled in favor of the plaintiffs on liability, but determined that ejectment was not a proper remedy and thereafter conducted a jury trial on damages; the damages were limited to the fair market value of the property at the time of trial in 2000 and to fair rental value damages from 1795 to 1999. The trial resulted in a verdict against New York State that, with prejudgment interest, totaled $247,911,999.42.[5]

On appeal, this Court determined that since the district court's rulings in *Cayuga*, *Sherrill* had "dramatically altered" the legal landscape against which ancient tribal land claims should be considered: "We understand *Sherrill* to hold that equitable doctrines, such as laches, acquiescence, and impossibility, can, in appropriate circumstances, be applied to Indian land claims, even when such a claim is legally viable and within the statute of limitations." *Id.* at 273. The Court concluded that *Sherrill*'s concern with the New York Oneidas' claim had been with "the disruptive nature of the claim itself," and that, accordingly, the equitable defenses invoked in *Sherrill* apply, not narrowly to claims seeking a revival of sovereignty, but to "'disruptive' Indian land claims more generally," *id.* at 274, whether such claims are le-

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[5] The United States successfully intervened in the *Cayuga* litigation in November 1992, so that notwithstanding New York's sovereign immunity, the Cayugas were not barred from bringing claims against the State of New York identical to those brought by the United States. *Cayuga*, 413 F.3d at 270-71. In 1999, the district court ruled that the State of New York "could be deemed an original or primary tortfeasor," responsible for the allegedly unlawful occupation of the subject land by third parties, and the district court thereafter elected to proceed with the case with New York as the sole defendant. *Id.* at 271-72.

gal or equitable in character, *see id.* at 276, and whether or not the remedy sought is limited to an award of money damages, *see id.* at 274. The Court concluded that the doctrine of laches barred the Cayugas' claims, which it characterized as "possessory claims" that were by their nature disruptive in that they called into question settled land titles over a "large swath of central New York State." *Id.* at 275. With regard specifically to the ejectment claim, the Court observed that "[t]he fact that, nineteen years into the case, at the damages stage, the District Court substituted a monetary remedy for plaintiffs' preferred remedy of ejectment cannot salvage the claim, which was subject to dismissal ab initio." *Id.* at 277-78 (footnote omitted). As for the trespass claim, the Court said, it "is predicated entirely upon plaintiffs' possessory land claim" and "because plaintiffs are barred by laches from obtaining an order conferring possession in ejectment, no basis remains for finding such constructive possession or immediate right of possession as could support [trespass] damages." *Id.* at 278. The Court reversed the judgment of the district court in favor of the Cayugas and ordered judgment entered for the defendants.

II. The Oneidas' Possessory Land Claims

A. *Cayuga*'s Import

The district court determined here that the plaintiffs "assert a current possessory interest in the land" and that their claims, to the extent premised on such an interest, are subject to the equitable considerations at issue in *Cayuga*. *Oneida III*, 500 F. Supp. 2d at 133. "Plaintiffs," the district court observed, "assert certain claims predicated on their continuing right to possess

land . . . and seek relief returning that land and damages based on their dispossession." *Id.* at 134. The court concluded that "[t]he Second Circuit has held that a laches defense does apply to 'indisputably disruptive' possessory land claims, like those brought by the Cayugas and Plaintiffs in the instant case," and that it was "required to find Plaintiffs' possessory land claims are subject to the defense of laches." *Id.* We agree.

With regard to the claims that the Oneidas alone assert against Madison and Oneida Counties, each one of these claims is a "possessory" claim of the sort found potentially subject to equitable bar in *Cayuga*. The Oneidas assert that the Counties have "unlawfully possessed the subject lands," excluding the Oneidas from their rightful possession; that they have "kept and continued to keep [the Oneidas] out of possession"; and that they have "severed attachments such as minerals, crops, timber and other valuable resources from the land without authority to do so." Oneida Am. Compl. ¶¶ 55-56, 59. The Oneidas seek, *inter alia*, "damages in the amount of the fair market value of the subject lands," and damages representing "the fair market rental value of the subject lands" and "the value of all minerals and other resources taken from the subject lands." Each of these claims, whether asserting violations of federal common law, the Nonintercourse Act, or the Treaty of Canandaigua, sounds either in ejectment, trespass, or a related theory of injury derived from the Oneidas' claimed right to possession of the lands.[6] Indeed, the Counties were not par-

[6] *Cayuga* recognized, correctly, that a claim sounds in ejectment even when the ejectment remedy is "effectively monetized," since the "substitut[ion] [of] a monetary remedy for plaintiffs' preferred remedy of ejectment" does not alter the character of a claim asserting a present

ties to the various sale agreements between New York and the Oneidas, and thus the only claims *available to be asserted* against them relate to their alleged unlawful occupation of the subject lands in derogation of the Oneidas' superior possessory interest. Such claims, premised on the Oneidas' continuing right of possession, fall within *Cayuga*'s holding that equitable defenses "apply to possessory land claims of this type." *Cayuga*, 413 F.3d at 276.

This much is clear from even the most cursory reading of *Cayuga*. *Cayuga* expressly concluded that "possessory land claims"—any claims premised on the assertion of a current, continuing right to possession as a result of a flaw in the original termination of Indian title—are by their nature disruptive and that, accordingly, the equitable defenses recognized in *Sherrill* apply to such claims. *See id.* at 274-75 (determining claim seeking award of current market value of subject lands to be merely a "monetized" form of a claim "assert[ing] a continuing right to immediate possession" (internal quotation marks omitted)); *id.* at 278 (indicating that claim seeking award of past rental value based on a trespass theory is subject to equitable defense because "there can be no trespass unless the [plaintiffs] possessed the land in question" and such a claim "is based on a violation of their constructive possession"). As the district court in this case determined, *Cayuga* "concluded that this type of claim is inherently disruptive because it seeks to overturn years of settled land ownership." *Oneida II*, 500 F. Supp. 2d at 133. Here, the claims against Madison and Oneida Counties and the

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right to possession and "subject to dismissal *ab initio*." *Cayuga*, 413 F.3d at 277-78.

relief sought from these defendants are effectively *identical* to the claims and relief sought in *Cayuga*, in which the plaintiffs sought both the current fair market value of the subject lands as an alternative remedy to injunctive relief sounding in ejectment, and rental damages from 1795 to 1999 sounding in trespass. *See Cayuga*, 413 F.3d at 276, 278. Accordingly, the claims against Madison and Oneida Counties are subject to the defense recognized by this Court in *Cayuga*.

The same perforce holds true for the identical claims sounding in ejectment, trespass, or related "possessory" theories of injury brought against New York State by both the Oneidas and the United States. The district court rightly noted that this Court "was very clear in *Cayuga*: Indian possessory land claims that seek or sound in ejectment of the current owners are indisputably disruptive and would, by their very nature, project redress into the present and future; such claims are subject to the doctrine of laches." *Oneida III*, 500 F. Supp. 2d at 136. In *Cayuga*, the Court concluded with regard to such claims that "the import of *Sherrill* is that 'disruptive,' forward-looking claims, a category exemplified by possessory land claims, are subject to equitable defenses, including laches." *Cayuga*, 413 F.3d at 277. This is true even when such claims are "legally viable and within the statute of limitations," *id.* at 273, when the relief sought is limited to monetary damages, and when the disruptive claims sound at law rather than in equity, *id.* at 273-75. Indeed, the United States acknowledges in its brief before this Court that *Cayuga* "held that requests for money damages grounded on the asserted right to possess the land at issue," including the plaintiffs' Nonintercourse Act claim, to the extent predicated on such a right, are subject to the laches defense. U.S.

Br. at 31. The United States contends that "[this] holding was in error for several reasons," *id.*, but as noted earlier this question is not properly before us, and we do not address it.

B. The Applicability of Laches

The plaintiffs next argue that even if the equitable considerations relevant in *Cayuga* are also applicable here, the defendants have nevertheless failed to establish the elements of a laches defense, so the plaintiffs' possessory claims may still proceed. The United States argues, in addition, that it is not subject to laches when acting in its sovereign capacity and that the district court therefore erred in applying laches against it. For the reasons that follow, we disagree.

This matter is indistinguishable from *Cayuga* in terms of the underlying factual circumstances that led the *Cayuga* court to conclude not only that the laches defense and other equitable defenses were available, but also that laches actually barred the claims at issue in that case. Here, as in *Cayuga*, a tremendous expanse of time separates the events forming the predicate of the ejectment and trespass-based claims and their eventual assertion. In that time, most of the Oneidas have moved elsewhere, the subject lands have passed into the hands of a multitude of entities and individuals, most of whom have no connection to the historical injustice the Oneidas assert, and these parties have themselves both bought and sold the lands, and also developed them to an enormous extent. These developments have given rise to justified societal expectations (expectations held and acted upon not only by the Counties and the State of New York, but also by private landowners and a pleth-

ora of associated parties) under a scheme of "settled land ownership" that would be disrupted by an award pursuant to the Oneidas' possessory claims. *See Cayuga*, 413 F.3d at 275. By *Cayuga*'s logic, moreover, this is true no matter what specific relief such an award would entail, whether actual ejectment, damages for ongoing trespass liability, or, instead, payment of the fair market value of the property in a single lump sum. As the Court in Cayuga concluded, "disruptiveness is inherent in the claim itself—which asks this Court to overturn years of settled land ownership—rather than [being] an element of any particular remedy which would flow from the possessory land claim." *Id*.

We have used the term "laches" here, as did the district court and this Court in *Cayuga*, as a convenient shorthand for the equitable principles at stake in this case, but the term is somewhat imprecise for the purpose of describing those principles. As *Cayuga* recognized, "[o]ne of the few incontestable propositions about this unusually complex and confusing area of law is that doctrines and categorizations applicable in other areas do not translate neatly to these claims." *Id*. at 276. The Oneidas assert that the invocation of a purported laches defense is improper here as the defendants have not established the necessary elements of such a defense. It is true that the district court in this case did not make findings that the Oneidas unreasonably delayed the initiation of this action or that the defendants were prejudiced by this delay—both required elements of a traditional laches defense. *See Costello v. United States*, 365 U.S. 265, 282, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961) ("Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."); *Veltri v. Bldg.*

Serv. 32B-J Pension Fund, 393 F.3d 318, 326 (2d Cir. 2004) ("A party asserting the equitable defense of laches must establish both plaintiff's unreasonable lack of diligence under the circumstances in initiating an action, as well as prejudice from such a delay." (internal quotation marks omitted)). This omission, however, is not ultimately important, as the equitable defense recognized in *Sherrill* and applied in *Cayuga* does not focus on the elements of traditional laches but rather more generally on the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury.

In *Sherrill*, the Supreme Court concluded that "standards of federal Indian law and federal equity practice" barred the New York Oneidas from obtaining declaratory and injunctive relief that would have exempted them from state property taxation for former reservation lands recently reacquired through market transactions. *Sherrill*, 544 U.S. at 214, 125 S. Ct. 1478 (internal quotation marks omitted). More specifically, the Court determined that the tremendous expanse of time that had passed between the initial, allegedly unlawful transactions and the eventual initiation of the action at issue, as well as the intervening economic and regulatory development of the subject lands, had given rise to justifiable societal expectations that would be disrupted by that remedy. *See id.* at 221, 125 S. Ct. 1478 ("[T]he distance from 1805 [when the land at issue was transferred] to the present day, the [plaintiff's] long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several

generations . . . render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate."); *see also id.* at 215-16, 125 S. Ct. 1478 (noting the existence of "justifiable expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction"); *id.* at 219-20, 125 S. Ct. 1478 (discussing the possibility for the disruption of such expectations were the plaintiffs to be granted the remedy sought). The Supreme Court discussed laches not in its traditional application but as one of several preexisting equitable defenses, along with acquiescence and impossibility, illustrating fundamental principles of equity that precluded the plaintiffs "from rekindling embers of sovereignty that long ago grew cold." *Id.* at 214, 125 S. Ct. 1478*; see also id.* at 217-20, 125 S. Ct. 1478 (finding support for the conclusion that the plaintiff's claim was barred by equitable considerations in the three preexisting defenses of laches, acquiescence, and impossibility); *see also id.* at 221, 125 S. Ct. 1478 (noting that the relevant equitable considerations "evoke the doctrines of laches, acquiescence, and impossibility"). Moreover, the Supreme Court made no mention of unreasonable delay by the New York Oneidas, as distinguished from delay alone, or prejudice to the particular defendants, as opposed to the disruption of broader societal expectations. *Sherrill*, then, did not involve the application of a traditional laches defense so much as an equitable defense that drew upon laches and other equitable doctrines but that derived from general principles of "federal Indian law and federal equity practice." *Id.* at 213, 125 S. Ct. 1478.

This Court's analysis in *Cayuga* was similar. Although the *Cayuga* court, like the district court in this case, employed the term "laches" to describe the de-

fense upon which its decision rested, *see Cayuga*, 413 F.3d at 277, it also expressly indicated that it based its conclusion on the same reasoning that the Supreme Court had employed in *Sherrill*, *see id.* at 275 ("[W]e conclude that possessory land claims of this type are subject to the equitable considerations discussed in *Sherrill*."). Additionally, when the *Cayuga* court, after concluding that the claims asserted by the plaintiff in that case were subject to the *Sherrill* defense, addressed the subsidiary question whether those claims were thereby barred, it considered only factors equivalent to those addressed in *Sherrill*, *see id.* at 277, and, indeed, rejected the Cayugas' contention that their claims were barred only if the elements of a traditional laches defense were met, *see id.* at 279-80 (concluding that a finding of no unreasonable delay did not preclude the conclusion that plaintiffs' claims were nevertheless barred in light of, *inter alia*, "the Supreme Court's ruling in *Sherrill*," *id.* at 280). The United States contends that *Cayuga* "wrongly altered the traditional laches analysis by making any inquiry into unreasonable delay irrelevant." U.S. Br. at 38. We conclude, in contrast, that *Cayuga* applied not a traditional laches defense, but rather distinct, albeit related, equitable considerations that it drew from *Sherrill*. Either way, we are bound by *Cayuga* and therefore reject the Oneidas' and United States' contention that the district court erred by failing to consider the elements of a traditional laches defense.

Finally, the intervention of the United States on behalf of the Oneidas does not change this outcome. Although the United States is traditionally not subject to delay-based equitable defenses under most circumstances, *see, e.g., United States v. Summerlin*, 310 U.S. 414, 416, 60 S. Ct. 1019, 84 L. Ed. 1283 (1940), *Cayuga*

expressly concluded that the United States *is* subject to such defenses under circumstances like those presented here (*i.e.*, a lengthy delay in asserting the relevant cause of action, the absence of an applicable statute of limitations for the great majority of this delay, and an intervention to vindicate the interests of an Indian nation). Indeed, on facts virtually indistinguishable from those here, the *Cayuga* court concluded that "whatever the precise contours of the exception to the rule against subjecting the United States to a laches defense, this case falls within the heartland of the exception." *Cayuga*, 413 F.3d at 279.[7] Although the United States contends that this holding was in error, see U.S. Br. at 20, this argument is not properly before us and we do not consider it, instead adhering faithfully to *Cayuga*. *See Sullivan*, 424 F.3d at 274.

III. The "Nonpossessory" Claims

Our conclusion that the district court properly applied the equitable principles recognized in *Sherrill* and *Cayuga* to the possessory claims asserted by the Oneidas and by the United States does not end our inquiry. The district court also determined that although claims based on the Oneidas' possessory rights to the subject lands were disruptive and therefore barred by laches,

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[7] The dissent argues that *Cayuga* is distinguishable in that the United States here is acting not only on behalf of the Oneidas, but to assert its own interest in the vindication of a federal statute. In *Cayuga*, however, the United States also asserted that the initial transfers of land from the Cayuga Indian Nation had violated the Nonintercourse Act, U.S. Compl. in Intervention ¶¶ 8, 10-11, *Cayuga*, 413 F.3d 266, and the dissent's purported distinction therefore cannot serve as a basis for declining to find *Sherrill*'s equitable defense applicable to the United States in this case.

the Oneidas had "allege[d] facts necessary to assert non-possessory claims" against New York State alone. *Oneida III*, 500 F. Supp. 2d at 139. The district court permitted the Oneidas to proceed with regard to one such claim. The plaintiffs press another on appeal. We begin by laying out with specificity each claim now before us.

First, the district court, broadly construing the Oneidas' complaint, discerned in it a common law "contract" claim—a different claim from any before considered by the Supreme Court, this Court, or the district court itself in this litigation's thirty-year history—premised on the assertion that the Oneidas received unconscionable consideration in the original transactions with New York State. The remedy for this alleged wrong, the district court concluded, is the reformation of the challenged agreements. *Id.* at 140. The district court determined that this claim was not barred by laches:

> Plaintiffs claim that the State inadequately compensated the Oneida Indian Nation for land transferred to it. This claim is best styled as a contract claim that seeks to reform or revise a contract that is void for unconscionability. This type of contract claim is not disruptive. . . . [T]he Court would reform the agreements through an exercise of its equitable power, which implicitly recognizes and confirms the transfer of property made pursuant to the agreements subject to attack. Therefore, Plaintiffs may pursue this cause of action while conforming to the Circuit's mandate in *Cayuga* that Defendants' settled expectations not be disrupted.

Id. The court determined that the Oneidas, to prevail on this "unconscionable consideration" claim, would need to

establish either (1) "the inadequacy of consideration . . . coupled with evidence of the inferiority of the Oneida Indian Nation's negotiating position, which can be established by evidence demonstrating that the State deceived or misled Plaintiffs as to the value of the land or had knowledge of any fact bearing upon its value that was not well known by Plaintiffs"; or (2) "the gross inadequacy of the consideration received . . . in comparison to the fair market value of the land such that it is unnecessary for Plaintiffs to make any additional showing regarding the State's actions or knowledge." *Id.* at 144. Notably, the district court grounded this claim in federal common law, not in any violation of the Nonintercourse Act. *See id.* at 138-39 & n.4, 140.

The plaintiffs on appeal, while generally supporting the district court's conclusion that a purportedly nonpossessory claim may proceed, focus principally on a fundamentally different claim from the one recognized by the district court. The United States contends that a finding that the challenged land transactions violated the Nonintercourse Act is in and of itself sufficient to support a damages award.[8] Contending that the Act protects not only against the unauthorized sale of Indian lands but that it also seeks to assure that any such sales that do take place are not "unfair," the United States asserts that "claims that seek fair compensation for the land" as a form of restitution "(rather than recovery of

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[8] To reiterate, the version of the Nonintercourse Act in effect in 1793 provided in relevant part that "[N]o purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, *shall be of any validity in law or equity*, unless the same be made by a treaty or convention entered into pursuant to the constitution." 1 Stat. at 330 (emphasis added).

possession) are . . . appropriate" under the Act.[9] U.S. Br. at 53, 56. The United States further contends that the restitutionary remedy should include not only fair compensation but also disgorgement of all profits realized by the State of New York through its transactions in the subject lands. The district court concluded such a claim, seeking a damages award in lieu of the return of unlawfully transferred property, is predicated on the Oneidas' right to possess the subject lands and is thus barred under the principles of *Cayuga*:

> The Circuit's reasoning [in Cayuga] 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 land necessarily implicates the Oneidas' historical claim to the land in question.

Oneida III, 500 F. Supp. 2d at 144 n.8. The court concluded that its contract claim, in contrast, "does not rely on any present or future claim to the land in question and [thus] does not run afoul of the *Cayuga* court's decision." *Id.*

The State of New York urges us to conclude that *each* of the above-described claims is similarly disruptive and accordingly subject to *Cayuga*'s equitable defense. New York also contends, *inter alia*, that its sov-

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[9] The Oneidas, while supporting the district court's conclusion that a nonpossessory, contract-based claim premised on federal common law may proceed, also articulate as an alternative a "fair compensation" claim grounded in New York's alleged violation of the Nonintercourse Act.

ereign immunity prevents the Oneidas from proceeding on the common law contracts-based claim, which New York asserts is not to be found in the United States' complaint. We conclude, for the reasons stated below, that the contract-based claim articulated by the district court is barred by New York's sovereign immunity. We agree with New York, moreover, that the equitable considerations in *Cayuga* are implicated by the plaintiffs' purportedly nonpossessory claims and that these considerations likewise prevent such claims from going forward.

A. New York's Sovereign Immunity Bars the Oneidas' "Contract" Claim

We begin with first principles. It is well established that "the States entered the federal system with their sovereignty intact," and that this sovereignty limits the "judicial authority in Article III" unless the states have "consented to suit" in court, "either expressly or in the plan of the convention." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991) (internal quotation marks omitted); *see also Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23, 54 S. Ct. 745, 78 L. Ed. 1282 (1934). It is also well established that in entering the federal union, the states implicitly gave consent to suits by the United States, *see, e.g., Alden v. Maine*, 527 U.S. 706, 755, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999); *Principality of Monaco*, 292 U.S. at 329, 54 S. Ct. 745; *cf. United States v. Minnesota*, 270 U.S. 181, 195, 46 S. Ct. 298, 70 L. Ed. 539 (1926) ("The reason the Indians could not bring the suits . . . lies in the general immunity of the state . . . from suit in the absence of consent. Of course, the immunity of the state is subject to the constitutional

qualification that she may be sued in this Court by the United States. . . ."), but not to suits against states by Indian tribes, *see Blatchford*, 501 U.S. at 781, 111 S. Ct. 2578 (finding no "compelling evidence" to suggest that consent to suit by Indian tribes was "inherent in the constitutional compact").

The Supreme Court determined in *Arizona v. California*, 460 U.S. 605, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983), a dispute among several states concerning their claims to the waters of the Colorado River, that because the United States had intervened in the action to assert water rights claims on behalf of Indian tribes, the intervention of the tribes themselves did not infringe the states' sovereign immunity. *See Arizona*, 460 U.S. at 614, 103 S. Ct. 1382. Significantly, however, the tribes intervening in Arizona did not "seek to bring new claims or issues against the states" other than those already asserted by the United States.[10] *Id.* The Court recently reaffirmed the continuing validity of *Arizona*, but again suggested that the case only applies when a private party asserts "an entirely overlapping claim" to one properly before the court, and only when the overlapping claim would "burden[ ] the State with no additional defense or liability." *Alabama v. North Carolina*, — U.S. —, 130 S. Ct. 2295, 2315, 176 L. Ed. 2d 1070 (2010).[11]

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[10] The Indian tribes in *Arizona* initially sought greater relief than did the United States but the United States ultimately "joined the Indians in moving for a supplemental decree to grant additional water rights to the reservation." *Arizona*, 460 U.S. at 612, 103 S. Ct. 1382.

[11] *Alabama v. North Carolina* involved a suit within the Supreme Court's original jurisdiction against North Carolina by a number of states and a private interstate commission relating to an interstate compact. *Alabama*, 130 S. Ct. at 2302-05. The special master preliminarily recommended denying North Carolina's motion to dismiss the

Relying on *Arizona*, we also have approved the denial of an Eleventh Amendment defense in a case in which an Indian tribe sued New York State and the United States intervened in the action seeking the same relief. *See Seneca Nation of Indians v. New York*, 178 F.3d 95 (2d Cir. 1999) (per curiam), *aff'g* 26 F. Supp. 2d 555 (W.D.N.Y. 1998). We again emphasized, however, that "the State of New York retains its Eleventh Amendment immunity to the extent that the [plaintiff Indian tribes] raise claims or issues that are not *identical to* those made by the United States." *Seneca Nation*, 178 F.3d at 97 (emphasis added)*; see also Seneca Nation of Indians v. New York*, 26 F. Supp. 2d at 560 (noting that the United States' complaint in intervention sought "the identical relief as the Senecas' [complaint]"); *accord Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 912-13 (8th Cir. 1997) (rejecting Minnesota's sovereign immunity defense when United States intervened in Indian tribes' suit seeking the same relief as sought by the tribes in the underlying action). This

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claims of the commission, which, the state argued, were barred by its sovereign immunity. *Id.* at 2314. The master relied on *Arizona*, noting that the other plaintiffs—all sovereign states—were also bringing claims against North Carolina and it was too early in the litigation to tell whether the commission's claims were "the same claims . . . seek[ing] the same relief as the other plaintiffs." *Id.* The Court noted that, with respect to two of the commission's claims, the commission's ability to sue derived entirely from its ability to represent the states' interests created by the interstate compact. *Id.* at 2315. With respect to the commission's remaining three claims, the Court noted that "while the Commission again seemingly makes the same claims and seeks the same relief as the States, it is conceivable that as a matter of law the Commission's claims are not *identical.*" *Id.* at 2316 (emphasis added). Therefore it was appropriate to "defer" the sovereign immunity question with respect to these claims until they were further clarified. *Id.*

is consistent with the Supreme Court's admonition that "[a] federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984).

We need not address here the precise contours of when a tribe's complaint raises a claim or issue not "identical to" one asserted by the United States, because even construing the United States' most recent amended complaint liberally, it simply does not contain the contract-based claim that the district court found to be adequately pled by the Oneidas. The United States admits before this Court that while a complaint need not specify the legal theory underlying its claims, it must set forth "those facts necessary to a finding of liability." *Amron v. Morgan Stanley Inv. Advisors Inc.*, 464 F.3d 338, 343 (2d Cir. 2006) (emphasis omitted). Here, the United States' complaint alleges no facts whatsoever regarding essential aspects of a contract-based claim—that the consideration the Oneidas received for the subject lands was inferior or grossly inferior to the lands' fair market value, that New York deceived or misled the Oneidas as to the value of the land, or that New York had knowledge of any fact bearing on the value of the land that was not known by the Oneidas themselves. *See Oneida III*, 500 F. Supp. 2d at 144 (describing facts required to be established to prevail on the district court's contract-based claim). Although the United States' amended complaint refers in one instance to the alleged profits the State made on its sales of the lands at issue, U.S. Second Am. Compl. ¶ 18, it is clear from the complaint's description of the nature of the action, the facts of the land transfers, the claims asserted, and the

"prayer for relief" that the United States asserts predominantly, if not exclusively, trespass and ejectment-based claims.[12]

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[12] *See, e.g.*, U.S. Second Am. Compl. ¶ 1.b (indicating that "[b]ecause [New York's purchases of the subject lands] violated the Trade and Intercourse Act, the State of New York failed to extinguish the Oneida Nation's *right to possess the Subject Lands* under federal law"); *id.* ¶ 2 ("The United States seeks monetary and other relief from . . . New York for its denial of the Oneida Nation's *enjoyment of its rights to the Subject Lands under federal law and for the trespasses to the Subject Lands* that originated with the State's illegal transactions."); *id.* ¶ 8 ("The United States has intervened in this action as plaintiff to enforce federal law, namely, the *restrictions on alienation* set forth in the Trade and Intercourse Act . . . ; to enforce the provisions of the Treaty of Canandaigua of 1794, . . . to which the United States was a party; and to protect the treaty-recognized rights of the Oneida Nation."); *id.* ¶ 13 (noting that the Treaty of Canandaigua gave the Oneida Nation "the right to occupy the Subject Lands and guaranteed the . . . free and undisturbed use of the land"); *id.* ¶ 14 (noting that the Nonintercourse Act "expressly forbade and declared invalid any sale of land, or any title or claim thereto, by any Indian Nation . . . without the approval and ratification of the United States"); *id.* ¶ 16 ("[E]ach of the above-mentioned agreements was illegal and void ab initio under the Nonintercourse Act."); *id.* ¶ 18 ("After each of its purported acquisitions . . . New York wrongfully asserted control and/or possession of . . . the Subject Lands."); *id.* ¶ 19 ("New York State unlawfully retains possession. . . ."); *id.* ¶¶ 22-24 (describing "Claim I: Federal Common Law Trespass Claim," premised on past and continuing violations of the Oneidas' possessory rights); *id.* ¶¶ 25-26 (describing "Claim II: Trade and Intercourse Claim," premised on fact that "New York State asserted control and assumed possession of the Subject Lands[,] . . . continues to assert control and possession of some of the Subject Lands," and "purport[ed] to sell or otherwise grant the Subject Lands to third parties," causing "Third Party Trespasses"); *id.* at 14 ("Prayer for Relief," requesting (1) a declaratory judgment that the Oneida Nation "has the right to occupy the lands described in this complaint"; (2) "a judgment awarding monetary and possessory relief, including ejectment where appropriate"; (3) a judgment award-

Even if the United States' complaint is deemed to allege a purportedly nonpossessory claim, moreover, it is clear that any such claim in the complaint is based entirely on the Nonintercourse Act. The United States' complaint asserts two claims against New York—a "Federal Common Law Trespass Claim" and a "Trade and Intercourse Claim." The former claim appears to ground its cause of action in both the Nonintercourse Act and federal common law but, as a claim for trespass, is clearly possessory. *See id.* ¶ 24; *Cayuga*, 413 F.3d at 278 ("[T]he trespass claim . . . is predicated entirely upon plaintiffs' possessory land claim, for the simple reason that there can be no trespass unless the Cayugas possessed the land in question."). The latter claim, grounded only in the allegation that the original land transactions violated the Nonintercourse Act, is therefore the only potential source of a nonpossessory claim. But the district court did not derive the Oneidas' purportedly nonpossessory claim from the Nonintercourse Act; rather, the "fair compensation" claim is based on an entirely different theory—that the Oneidas possess a *common law* right of action sounding in contract to reform land sale agreements that were supported, they allege, by unconscionable consideration. *See Oneida III*, 500 F. Supp. 2d at 140-41 & n.6; *see also id.* at 139 n.4 (indicating that "a claim predicated on a violation of the Nonintercourse Act . . . might also be appropriate," but declining to consider such a claim).

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ing "mesne profits or fair rental value for the entire Claim Area," on the grounds that New York was "the initial trespasser"; (4) a judgment "awarding appropriate monetary relief" for lands no longer occupied by the State, also on the grounds that it was "the initial trespasser"; (5) attorneys fees and costs; (6) "such other relief as this Court may deem just and proper") (emphasis added throughout).

The United States suggests that we may consider its pleadings "constructively amended" to include the nonpossessory "contract" claim brought by the Oneidas and recognized by the district court because the issue was litigated below. Constructive amendment, when used by appellate courts, is a "judicially created" discretionary doctrine that we have used "extremely sparing[ly]" to recognize that an issue not in the parties' pleadings was actually litigated in the court below. *City of Rome, N.Y. v. Verizon Commc'ns, Inc.*, 362 F.3d 168, 181 (2d Cir. 2004). "When issues that were not raised in the pleadings are tried *by express or implied consent of the parties*, this consent acts to permit what is in effect a constructive amendment of the pleadings to include those issues." *Walton v. Jennings Cmty. Hosp., Inc.*, 875 F.2d 1317, 1320 n.3 (7th Cir. 1989) (emphasis added) (internal quotation marks omitted). Here, however, New York never consented, expressly or otherwise, to the litigation of any nonpossessory claims, and certainly not to the claim as formulated by the district court; indeed, it vigorously contended before the district court that neither the Oneidas nor the United States had asserted such a claim in their complaints. *See*, *e.g.*, Def.'s Reply Mem., Doc. 606 (Mar. 2, 2007), at 2-8 & n.3.[13] Although the district court rejected this argument and found that the Oneidas' complaint alleged a nonpossessory claim, *see*

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[13] The United States and Judge Gershon in dissent note that New York described the Oneidas' and United States' complaints as "parallel" in its summary judgment briefing below. The State meant, however, only that both complaints asserted the Oneidas' right to possess the land in question. *See* Def.'s Mem. of Law in Support of Motion for Summary Judgment at 3-4, Doc. 582 (Aug. 11, 2006). New York never conceded that *either* complaint adequately alleged nonpossessory claims, let alone consented to the litigation of such claims.

Oneida III, 500 F. Supp. 2d at 139-40, this does not alter the fact that New York did not in any way consent to the litigation of any such nonpossessory claims such that we may consider the United States' complaint constructively amended. *Cf.* 6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1494 (3d ed. 2010) ("[I]f the issue in fact has not been tried with the consent of the parties, then an amendment to conform to the pleadings will not be permitted no matter when made."); *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1087 (2d Cir. 1993) (although plaintiffs could not state a claim under state tort law, *defendants* had argued before district court that federal maritime law governed the claim at issue, and parties had litigated whether relief was available under maritime law; thus complaint could be constructively amended to assert a maritime law claim).

Finally, we note that the United States in its brief before this Court does not even defend the contract claim as articulated by the district court. The United States asserts with regard to the district court's contract-based claim that it "does not agree with the entirety of the district court's analysis," U.S. Br. at 64, and, specifically, that it believes it need only show violation of the Nonintercourse Act to establish a basis for recovering restitutionary damages. The United States' argument with regard to New York's sovereign immunity, at base, is that because the United States could have asserted in its complaint (if granted leave to amend) a claim on which the Oneidas were permitted to proceed, we should take the United States to have pleaded this claim. We have our doubts that this casual approach to analysis of a state's assertion of sovereign immunity could ever be appropriate. *See Blatchford*, 501

U.S. at 785, 111 S. Ct. 2578 (noting that "[t]he consent, 'inherent in the convention,' to suit by the United States . . . is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself"). It is particularly *inappropriate* in this case, moreover, given that the United States in effect disavows on appeal the claim on which the Oneidas were permitted to proceed. We therefore determine that New York is immune from suit with regard to the "contract" claim recognized by the district court and conclude that this claim must be dismissed.[14]

B. *Cayuga* Bars the Nonintercourse Act Claim

New York next contends that the Nonintercourse Act, which does not by its terms provide for a damages remedy, cannot support a claim for damages, and that as a result, the plaintiffs' alternative "nonpossessory" claim based on violation of the Act states no grounds on which they are entitled to relief. New York argues, in addition, that this purportedly nonpossessory claim is barred by the equitable considerations described in *Sherrill* and *Cayuga*. We agree with New York as to the latter proposition and conclude, more generally, that each of the purportedly nonpossessory claims pressed by plaintiffs on appeal falls within the equitable bar recognized in *Cayuga*. Accordingly, we need not and do not address

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[14] Given this disposition, we need not address the State's alternative arguments that such a claim does not raise a federal question, so that the district court abused its discretion in exercising jurisdiction over it after dismissing the possessory claims, and that the contract-based claim does not exist in federal common law.

the question whether the Nonintercourse Act can support a claim seeking damages.

The equitable defense recognized in *Sherrill* and *Cayuga* is not limited to "possessory" claims—to claims premised on the assertion of a current possessory right to tribal lands held by others on the theory that the original transfer of ownership of the lands was in some way flawed. Rather, the defense is properly applied to bar any ancient land claims that are disruptive of significant and justified societal expectations that have arisen as a result of a lapse of time during which the plaintiffs did not seek relief. *See Sherrill*, 544 U.S. at 215 n.9, 125 S. Ct. 1478 ("The relief [the New York Oneidas] seek[ ] . . . is unavailable because of the long lapse of time, during which New York's governance remained undisturbed, and the present-day and future disruption such relief would engender.").

This much is clear from *Sherrill* itself. In *Sherrill*, from which the *Cayuga* panel drew the equitable principles on which it relied, the New York Oneidas sought only equitable and declaratory relief regarding the imposition of property taxes on lands to which they held legal title, and which they claimed were exempt from local taxation. *See id.* at 211-12, 125 S. Ct. 1478. As it was undisputed that the plaintiffs had acquired legal title to the lands through contemporary market transactions, *see id.* at 211, 125 S. Ct. 1478, no right to possession was placed at issue by their claims.[15] Despite this

[15] We recognize that the municipality imposing the property taxes in *Sherrill* had initiated eviction proceedings because of the New York Oneidas' refusal to pay. *See Sherrill*, 544 U.S. at 211, 125 S. Ct. 1478. Those proceedings, however, were not directly at issue before the Supreme Court, which considered only whether the plaintiffs could seek

fact, the Supreme Court determined that the plaintiffs were barred from seeking their desired remedy due to the long lapse of time between the Oneidas' ancient dispossession and their attempt to revive sovereignty, the attendant development of justified societal expectations as to regulatory authority during this period, and the potential for the plaintiffs' desired remedy to disrupt those expectations. *See id.* at 214-21, 125 S. Ct. 1478. The critical question therefore was not whether the claim at issue was premised on an assertion of a current possessory right stemming from a flaw in the original termination of Indian title, but rather whether an award of relief to the plaintiffs would be disruptive of justified societal expectations arising at least in part from the long lapse of time between the conduct complained of and the effort to obtain relief.

This Court undertook the same analysis in *Cayuga*. The claims at issue in that case *were* premised on the assertion of a current possessory right to the subject lands founded on the alleged illegality of their initial transfer. *See Cayuga*, 413 F.3d at 277-78. *Cayuga* expressly held, however, that the dispositive question in ascertaining the applicability of *Sherrill*'s equitable defense is not whether a current possessory right is asserted, but whether a plaintiff's claim is inherently disruptive. *See id.* at 274 ("[W]hat concerned the *[Sherrill]* Court was the disruptive nature of the claim itself."); *id.* (indicating that the equitable defense identified in *Sherrill* "appl[ies] to 'disruptive' Indian land claims more generally"); *id.* at 277 ("[T]he import of *Sherrill* is that

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relief preventing the imposition of taxes. Moreover, the eviction proceedings were premised on contemporary conduct, not the ancient conduct leading to the plaintiffs' original loss of the lands.

disruptive, forward-looking claims, a category exemplified by possessory land claims, are subject to equitable defenses . . . ." (internal quotation marks omitted)); *see also id.* at 275 (concluding that possessory claims are disruptive in that they threaten "to overturn years of settled land ownership"). Under the reasoning employed in *Cayuga*, then, the equitable defense originally recognized in *Sherrill* is potentially applicable to all ancient land claims that are disruptive of justified societal interests that have developed over a long period of time, of which possessory claims are merely one type, and regardless of the particular remedy sought.

The Nonintercourse Act claim proposed by the Oneidas and by the United States is disruptive in precisely this fashion. Despite the contentions of the plaintiffs, this claim is, at base, premised on the invalidity of the initial transfer of the subject lands. The Nonintercourse Act provides that "no sale of lands made by . . . any nation or tribe of Indians" undertaken without the endorsement of the United States "shall be valid." 1 Stat. at 330. Even assuming that a court may grant alternative remedies upon finding that a purported sale was consummated in violation of the Nonintercourse Act, the underlying premise of a claim based on such a violation is that the transaction itself was void *ab initio*. *See Oneida II*, 470 U.S. at 245, 105 S. Ct. 1245 ("The pertinent provision of the [Nonintercourse Act] . . . merely codified the principle that a sovereign act was required to extinguish aboriginal title and thus that a conveyance without the sovereign's consent was void *ab initio*."). Such a claim, which necessarily calls into question the validity of the original transfer of the subject lands and at least potentially, by extension, subsequent ownership of those lands by non-Indian parties, effectively "asks

this Court to overturn years of settled land ownership." *Cayuga*, 413 F.3d at 275. Claims having this characteristic, as *Cayuga* recognized, necessarily threaten to undermine broadly held and justified expectations as to the ownership of a vast swath of lands—expectations that have arisen not only through the passage of time but also the attendant development of the properties. Accordingly, such claims are subject to the defense recognized in *Sherrill* and *Cayuga*.

The United States contends, citing *United States v. Mottaz*, 476 U.S. 834, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (1986), that allowing a claim to go forward in this case would clear the cloud on title to the subject lands created by their invalid transfer in violation of the Nonintercourse Act. We disagree. Mottaz involved a claim that the United States had unlawfully sold the plaintiff's interest in lands to the United States Forest Service without her consent. *Mottaz*, 476 U.S. at 836-37, 106 S. Ct. 2224. The Court concluded that the claim was time-barred under the Quiet Title Act, 28 U.S.C. § 2409a(a), and that the claim was subject to that Act because it sought to confirm the plaintiff's title in her land. *Id.* at 841-42, 106 S. Ct. 2224. The Court distinguished the claim before it from a hypothetical claim that would not be covered by the Act, in which the plaintiff sought only "recovery of her share of the proceeds realized by the United States" from its sale of the land "but allegedly never distributed." *Id.* at 842, 106 S. Ct. 2224. Such a claim, the Court said, "would involve a concession that title had passed" in the sale and would only require decision of whether the plaintiff received fair compensation. *Id.*

Unlike the hypothetical claim described in *Mottaz*, the Nonintercourse Act claim here necessarily requires a conclusion that title did *not* pass validly in the challenged land transactions, because the claim's premise is that the transactions violated the Nonintercourse Act. Plaintiffs demand not, as in *Mottaz*'s hypothetical, a share of the profits from a *concededly valid* sale that were allegedly never distributed, but "fair compensation" and "restitution" merely as substitute remedies for the return of the property that they must establish was *unlawfully taken* in order to prove their claim. The invalidity of the sale *ab initio* is the underlying premise of a Nonintercourse Act claim and any theory of recovery plaintiffs could seek pursuant to this claim. Awarding such relief here would not involve "concession[s] that title [has] passed" but rather would *establish* that it had not, but that return of the property was impossible as a remedy under the circumstances.[16]

Even if it were not barred by the Eleventh Amendment, the contract-based claim that the district court allowed to proceed must similarly fail. The claim essentially amounts to the assertion that the agreement by which the State of New York purported to acquire title was unconscionable. If a contract is unconscionable then it is also necessarily invalid and unenforceable. *See*, *e.g.*, *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 121-22 (2d Cir. 2010) (summarizing New York law). Moreover, although some previous decisions have grant-

[16] We note also that the basis of the jury award rejected in *Cayuga* was, in part, the fair market value of the land. *Cayuga*, 413 F.3d at 272. An award of the land's fair market value would presumably, under the United States's theory, have similarly extinguished the Cayugas' possessory interest in the land, and yet this provided no basis for avoiding the equitable bar found to exist in that case.

ed reformation as a remedy for such claims, *see, e.g.*, *Osage Nation of Indians v. United States*, 119 Ct. Cl. 592, 97 F. Supp. 381, 422 (1951), and a court generally is allowed substantial flexibility in its choice of remedy when it determines that a contract or a term thereof is unconscionable, *see* Restatement (Second) of Contracts § 208 (1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."), the traditional remedy for a claim of unconscionability is to deny enforcement of the relevant contract, see 8 Richard A. Lord, *Williston on Contracts* § 18. 1, at 2-9 (4th ed. 1998 & Supp.2009); 3 Dan B. Dobbs, *Law of Remedies: Damages-Equity-Restitution* § 12.8(4), at 215-19 (2d ed. 1993). The claim and its attendant remedy would again necessarily call into question and disrupt settled expectations regarding the ownership of land stemming from the original transfer of title to New York; the contract claim, therefore, like the Nonintercourse Act claim, is subject to equitable defenses.

The plaintiffs, at least for now, have elected after years of litigation to pursue particular alternative remedies that would not actually require the State of New York or the parties that have subsequently acquired the subject lands from the State to return the lands to the Oneidas. This election, however, does not exempt their claims from the defense established in *Sherrill* and *Cayuga*. *Cayuga* clearly indicated that adroit manipulation of the remedy sought will not rescue a claim where its essential premise threatens to disrupt justified societal expectations. Thus, *Cayuga* confirms that in this con-

text the applicability of an equitable defense requires consideration of the basic premise of a claim, rather than the particular remedy sought. *See Cayuga*, 413 F.3d at 275 (noting that the "disruptiveness [identified by the *Cayuga* Court was] inherent in the claim itself . . . rather than an element of any particular remedy which would flow [therefrom]"); *id.* at 277-78 (noting that the claim was subject to dismissal "*ab initio*" regardless of the remedy sought). Accordingly, we conclude that the purportedly nonpossessory claims asserted by the plaintiffs in this case are subject to the defense recognized in *Sherrill* and *Cayuga*. Moreover, for the reasons we have already discussed, this defense is not only applicable, but also serves to bar these claims.

We note that it would be significantly anomalous if we were to hold otherwise. The relevant defense, as originally articulated in *Sherrill*, served solely to bar a particular equitable remedy on account of underlying equitable concerns. *Cayuga* held that claims sounding primarily in law that would "project redress . . . into the present and future" are also subject to *Sherrill*'s equitable defense. *Cayuga*, 413 F.3d at 275 (quoting *Sherrill*, 544 U.S. at 202 n.14, 125 S. Ct. 1478). The possessory claims in Cayuga and in this case, consisting in effect of claims for ejectment and trespass, are canonical claims at law. *See id.* at 283 (Hall, *J.*, dissenting in part and concurring in the judgment in part) ("Historically, both ejectment and trespass are actions at law." (citing 1 Dobbs, *supra*, §§ 5.1, 5.10(1))); *see also id.* at 275 (majority opinion). In contrast, the relief sought by the plaintiffs with regard to their purportedly *nonpossessory* claims—reformation of the agreements embodying the original transfer of the subject lands resulting in an award of "fair compensation"—was traditionally avail-

able *only through equity*. *See Ivinson v. Hutton*, 98 U.S. 79, 82, 25 L. Ed. 66 (1878) ("Power to reform written contracts . . . is everywhere conceded to courts of equity, and it is equally clear that it is a power which cannot be exercised by common-law courts."); 1 Dobbs, *supra*, § 4.3(7), at 619 ("Reformation [of a contract] is traditionally an equitable remedy. . . . Within limits, some unconscionable contract provisions may be reformed to bring them within minimum legal standards of fairness."). Granted, the United States also seeks "restitution" in lieu of the return of the land, U.S. Br. at 58, and restitution is a form of relief available at law, *see Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212-16, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002). The cases on which the United States relies suggest, however, that such relief in this case would also be equitable in nature. *See*, *e.g.*, *Felix v. Patrick*, 145 U.S. 317, 328, 12 S. Ct. 862, 36 L. Ed. 719 (1892); *United States v. Minnesota*, 270 U.S. 181, 191-92, 46 S. Ct. 298, 70 L. Ed. 539 (1926); *see also Great-W.*, 534 U.S. at 215, 122 S. Ct. 708 (describing "an action for restitution of the property (if not already disposed of) or disgorgement of proceeds (if already disposed of)" as "equitable" (emphasis omitted) (quoting *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250, 120 S. Ct. 2180, 147 L. Ed. 2d 187 (2000))); 1 Dobbs, *supra*, § 4.3(5), at 608-14 (indicating that actions for restitution seeking disgorgement of profits generally have been deemed actions in equity). Even when an action for restitution is one at law, moreover, the availability of relief is animated by equitable concerns. *See* 1 Dobbs, *supra*, § 4.2(3), at 581 (citing *Moses v. MacPherlan*, (1760) 97 Eng. Rep. 676 (K.B.)). In sum, this Court concluded in *Cayuga* that the equitable defense recognized in *Sherrill* also applies

against canonical actions at law. It would be strange indeed to conclude that it is *inapplicable* to closely related actions at equity or to related actions that are animated by equitable concerns. This confirms our view that the equitable defense recognized in *Sherrill* is applicable here.

Our decision also prevents the plaintiffs from converting an otherwise unsuccessful claim—like the claims asserted by the Cayuga Indian Nation in *Cayuga*—into a successful claim simply by re-framing it as "nonpossessory." As this Court has previously indicated, the essence of a cause of action is found in the facts alleged and proven by the plaintiff, not the particular legal theories articulated. *Cf. Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 89 (2d Cir. 2000) ("[W]e may not affirm the dismissal of [a] complaint because [the plaintiff] ha[s] proceeded under the wrong theory 'so long as [he has] alleged facts sufficient to support a meritorious legal claim.'" (quoting *Northrop v. Hoffman of Simsbury, Inc.*, 134 F.3d 41, 46 (2d Cir. 1997))), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). The factual predicate of the claims asserted by the Oneidas in this case is nearly identical to that underlying the claims made by the *Cayuga* plaintiffs. *Compare* Oneida Am. Compl. ¶¶ 16-39, *with* Cayuga Compl. ¶¶ 30, 34-50. Moreover, even liberally construing the complaints here to contain some references to the claims now contended to be nonpossessory, the Oneidas and the United States, in the years prior to *Cayuga*, habitually referred to their claims as vindicating possessory rights, *see, e.g.*, Oneida Compl. at ¶¶ 11, 14-17, 21-22, 25; Tr. of Argument re: Motion to Amend at 12-13, 20, 48, 83, Doc. 136 (Apr. 2, 1999); Supp. Mem. of New York Oneidas at 1, Doc. 121

(Apr. 8, 1999) ("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."); Oneida Am. Compl. at ¶¶ 41-43, 46, 48-49, 51-52, 54-55, 58-59, 61-62; and only fully articulated their purportedly nonpossessory claims in the aftermath of *Cayuga*. The fact that the Oneidas' claims are litigated after this Court's decision in *Cayuga* has afforded them an opportunity to attempt to cast their claims in such a way as to avoid *Cayuga*'s equitable defense. The equitable principles that informed *Cayuga*, however, are no less present in this case.

Finally, the Oneidas contend that the application of *Cayuga* to the purportedly nonpossessory claims asserted here would effectively overrule *Oneida II*. We disagree. The Supreme Court indicated in *Oneida II* that there exists a federal common law cause of action by which Indian nations may seek recompense for ancient deprivations of their ancestral lands, *see Oneida II*, 470 U.S. at 236, 105 S. Ct. 1245, and suggested without deciding that such a claim would not be barred by laches, *see id.* at 244 n.16, 105 S. Ct. 1245. *But see id.* at 263-70, 105 S. Ct. 1245 (Stevens, J., dissenting) (contending for four Justices that laches would bar such claims); *Felix*, 145 U.S. at 334-35, 12 S. Ct. 862 (applying laches to an action seeking to establish a constructive trust over lands conveyed in violation of a federal statutory alienation restraint); *cf. Wetzel v. Minn. Ry. Transfer Co.*, 169 U.S. 237, 241, 18 S. Ct. 307, 42 L. Ed. 730 (1898) ("The truth is, there must be some limit of time within which these excuses [for not bringing an action to cancel an unlawful land conveyance] shall be available, or titles might forever be insecure."). It is critical to note, however, that the plaintiffs in *Oneida II* asserted

claims only against the Counties of Madison and Oneida, which were not alleged to have participated in the original, purportedly unlawful transfer of the subject lands but which did maintain possession of those lands. *See Oneida II*, 470 U.S. at 229, 105 S. Ct. 1245. The only claim recognized by the Supreme Court in *Oneida II* was thus necessarily a claim premised on an assertion by the plaintiffs of a continuing right to possession. *Id.* at 236, 105 S. Ct. 1245 ("[W]e hold that the Oneidas can maintain this action for violations of their *possessory* rights based on federal common law." (emphasis added)). *Cayuga*'s holding, which we are bound to follow, was that all claims that are "disruptive," a category which includes those premised on the assertion of a continuing possessory interest in the subject lands, are barred by the defense recognized in *Sherrill*. *Cayuga* thus found *Sherrill*'s equitable defense to be applicable to the only claim recognized in *Oneida II*—a result that was fully consistent with the Supreme Court's decision in *Oneida II*, which only recognized that the claim existed. The plaintiffs' nonpossessory claims, in contrast, have been recognized by neither the Supreme Court nor by this Court and are, as discussed above, largely equitable in nature, rendering inapplicable *Oneida II*'s concern regarding the application of equitable defenses to claims at law. *See Oneida II*, 470 U.S. at 244 n.16, 105 S. Ct. 1245. In sum, then, our decision here is not in tension with *Oneida II*.

CONCLUSION

For the foregoing reasons, we conclude that all claims raised by the plaintiffs in this action, whether possessory or purportedly nonpossessory, are subject to and barred by the defense recognized in *Sherrill* and

Cayuga. The Oneidas' contract-based claim is further barred by New York's sovereign immunity. For this reason, the judgment of the district court is **AFFIRMED** as to the dismissal of plaintiffs' possessory claims, and **REVERSED** with respect to plaintiffs' nonpossessory 141 claims. The case is **REMANDED** to the district court for the entry of judgment and the resolution of any pending motions.

GERSHON, District Judge, concurring in part and dissenting in part:

The Supreme Court has held that the Oneida Indian Nation has "a federal common-law right to sue to enforce [its] aboriginal land rights." *County of Oneida, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 235, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985) ("*Oneida II*"); *see also Oneida Indian Nation of N.Y. State v. County of Oneida, N.Y.*, 414 U.S. 661, 674, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974) ("*Oneida I*"). It has done so acknowledging that, while "[o]ne would have thought that claims dating back for more than a century and a half would have been barred long ago," "neither petitioners nor we have found any applicable statute of limitations or other relevant legal basis for holding that the Oneidas' claims are barred or otherwise have been satisfied." *Oneida II*, 470 U.S. at 253, 105 S. Ct. 1245. And yet, after thirty-five years of litigation, including two trips to the Supreme Court and the intervention of the United States on plaintiffs' behalf, the majority forecloses the Oneidas from obtaining any remedy in this action.

Like the majority, I accept that, in light of the decision in *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005), plaintiffs' claims that hinge on their possessory rights to the land fail. Unlike the ma-

jority, I conclude that *Cayuga* does not foreclose plaintiffs' non-possessory claims. Consequently, I dissent.

I.

The plaintiffs—the Oneida Indian Nation and the United States—both present two cognizable non-possessory claims. First, the United States emphasizes its federal common law claim against the State for violating the Nonintercourse Act, 25 U.S.C. § 177, when the State failed to pay the Oneidas a fair price for their land. (The Oneidas also assert a claim under the Nonintercourse Act.) This claim is consistent with the Act's "obvious purpose": "to prevent unfair, improvident, or improper disposition by Indians of lands owned or possessed by them. . . ." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119, 80 S. Ct. 543, 4 L. Ed. 2d 584 (1960). Put differently, the United States seeks to vindicate not its right under the Act to stop sales without its approval, but its right to ensure that when the Oneidas sold their land, they would receive a fair price. *See U.S. v. Oneida Nation of N.Y.*, 201 Ct. Cl. 546, 477 F.2d 939, 943 (1973) (noting that the United States' responsibility under the Nonintercourse Act "was not merely to be present at the negotiations or to prevent actual fraud, deception, or duress alone; *improvidence, unfairness, the receipt of unconscionable consideration would likewise be of federal concern*.") (internal quotation marks omitted) (emphasis in original).

Unquestionably, the United States may sue New York for a violation of a federal statute. *See Cramer v. United States*, 261 U.S. 219, 233, 43 S. Ct. 342, 67 L. Ed. 622 (1923) ("The United States may lawfully maintain

suits in its own courts to prevent interference with the means it adopts to exercise its powers of government and to carry into effect its policies.") (internal quotation marks omitted). In other words, the United States has both an interest in this suit as trustee for the Native Americans, and an *independent* interest in ensuring that the State complies with the Nonintercourse Act. *See United States v. Minnesota*, 270 U.S. 181, 194, 46 S. Ct. 298, 70 L. Ed. 539 (1926) (holding that the United States' interest in an Indian claims suit 142 "arises out of its guardianship over the Indians, and out of its right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations, and in both aspects the interest is one which is vested in it as a sovereign.")

In my view, both the United States and the Oneidas also assert a claim arising under federal common law which, as articulated by Judge Kahn, is a contract claim based on unconscionability.[1] The majority does not chal-

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[1] In finding a cognizable federal contract law claim of unconscionability, Judge Kahn drew analogies from the body of law federal courts have developed relating to Indian claims seeking fair compensation from the United States. *Oneida Indian Nation of N.Y. v. N.Y.*, 500 F. Supp. 2d 128, 140-45 (N.D.N.Y.2007). In particular, he noted that when Congress, in 1946, enacted the Indian Claims Commission Act ("the ICCA") "to hear and determine all tribal claims against the United States that accrued before August 13, 1946," it included "claims which would result if the treaties, contracts and agreements between the claimant and the United States were revised on the ground of fraud, duress, [or] unconscionable consideration. . . ." *Id.* at 140-41. Judge Kahn explained that, "[w]hile claims based on unconscionable consideration were brought pursuant to statutory right, the Court of Claims fashioned a common law rule based on preexisting precedents to determine when Indian claimants could prevail on related claims." *Id.* at 142. Caselaw developed in the Court of Claims, he reasoned, "sup-

lenge that the contract claim has been adequately pled in the Oneidas' complaint, but takes the position that the United States' amended complaint itself lacks sufficient factual allegations to support the claim. Because of disparities between the two complaints, the majority concludes that the Oneida Nation cannot take advantage of the United States' intervention to overcome the State's sovereign immunity. *See Alabama v. North Carolina*, — U.S. —, 130 S. Ct. 2295, 2315, 176 L. Ed. 2d 1070 (2010) (concluding that a State's sovereign immunity is not compromised "by an additional, nonsovereign plaintiff's bringing an entirely overlapping claim for relief that burdens the State with no additional defense or liability.").[2]

If the majority finds the United States' amended complaint insufficient, then we should deem the United States' complaint constructively amended. *See Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1087 (2d Cir. 1993).[3] Judge Kahn found that the Oneida

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ports a holding that when the record shows that an agreement resulted in a gross disparity between the fair market value and the price paid for the land transferred, a claim of unconscionable consideration presumptively exists and supports the revision of contract." *Id.*

[2] The majority does not dispute that the Nonintercourse Act claim was pled by the United States and therefore does not present sovereign immunity issues.

[3] Federal Rule of Civil Procedure 15(b)(2) provides that "[w]hen an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." Although this rule technically does not apply on appeal, appellate courts, using Fed. R. Civ. P. 15(b) "by way of analogy," permit constructive amendment of pleadings "when the effect will be to acknowledge that certain issues upon which the lower court's decision has been based or consistent with the trial court's judgment have been litigated."

Nation's complaint set forth adequate facts to support its non-possessory contract claim, a finding the majority does not dispute. The State, therefore, had full notice of the claim, and it never argued below that the parties' complaints were inconsistent; in fact, in its summary judgment briefing, the State described the complaints as "parallel." The State chose to bring its dispositive motion as one for summary judgment, where the theories of the case and issues would be more clearly defined than at the pleading stage. *See Swierkiewicz v. Sorema N.A*, 534 U.S. 506, 512, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) ("[Fed. R. Civ. P.'s 8(a)(2)'s] simplified notice pleading requirement relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."). And even after plaintiffs squarely presented the State with their non-possessory theories, the State avowed that no further discovery was necessary. All parties briefed the availability of non-possessory claims and damages extensively in their briefs on appeal. Consequently, the State would suffer no unfair prejudice; it had full knowledge of the facts and legal theories relied upon by both plaintiffs at the time of the summary judgment motion, and, given that it did not raise any disparities between the two complaints, or sovereign immunity issues, before the district court, cannot plausibly claim that it would have supported the motion any differently had there been no disparities.[4]

6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1494 (3d ed.2010).

[4] Constructive amendment in these circumstances is consistent with our federal rules' instruction that "[p]leadings must be construed so as to do justice." Fed. R. Civ. P. 8(e). "This provision is not simply a precatory statement but reflects one of the basic philosophies of practice

In addition to finding the United States' pleading insufficient, the majority also reasons that the United States "disavows" such a claim in its briefs to this court. This mischaracterizes the United States' position. The United States asserted at oral argument that there is both a federal common law contract claim and a common law Nonintercourse Act claim. Clearly the United States prefers its Nonintercourse Act claim, under which, it argues, it would not have to prove "gross inadequacy of consideration" or the "inferiority of the Oneida Indian Nation's negotiating position" to prevail. But there is nothing in its briefs or statements at oral argument that "disavows" the contract claim.[5]

In any event, whether the claim is premised on contract law or the Nonintercourse Act, the remedy would,

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under the federal rules." 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1286 (3d ed. 2010). "One of the most important objectives of the federal rules is that lawsuits should be determined on their merits and according to the dictates of justice, rather than in terms of whether or not the averments in the paper pleadings have been artfully or inartfully drawn." *Id.* Where, as here, a defendant has suffered no prejudice, constructive amendment is entirely compatible with this objective.

[5] Judge Kahn premised the Oneidas' and the United States' nonpossessory claim on the contract claim rather than the Nonintercourse Act. This was because he found that "the Circuit recognized an implied right of action [under the Nonintercourse Act] that was possessory in nature," and that the federal common law claim was, therefore, "on stronger ground." 500 F. Supp. 2d at 139 n.4. Although this court did, in fact, suggest that an implied right of action under the Nonintercourse Act would be possessory, it did so when only the Counties, and not the State, were the defendants in this case. *See Oneida Indian Nation of N.Y. v. Oneida County*, 719 F.2d 525, 540 (2d Cir. 1983). Because the Counties were not involved in the land transactions, the Oneida Nation could assert only possessory remedies against them. Therefore, nonpossessory claims were never at issue until now.

as Judge Kahn acknowledged, be the same: "the difference between the fair market value of the land at the time and the consideration received by the Oneida Indian Nation minus any offsets, including, but not limited to, sales costs incurred by the State." *Oneida Indian Nation of N.Y. v. N.Y.*, 500 F. Supp. 2d 128, 144, 139 n.4 (N.D.N.Y. 2007) (noting that "an analysis of Plaintiffs' common law claims would be part of the determination of a remedy that would be commensurate with vindicating any violations144 of the Nonintercourse Act.").[6] Voluminous evidence of unfair compensation was before the district court. *See id.* at 145. An expert reviewed the State's records of proceeds it obtained from sales of the Oneida land to show the gross disparity between the price the State paid the Oneidas for their land and the price the State received after a quick resale. Judge Kahn also noted "previous rulings that the State paid the Oneida Indian Nation 'approximately fifty cents per acre' in 1795 to purchase about a third of the reservation and resold the land to 'white settlers for about $3.53 per acre.'" *See id.* at 145 (quoting *Oneida Indian Nation of N.Y. State v. Oneida County*, 719 F.2d 525, 529 (2d Cir. 1983)). Taken together, this evidence "suggests that there are material facts indicating that the consideration paid to the Oneida Indian Nation by the State was significantly under the then-fair market price." *Id.* Remedying the disparity would both cure the unconscionability of the original contract and disgorge the benefits the State gained by the contract in violation of federal

[6] The Nonintercourse Act "contains no remedial provision." *See Oneida II*, 470 U.S. at 238-39, 105 S. Ct. 1245. Therefore, the court may "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 66, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992).

law. *See* Dan B. Dobbs, *Law of Remedies*, § 4.1, at 552 (2d ed. 1993) (the "purpose [of restitution] is to prevent the defendant's unjust enrichment by recapturing the gains the defendant secured in a transaction.")

II.

Determining whether plaintiffs have alleged cognizable claims is only the first part of the inquiry; the court must also consider whether both the claims and remedies the plaintiffs assert are precluded by the equitable defense articulated in *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005) ("*Sherrill*"), and *Cayuga. Sherrill* was an extraordinary case. The Oneida Nation claimed that it was exempt from paying property taxes to the City of Sherrill for land that was part of the Oneidas' historic reservation, but which had been sold by them years before, and then reacquired. Plaintiffs argued that they had regained sovereignty over the land they purchased in the open market. *See* 544 U.S. at 213, 125 S. Ct. 1478. The Court rejected their "unification theory," explaining that the "standards of federal Indian law and federal equity practice" precluded the Oneida Nation from "rekindling embers of sovereignty that long ago grew cold." *Id*. at 214, 125 S. Ct. 1478. The Court noted that "the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*." *Id*. at 221, 125 S. Ct. 1478. "However," the Court concluded, "the distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the City of Sherrill spanning several generations . . . render ineq-

uitable the piecemeal shift in governance this suit seeks unilaterally to initiate." *Id.*

In *Cayuga*, this court applied *Sherrill*'s equitable defense to bar the Cayugas' possessory land claims. The Cayugas had filed suit in 1980, alleging that the cession of certain tribal lands to the State of New York in 1795 and 1807 was never ratified by the federal government. For these violations, they, later joined by the United States, sought actual possession of their ancestral reservation land. After ruling for the Cayugas on the liability issues, the 145 district court decided a series of issues concerning the appropriate remedy. The court concluded that ejectment was a drastic, inappropriate remedy that would "result in widespread disruption not only to the Counties and those residing therein, but to the State of New York as a whole." *Cayuga Indian Nation of N.Y. v. Cuomo*, 1999 WL 509442 at (N.D.N.Y. July 1, 1999). The district court submitted the issue of monetary damages to a jury and the jury awarded the Cayugas damages "for loss of use and possession" of the land. *See Cayuga Indian Nation of N.Y. v. Pataki*, 165 F. Supp. 2d 266, 273 (N.D.N.Y. 2001).

The Second Circuit reversed. It understood *Sherrill* as holding "that equitable doctrines, such as laches, acquiescence, and impossibility, can, in appropriate circumstances, be applied to Indian land claims, even when such a claim is legally viable and within the statute of limitations." *Cayuga*, 413 F.3d at 273. It also held that *Sherrill*'s equitable considerations applied equally to the district court's "monetization" of their ejectment claim, reasoning that the main concern underlying *Sherrill*'s decision was the "disruptive nature of the claim itself." *Id.* at 274. Therefore, despite *Sherrill*'s emphasis that

the question of rights was "very different" from the question of remedy, 544 U.S. at 213, 125 S. Ct. 1478, the *Cayuga* court held that "[w]hether characterized as an action at law or in equity, 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.'" *Cayuga*, 413 F.3d at 275 (emphasis added) (quoting *Sherrill*, 544 U.S. at 202, 125 S. Ct. 1478).

The plaintiffs' claims at issue here—whether premised on the Nonintercourse Act or contract law—are *non*-possessory and do not "project redress into the present and future." The Nonintercourse Act claim seeks restitution of the State's profits from the State, a common remedy for violations of federal law, and one that does not implicate land ownership, much less possession. *See, e.g., Securities and Exchange Comm'n. v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir. 1971) ("[T]he Supreme Court has upheld the power of the government without specific statutory authority to seek restitution . . . as an ancillary remedy in the exercise of the courts' general equity powers to afford complete relief."). As for the contract claim, a finding that a term in the contract was unconscionable does not require "voiding" the underlying title, as the majority suggests. Even while acknowledging the "substantial flexibility" courts have to remedy such claims, the majority asserts that "the traditional remedy for a claim of unconscionability is to deny enforcement of the relevant contract." Therefore, the majority concludes, "[t]he claim [of unconscionability] and its attendant remedy would again necessarily call into question and disrupt settled expectations regarding the ownership of land

stemming from the original transfer of title to New York[.]"

But we are not constrained to provide only a "traditional" remedy for any violation; to the contrary, judgments "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54. As the majority itself notes, in remedying an unconscionability claim, courts can choose, as Judge Kahn did, to reform the contract, rather than void it. This has the effect of denying enforcement of the unconscionable provision—in this case, the price—while preserving the rest of the contract, including the transfer of title.

I do not agree with the implication that a claim is possessory if even one potential remedy would question title. In *United States v. Mottaz*, 476 U.S. 834, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (1986), a plaintiff alleged that the United States had unlawfully sold her interest in her land and sought the market value of the land as the remedy. The plaintiff's position was that the Quiet Title Act, 28 U.S.C. § 2409a(a), which governs actions to "adjudicate a disputed title to real property in which the United States claims an interest," did not apply to her case. The Court disagreed, holding that, in "demand-[ing] damages in the amount of the *current* market value of her interests," the plaintiff sought "a declaration that she alone possess[ed] valid title to her interests . . . and that the title asserted by the United States is defective. . . ." *Id.* at 842, 106 S. Ct. 2224 (emphasis in original). Therefore, the Quiet Title Act applied, and, because the plaintiff had not filed within the limitations period of that Act, her claim was defective. The Court, however, acknowledged that, if she had sought merely a

share of the proceeds, rather than the current fair market value of her land, "a claim for monetary damages in that amount would involve a concession that title had passed . . . and that the sole issue was whether [she] was fairly compensated for the taking of her interests in the allotments." *Id.* This reasoning applies to the plaintiffs in this case: their claim, and their requested remedy, necessarily concedes that title has validly passed.

The majority distinguishes *Mottaz* by stating that awarding relief in this case "would not involve 'concession[s] that title [has] passed' but rather would establish that it had not, but that return of the property was impossible as a remedy under the circumstances." In doing so, the majority refers to plaintiffs' requests for "fair compensation" and "restitution" as "substitute remedies," apparently to liken what is sought here to the monetization found improper in Cayuga. But these are not "substitute remedies"—a term that is the majority's own, and not that of the plaintiffs or the district court—but separate *claims* with separate *remedies* pled in the complaint. *See* Fed. R. Civ. P. 8(d) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically. . . .").

The suggestion that plaintiffs raised these non-possessory claims and remedies only "to cast their claims in such a way as to avoid *Cayuga*'s equitable defense" is not to the point. Unlike the majority, I do not fault the Oneidas for adjusting their claims to recognize the changing legal landscape. It shows no disrespect to precedent to acknowledge that *Cayuga* significantly changed that landscape. *Cayuga* not only applied laches to bar Indian land claims, as well as remedies, relying on Sherrill, but it also applied laches to the United States'

claims.[7] After thirty-five years of litigation in this case, and intervening appeals in two other cases, *Sherrill* and *Cayuga*, it is not surprising or improper that plaintiffs would reevaluate and refine their positions.

At its broadest reading, *Cayuga* limits only recovery for all possessory claims; while *Cayuga* found that both legal and equitable claims could be possessory in nature, and therefore subject to equitable defenses based on disruption to settled expectations regarding land title, *Cayuga* does not compel us to find, or even suggest, that non-possessory claims are to be treated as possessory. This is particularly true here where the United States seeks to vindicate a right that is not possessory in any sense: the right to sue for a violation of its statute.

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[7] I need not address the applicability of this aspect of *Cayuga*'s holding to the present case because I do not agree with the majority that *Sherrill*'s equitable defenses apply to the non-possessory claims. However, it is worth noting that the *Cayuga* majority acknowledged that "laches is not available against the federal government when it undertakes to enforce a public right or protect the public interest." *Cayuga*, 413 F.3d at 279 n.8. Reasoning that "the United States intervened in *[Cayuga]* to *vindicate the interest of the Tribe*, with whom it has a trust relationship," the majority in *Cayuga* held that the United States was subject to a laches defense because, it concluded, that case did not involve the enforcement of a public right or the protections of a public interest. *Id.* at 278, 279 n.8. In this case, as described above, the United States has two independent roles: as trustee for the Oneidas, *and* as a sovereign. The United States' role as a sovereign enforcing its own statute by definition "involve[s] the enforcement of a public right or the protections of a public interest." Thus, the question of laches does not rest "on facts virtually indistinguishable" to those in *Cayuga*, as the majority suggests; the different claims call for a different analysis.

III.

Finally, and perhaps most importantly, we must not forget the actual concerns *Cayuga* and *Sherrill* addressed. In *Cayuga*, the court wrote that "[i]nasmuch as the instant claim, a possessory land claim, is subject to the doctrine of laches, we conclude that the present case must be dismissed because the same considerations that doomed the Oneidas' claim in *Sherrill* apply with equal force here." *Cayuga*, 413 F.3d at 277. A claim for actual possession, as involved in *Cayuga*, or monetization of the possessory claim, as the district court granted the Cayugas, was found to presuppose that no title ever passed to the State. This in turn introduced difficult present-day complications that would affect innocent third-party purchasers and the current value of the developed land. These were among the considerations that had led the Supreme Court in *Sherrill* to reject the restoration of sovereignty to the Oneidas.

The nonpossessory claims and remedy involved here implicate none of these concerns. Present-day land considerations are irrelevant to the question of whether the State should disgorge the profit it earned from violating a United States statute. To calculate a restitution or fair compensation remedy, the court would not have to consider improvements to the land, settled expectations of innocent parties, or the "distinctly non-Indian character of the area and its inhabitants." *Sherrill*, 544 U.S. at 202, 125 S. Ct. 1478. The distance in time matters little in this case because the damages calculation, with the exception of interest, would be no different than if this claim had been brought immediately after the alleged

sales by the State.[8] In other words, a fair compensation remedy would not upset present-day expectations because it has nothing to do with the present at all.

Cayuga held that "the import of *Sherrill* is that 'disruptive,' forward-looking claims, a category exemplified by possessory land claims, are subject to equitable defenses, including laches." *Cayuga*, 413 F.3d at 277. Nothing in *Cayuga* or *Sherrill* prohibits the purely backward-looking, non-possessory claims asserted here and the remedy described by Judge Kahn. What *Cayuga* was concerned about—whether labeled a claim or remedy—was avoiding undue disturbance of ancient land titles and settled expectations regarding them. The claims and remedy recognized by the district court in this case, and pursued now by the Oneidas and by the United States, involve no such disturbance. With this decision, the majority forecloses plaintiffs from bringing *any* claims seeking *any* remedy for their treatment at the hands of the State. This is not required by *Sherrill* or *Cayuga*, and is contrary to the spirit of the Supreme Court's decisions in this very case. Therefore, I dissent and would affirm Judge Kahn's carefully considered decision and order denying summary judgment to the State.

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[8] Of course, the distance in time affects pre-judgment interest. But, as Judge McCurn recognized in *Cayuga*, prejudgment interest is an equitable matter. *See Cayuga Indian Nation of N.Y.*, 165 F. Supp. 2d at 297. The particulars of Judge McCurn's analysis have never been addressed by this Court, and there is no reason to believe that the district court, on remand, and then this Court, on appeal, could not address the equities of prejudgment interest if damages were awarded. But the potential for a large award, without more, cannot itself be treated as so disruptive as to justify dismissal of a legally sound claim.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

No. 574-CV-187 LEK/DRH

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

AND

THE UNITED STATES OF AMERICA, AND THE NEW
YORK BROTHERTOWN INDIAN NATION,
PLAINTIFFS-INTERVENORS

v.

THE STATE OF NEW YORK, THE COUNTY OF MADISON,
NEW YORK, AND THE COUNTY OF ONEIDA, NEW YORK,
DEFENDANTS

Filed: May 21, 2007

MEMORANDUM-DECISION AND ORDER

KAHN, District Judge.

This action is brought by three Oneida tribal groups—the Oneida Indian Nation of New York ("New York Oneidas"), the Oneida Tribe of Indians of Wisconsin, and the Oneida of the Thames (collectively, the "Oneidas" or "Plaintiffs"). Plaintiffs seek redress for

allegedly unlawful transfers of approximately 250,000 acres of land in central New York. The United States intervened as a plaintiff in this action in March, 1998. Presently before the Court is a Motion for summary judgment submitted on behalf of defendants, the State of New York (the "State") and the Counties of Oneida and Madison (the "Counties") (collectively, "Defendants"). *See* Defts' Motion for Summary Judgment (Dkt. No. 582).

I. Historical Background

At the time of the American Revolution, the Oneida Indian Nation, of which Plaintiffs are direct descendants, was one of the six nations of the Iroquois, or Haudenosaunee, Confederation, which was then the most powerful Indian tribe in the Northeast. *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 230, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985) ("*Oneida II*"). The Oneidas actively aided the colonists during the Revolution, even while most of the Iroquois sided with the British. *Id.* at 231, 105 S. Ct. 1245. In recognition of this vital aid, the United States guaranteed certain lands to the Oneidas. *Id.* The 1794 Treaty of Canandaigua was one of a series of treaties in which "the National Government promised that the Oneidas would be secure in the possession of the lands on which they settled." *Id.*

In 1788, the Oneidas ceded most of their six (6) million acre homeland to the State, reserving only 300,000 acres for themselves. Joseph Singer, *Nine-Tenths of the Law: Title Possession & Sacred Obligation*, 38 Conn. L. Rev. 605, 612 (2006). Commentators note that while the Oneidas made the decision to proceed with the transfer of their aboriginal lands, they likely did so under great

duress. *Id.* The Oneidas bring this action to vindicate their tribal rights in approximately 250,000 acres of land located generally in the Counties; this land comprises a small fraction of their original lands and was specifically guaranteed to the Oneidas "use and cultivation" by the Treaty of Canandaigua. *See id.*; Amended Complaint (Dkt. No. 582, Attach. 6, Ex. A) at ¶ 1; Plntfs' Stat. of Mat. Facts (Dkt. No. 599, Attach. 2) at ¶ 1.

Plaintiffs allege that the claimed land was wrongfully acquired or transferred from them by the State through a series of transactions in violation of the Indian Trade and Intercourse Act, codified as 25 U.S.C. § 177 (the "Nonintercourse Act"), the Treaty of Canandaigua, and federal common law. *Id.* This action and other related Indian land claims have a long and tortured procedural history; familiarity with the history and the detailed factual record in this case is presumed.[1]

Plaintiffs are the heirs and political successors to the aboriginal Oneida Indian Nation that occupied the claimed land from time immemorial. *Id.* at 11. Plaintiffs are also the heirs to a long and proud history; a history that is filled with a number of betrayals. As part of that history, Plaintiffs inherited the legal claim to right the historic wrongs born of actions that can only be seen as grave injustices. The courts have held themselves open to Plaintiffs' land claims for generations, however, recent legal developments raise the possibility that this Court might be compelled to close its doors now. The Court does not believe that the higher courts intended to or have barred Plaintiffs from receiving any relief; to

[1] The factual history of this action is described in detail in *Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104 (N.D.N.Y. 2002) ("*Oneida 2002*") (Kahn, D.J.).

do so would deny the Oneidas the right to seek redress for long-suffered wrongs. For the reasons discussed below, the Court grants Defendants' Motion for summary judgment in part and denies the Motion in part.

II. Background Related to Present Motion

Defendants argue that recent decisions by the United States Supreme Court and the Court of Appeals for the Second Circuit mandate dismissal of the claims asserted by the Oneidas (and the United States on their behalf) in the instant case. Defts' Mem. of Law (Dkt. No. 582, Attach. 3) at 2-3. In March, 2005, the Supreme Court issued its decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005). In *Sherrill*, the Supreme Court held that equitable principles barred the New York Oneidas from reasserting tribal sovereignty over land they had purchased that was within the boundaries of the Oneidas' former reservation area. *Id.* Following the *Sherrill* decision, the Second Circuit held in *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005), cert. denied, — U.S. —, —, 126 S. Ct. 2021, 2022, 164 L. Ed. 2d 780 (2006), that disruptive possessory land claims are subject to the equitable doctrines, specifically laches, applied in *Sherrill*. *Id.* at 275. Defendants assert that the heart of Plaintiffs' case is the claim that they have a current possessory interest in the claim area that dates back to time immemorial, which was recognized by the United States in the 1794 Treaty of Canandaigua, and that has never been extinguished. Defts' Mem. of Law (Dkt. No. 582, Attach. 3) at 16. Accordingly, Defendants suggest that Plaintiffs' claims are foreclosed by *Sherrill* and *Cayuga* and must be dismissed. Plaintiffs respond that: (1) Defendants have

ignored the Oneidas' non-possessory claim to compel the State of New York to pay fair compensation for the Oneidas' land based on its value when the State acquired it; and (2) their trespass damages claims cannot be barred by laches without further discovery of facts related to the delay in bringing the claims and the prejudice that may result from those claims. Plntfs' Mem. of Law (Dkt. No. 599, Attach. 1) at 1-2.

III. Discussion

A. Standard of Review

Rule 56 of the *Federal Rules of Civil Procedure* provides that summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Courts applying this standard must "resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment." *Brown v. Henderson*, 257 F.3d 246, 251 (2d Cir. 2001) (quoting *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 216 (2d Cir. 2001)).

Once the moving party meets its initial burden by demonstrating that no material fact exists for trial, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (citations omitted). The nonmovant "must come forth with evidence sufficient to allow a reasonable jury to

find in her favor." *Brown*, 257 F.3d at 251 (citation omitted). Bald assertions or conjecture unsupported by evidence are insufficient to overcome a motion for summary judgment. *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir. 1991); *W. World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990).

B. Laches Bar Plaintiffs' Possessory Land Claims

1. Reconsideration of Defendants' Laches Defense

Defendants assert that the *Cayuga* decision, which dismissed land claims brought by the Cayuga Nation, means that the Second Circuit has already determined that the very claims at issue in this case are barred by laches. Defts' Mem. of Law (Dkt. No. 582, Attach. 3) at 19. Relying on Supreme Court and Second Circuit precedent, this Court struck Defendants' laches defense in its March, 2002 Memorandum-Decision and Order. *Oneida 2002*, 194 F. Supp. 2d at 124. In their Memorandum of Law, Defendants urge the Court to reconsider its prior decision regarding the laches defense. Defts' Mem. of Law (Dkt. No. 582, Attach. 3) at 7. As discussed below, in light of the *Cayuga* and *Sherrill* decisions, the Court now holds that Defendants can assert a laches defense against Plaintiffs' possessory land claims.

Courts retain the inherent authority to modify or adjust all interlocutory orders prior to the entry of a final judgment. *Parmar v. Jeetish Imports, Inc.*, 180 F.3d 401, 402 (2d Cir. 1999) (citing Fed. R. Civ. P. 54(b); *United States v. LoRusso*, 695 F.2d 45, 53 (2d Cir. 1982)). Typically, on a motion by a party, a court may justifiably reconsider its previous ruling when there is an intervening change in the controlling law. *Delaney v. Selsky*, 899 F. Supp. 923, 925 (N.D.N.Y. 1995) (McAvoy,

C.J.) (citing *Doe v. New York City Dep't of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1983)). However, there must be more that simply "mere doubt" regarding the effect of an apparent change in the controlling law in order to open a matter for full reconsideration. *See Doe*, 709 F.2d at 790 n.9.

This Court's prior Order reviewed the case law and found that "[c]ourts analyzing Indian land claim actions have consistently rejected the use of delay-based defenses." *Oneida 2002*, 194 F. Supp. 2d at 123 (citing *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1084, 1097 (2d Cir. 1982) (rejecting the validity of delay-based defenses, specifically laches, in Indian land claim action)). In *Cayuga*, the Second Circuit reasoned, based on the *Sherrill* decision, that equitable defenses, including laches, can be applied to viable possessory land claims that were filed within the applicable statute of limitation. *See Cayuga*, 413 F.3d at 273-74. Furthermore, the Second Circuit explicitly stated, "if the Cayugas filed this complaint today, exactly as worded, a District Court would be required to find the claim subject to the defense of laches under *Sherrill* and could dismiss on that basis," *id.* at 278, and conceded that, "*Sherrill* effectively overruled [the Second Circuit's] holding in *Oneida Indian Nation v. New York* . . . that laches and other time-bar defenses should be unavailable . . ." *Id.* at 277 n.6. The Second Circuit has now recognized that the precedents relied on by this Court's prior ruling have been overruled; therefore, there can be no question that the controlling law has been effectively transformed and that the Court's prior order should be reconsidered.

2. Plaintiffs Assert Possessory Land Claims Subject to Laches Defense

The Second Circuit determined that the Cayugas' claim had always been one "sounding in ejectment." *Id.* at 274. The Circuit reasoned that though the district court only awarded money damages, the Cayugas had "asserted a continuing right to immediate possession as the basis of all of their claims, and have always sought ejectment of the current landowners as their preferred form of relief." *Id.* The Second Circuit concluded that this type of claim is inherently disruptive because it seeks to overturn years of settled land ownership. *Id.* at 275. Therefore, as discussed above, the Circuit held that the type of claim advanced by the Cayugas is subject to equitable defenses, including laches. *Id.*

In their Amended Complaint, Plaintiffs assert a current possessory interest in the land and seek equitable relief restoring possession to them of the land held by Defendants. For example, Plaintiffs' Amended Complaint alleges, *inter alia*, that they were "unlawfully dispossessed of the subject lands, and that unlawful dispossession of the subject lands continues to the present day." Amended Complaint (Dkt. No. 582, Attach. 6, Ex. A) at 49. Moreover, Plaintiffs claim that "[u]nder the Nonintercouse Act, 25 U.S.C. § 177, Plaintiff Tribes have a continuing right to title to and possession of the subject lands, absent a transfer of the subject lands in compliance with that Act." *Id.* at ¶ 58. In connection with these claims, Plaintiffs seek relief, including, but not limited to: (1) a declaration that they have possessory rights to the claimed lands and that Defendants' interests in the lands are null and void; (2) injunctive relief as necessary to restore possession of the claimed

lands to which Defendants claim title; (3) damages in the amount of the fair market value of the subject lands, as improved; and (4) trespass damages. *See id.* at 24-25. Like the claims before the Second Circuit in *Cayuga*, Plaintiffs assert certain claims predicated on their continuing right to possess land in the claim area and seek relief returning that land and damages based on their dispossession. The Second Circuit has held that a laches defense does apply to "indisputably disruptive" possessory land claims, like those brought by the Cayugas and Plaintiffs in the instant case, when plaintiffs seek possession of large swaths of land and the possible ejectment of current landowners. *See Cayuga*, 413 F.3d at 275. Accordingly, pursuant to the *Cayuga* decision, the Court is now required to find Plaintiffs' possessory land claims are subject to the defense of laches.

3. Application of Laches Defense

The *Cayuga* court has adopted a specific set of criteria, originally articulated in *Sherrill*, to determine when laches should bar possessory Indian land claims, such as those before the Court. *See Cayuga*, 413 F.3d at 277. The Second Circuit concluded that the same considerations that "doomed the Oneidas' claim in *Sherrill*" required the dismissal of the Cayugas' land claims; these considerations were:

> [G]enerations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation; at least since the middle years of the 19th century, most of the [Tribe] have resided elsewhere; the longstanding, distinctly non-Indian character of the area and its inhabitants; the distance from 1805 to the present day;

> the [Tribe's] long delay in seeking equitable relief against New York or its local units; and developments in [the area] spanning several generations.

Id. (internal citations and quotations omitted). As discussed below, in light of the factors established by the Second Circuit, the Court concludes that the factual record developed in this case and the Supreme Court's findings in *Sherrill* warrant dismissal of Plaintiffs' possessory land claims to the land held by Defendants. he generally self-evident findings below apply with equal force to land held by Defendants, as well as to land held by private parties.

The transactions at issue before the Court are of particularly ancient pedigree; however, Plaintiffs did not seek redress until relatively recently. In *Sherrill*, the Supreme Court reviewed the historical record of the State's purchases of reservation land from the Oneidas—purchases which are the subject of the instant action. *See Sherrill*, 544 U.S. at 204-05, 125 S. Ct. 1478. The Supreme Court noted that even after the 1794 Treaty of Canandaigua acknowledged the Oneida Reservation and guaranteed the Oneidas' free use and enjoyment of their territory, the State continued to purchase reservation land over the objections of President Washington's administration. *Id.* at 205, 125 S. Ct. 1478. For example, in 1795, without federal supervision, the State negotiated to buy 100,000 acres of the 300,000 acres that comprised the Oneidas' Reservation; by 1843, the New York Oneidas retained less than 1,000 acres in the State. *Id.* at 205-07, 125 S. Ct. 1478. Accordingly, it stands to reason that most of the transactions at issue are now over 150 years old. The Oneidas acknowledge that the last transaction that they or individual Oneidas entered

into with the State took place in 1846. Plntfs' Stat. of Mat. Facts (Dkt. No. 599, Attach. 2) at ¶ 2. The *Sherrill* decision concluded that the same transactions now before this Court "occurred in the early years of the Republic . . . [, yet] [t]he Oneidas did not seek to regain possession of their aboriginal lands by court degree until the 1970's." *Id.* at 217. The Supreme Court held that, combined with other factors, "this long lapse of time" precluded the Oneidas from gaining the disruptive remedy they sought. *Id.* Plaintiffs did not first file their Complaint with this Court until 1974, nearly 130 years after the last transaction subject to suit. *See* Complaint (Dkt. No. 1). Consequently, this Court is bound by the Supreme Court's findings that, for purposes of applying laches to land claims, there was a significant lapse of time between the complained of land transactions and Plaintiffs' efforts to regain possession of the claimed land.

Most of the Oneidas have lived elsewhere since the mid-nineteenth century and the land in the claim area has a distinctly non-Indian character. *Id.* at 202, 125 S. Ct. 1478. In spite of its commitments under the Treaty of Canandaigua, the United States and its agents "pursued a policy designed to open reservation land to white settlers and to remove tribes westward." *Id.* at 205, 125 S. Ct. 1478. As a result, Federal agents actively encouraged the Oneidas to move west. *Id.* at 206, 125 S. Ct. 1478. Accordingly, by 1825, nearly 150 Oneidas had moved to Wisconsin; 600 Oneidas resided in Wisconsin by 1838, while 620 remained in New York. *Id.* Finally, as the Supreme Court recognized, by the mid-1840's only 200 Oneidas remained in the State. *Id.* at 207, 125 S. Ct. 1478. Furthermore, Plaintiffs also admit that the population of the claim area has been predomi-

nately non-Indian since the mid-nineteenth century. Plntfs' Stat. of Mat. Facts (Dkt. No. 599, Attach. 2) at ¶ 9.

At the same time, the historical record reflects an explosion of the white settler population in the area that is now Oneida and Madison Counties. In 1790, one settler town with a population of 1,891 abutted the Oneida reservation. Taylor Report (Dkt. No. 582, Attach. 9, Ex. J) at 143. By the next census in 1800, there were eighteen settler towns around the Oneida Reservation with a population of 28,815; the settler population reached 55,778 in 1810. *Id.* In 1890, Madison County had a population of 42,892 and Oneida County's population was 122,922. 1890 Census (Dkt. No. 582, Attach. 12, Ex. W) at Table 4. By 2005, 235,469 people lived in Oneida County, and only 0.2% of that population was recorded in the census as American Indian and Alaska Native persons, a percentage that would presumably include any Oneidas presently living in the county. *See* U.S. Census Bureau, Oneida County, New York website *at* http://quickfacts.census.gov/qfd/states/36/36065.html (last visited Apr. 25, 2007). Madison County had a population of 70,337 in 2005, of which 0.6% was recorded as American Indian and Alaska Native persons. *See* U.S. Census Bureau, Madison County, New York website at http://quickfacts.census.gov/qfd/states/36/36053.html (last visited Apr. 25, 2007). Accordingly, the Court finds that there can be no dispute that since the nineteenth century the population of Madison and Oneida Counties has been fundamentally transformed and is now comprised primarily of non-Oneida peoples. *See*, *e.g.*, *Sherrill*, 544 U.S. at 220, 125 S. Ct. 1478 (". . . Oneida County [is] today overwhelmingly populated by non-Indians.").

Non-Indians have greatly developed the area in question and have justified expectations that they will continue to maintain their lives there. The Supreme Court has explicitly stated "that [g]enerations have passed during which non-Indians have owned and developed the area that once composed the [Oneidas'] historic reservation." *Id.* at 202, 125 S. Ct. 1478. As part of its holding denying the Oneidas' sovereignty over land within the City of Sherrill, the Supreme Court recognized and relied on the "dramatic changes in the character of the properties" located within the claim area at issue before the Court. *Id.* at 216-17, 125 S. Ct. 1478. While asserting that Oneidas did continue to live in the area, Plaintiffs themselves admit that non-Indians occupied and developed the land. Plntfs' Stat. of Mat. Facts (Dkt. No. 599, Attach. 2) at ¶ 4. Moreover, in a prior Order in this case, the Court found that Plaintiffs could not amend their complaint to include 20,000 private landowners because of the impossibility of restoring to the Oneidas lands that non-Oneida peoples have subjected to "development of every type imaginable . . . for more than two centuries." *Oneida Indian Nation of New York v. County of Oneida*, 199 F.R.D. 61, 92 (N.D.N.Y. 2000) (McCurn, Senior D.J.). The same self-evident observation can be made in connection with Defendants' lands before the Court in the instant Motion. *See id.*

The Second Circuit was very clear in *Cayuga*: Indian possessory land claims that seek or sound in ejectment of the current owners are indisputably disruptive and would, by their very nature, project redress into the present and future; such claims are subject to the doctrine of laches. *Cayuga*, 413 F.3d at 275. Furthermore, the Second Circuit dismissed the Cayugas' claims in sub-

stantial part because the same considerations that doomed the Oneidas' claim in *Sherrill* applied with equal force to the Cayugas' claims. *See id.* at 277. The claims before this Court arise from nearly identical circumstances and the Court is obligated to follow the same reasoning.

Plaintiffs argue that a laches inquiry is fact-intensive and that the Court cannot determine whether laches bars Plaintiffs' claims without permitting additional discovery and holding an additional evidentiary hearing. Plntfs' Mem. of Law (Dkt. No. 599, Attach. 1) at 13-15. Some could read the *Cayuga* decision to require an evidentiary hearing regarding a laches defense because it states that it is "affirm[ing] the District Court's finding that the possessory land claim is barred by laches." *Cayuga*, 413 F.3d at 277. However, the Second Circuit prefaced its "affirmance" by noting that "the considerations identified by the Supreme Court in *Sherrill* mandate[d]" such an action. *Id.* This Court understands this language to mean that even in the absence of a finding by the district court that laches barred the claims, the Second Circuit would have held that the *Sherrill* factors controlled and that the Cayugas' claims were barred by laches. Therefore, as discussed above, the Court finds additional discovery unnecessary,[2] and that

[2] It is also important to note that 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. This Court takes special notice of Judge McCurn's wise reasoning, born of long experience with various Indian land claim litigations, that led him to conclude the following about the efficacy of ordering such an evidentiary hearing:

the undisputed facts as developed by the parties and in Second Circuit and Supreme Court precedent require the Court to grant Defendants' Motion for summary judgment and dismiss Plaintiffs' possessory land claims.

The Court is compelled to take this action to prevent further disruption: Plaintiffs seek to eject Defendants from their land and obtain trespass damages related to Defendants' unjust possession of the land. Under 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. In fact, the Oneidas have diligently pursued their claims in various fora, and this finding does not, in any substantial part, rest on any supposed deficiency in the Oneidas'

It is true that for a time in *Cayuga*, this court did entertain the possibility of ejectment as a remedy. Exercising an abundance of caution in this relatively nascent area of federal Indian law, (*i.e.* the appropriate remedies for land claims), the court in *Cayuga* did conduct an evidentiary hearing on the issue of the availability of ejectment as a remedy. Like a Monday morning quarterback with the advantage of hindsight, however, the court is now convinced that that hearing can fairly be described as an academic exercise. Much of the proof adduced therein fell into the category of commonsense observations as to the relative pros and cons of ejectment. Many of the reasons which this court gave in *Cayuga Indian Nation of New York v. Cuomo*, 80-CV-930, 80-CV-960, 1999 WL 509442 (N.D.N.Y. July 1, 1999) (McCurn, Senior D.J.) for not permitting ejectment, such as the potential for displacement of vast numbers of private landowners; "negative economic impact[;]" "widespread disruption" to everyone residing in the general vicinity of the claim area due, in part, to interference with transportation systems which currently transect the claim area, were self-evident. *See id.* at *22 and *29. The court gained insight—either factually or legally—from that hearing; it only needlessly prolonged the *Cayuga* litigation.

Oneida Indian Nation of New York, 199 F.R.D. at 92.

efforts to vindicate their claims.[3] However, claims based on the Oneidas' 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. Past injustices suffered by the Oneidas cannot be remedied by creating present and future injustices.

C. Non-Possessory Claims Survive Summary Judgment

As the Supreme Court recognized in *Sherrill*, the Oneidas' claims concern "grave, but ancient, wrongs, and the relief available must be commensurate with that historical reality." *Sherrill*, 544 U.S. at 217 n.11, 125 S. Ct. 1478. Finding that the Oneidas have a current possessory right in the land at issue would create an

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[3] *See generally*, Joseph Singer, *Nine-Tenths of the Law: Title Possession & Sacred Obligation*, 38 Conn. L. Rev. at 615-28. (enumerating barriers that Oneidas faced to bringing suit, including: general lack of jurisdiction to hear claims in federal and state court and finding a private right of action to vindicate their rights); *see also Oneida Indian Nation of New York v. Oneida County*, 434 F. Supp. 527, 536-37 (N.D.N.Y. 1977) ("*Test Case*") (Port, Senior D.J.) ("Despite these conditions of poverty and illiteracy, and although their attempts to redress grievances were totally futile, the Oneidas did protest the continuing loss of their tribal land. These efforts were not documented prior to 1909. However, expert witnesses testified that between 1840 and 1875 the Oneidas often attempted to petition the federal government. Usually, such petitioning was conducted through the Oneidas' Indian agent. On one occasion, in 1874, a group of Oneidas travelled from Wisconsin to Albany, New York and consulted with a private law firm. All of these efforts were to no avail. Between 1909 and 1965, the Oneidas contacted the federal government innumerable times in connection with land claims and other grievances.").

unduly burdensome disruption to the State and Counties; however, Plaintiffs have alleged other, non-disruptive, claims that are commensurate with the historical record and current property holdings, and allow them the opportunity to vindicate claims that were wrongly denied them.

Plaintiffs assert that their Complaint contains a non-possessory claim against only the State for damages in the amount by which the State underpaid the Oneidas for their land, which the State re-sold for large profits. Plntfs' Mem. of Law (Dkt. No. 599, Attach. 1) at 4. According to Plaintiffs, their fair compensation claim is not disruptive and, therefore, is not subject to a laches defense. *Id*. at 5. Plaintiffs state that a fair compensation claim is based on the premise that titles cannot be challenged. *Id*. at 6. Plaintiffs explain this claim recognizes that when 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, usually the defendants' profit on re-sale. *Id*. Accordingly, a fair compensation claim recognizes that equity bars the return of land and assures fair compensation for the sale of that land; therefore, fair compensations damages accept the finality of the land conveyances and, instead of rescission, retrospectively make the transaction fair. *Id*.

1. *Sherrill* and *Cayuga* Only Bar Disruptive Possessory Claims

As explained above, the Second Circuit, relying on the reasoning in *Sherrill*, dismissed the Cayugas' possessory land claims because they were disruptive, for-

ward-looking claims subject to laches and other equitable defenses. *Cayuga*, 413 F.3d at 277. The Circuit also barred the Cayugas' request for trespass damages in the amount of the fair rental value of the land for the entire period of dispossession. *Id.* at 278. The Circuit explained that trespass damages were also "predicated entirely upon plaintiffs' possessory land claim, for the simple reason that there can be no trespass unless the Cayugas possessed the land in question." As a result, the Circuit reasoned that the Cayugas' request for trespass damages depended on their disruptive, possessory land claim and was also barred by laches. *Id.* Accordingly, a claim not predicated on Plaintiffs' possession of the disputed land would not be subject to the equitable defense of laches. This outcome is consistent with precedent: Plaintiffs are pursuing this action at law and the application of laches in such an action "would be novel indeed." *Oneida II*, 470 U.S. at 245 n.16, 105 S. Ct. 1245.

2. Plaintiffs Assert Non-Possessory Common Law Claims

In *Sherrill*, the Supreme Court stated that its decision in *Oneida II* recognized that the Oneidas could maintain a federal common-law claim for damages for ancient wrongdoing in which both national and state governments were complicit. *Sherrill*, 544 U.S. at 202, 125 S. Ct. 1478. The *Sherrill* decision explicitly held that "the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II.*" *Id.* at 221, 125 S. Ct. 1478. In *Oneida II*, the Supreme Court held that the Nonintercourse Act does not speak to the question of remedies, and, therefore, the Oneidas are not preempted from bringing federal common-law actions to

enforce their rights. *See Oneida II*, 470 U.S. at 237-40, 105 S. Ct. 1245. Therefore, subject to the requirements laid out by the Second Circuit in *Cayuga*, Plaintiffs may bring common law claims against Defendants to remedy past violations of their legal rights.[4]

i. Plaintiffs Adequately Pled Non-Possessory Claims

In their Amended Complaint, Plaintiffs do allege facts necessary to assert non-possessory claims against the State. The only burden that a plaintiff must meet at the pleading stage is that found in Rule 8(a) of the *Fed-*

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[4] Additionally, the Second Circuit has previously held that the Oneidas can maintain a private right of action to enforce the Nonintercourse Act and may seek damages for violations of the act. *Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 537-41 (2d Cir. 1983). The Supreme Court did not reach the question or determine if there was an implied statutory cause of action under the Nonintercourse Act when it reviewed the Circuit's decision in *Oneida II*. *Oneida II*, 470 U.S. at 233. Accordingly, a claim predicated on a violation of the Nonintercourse Act and seeking remedies effectuating the intent of the act might also be appropriate. However, Defendants correctly note that the Circuit recognized an implied right of action that was possessory in nature. *See* Defts' Reply Mem. of Law (Dkt. No. 606, Attach. 1) at 7 n.9. The Circuit noted that the Oneidas' right of action "closely corresponds to the common law action for ejectment in which a plaintiff need only establish his right to possession." *Oneida Indian Nation*, 719 F.2d at 540. The implied right of action found by the Circuit was based on ejectment and would likely be subject to the same laches analysis discussed in Section III.B, *supra*. There is no precedent that forecloses Plaintiff from asserting a right of action under the Nonintercourse Act. However, in light of *Sherrill* and *Cayuga*, Plaintiffs' common law claims are on stronger ground. In any event, an analysis of Plaintiffs' common law claims would be part of the determination of a remedy that would be commensurate with vindicating any violations of the Nonintercourse Act. Therefore, the Court will limit its discussion to Plaintiffs' common law claims.

eral Rules of Civil Procedure, which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Amron v. Morgan Stanley Inv. Advisors, Inc.*, 464 F.3d 338, 343 (2d Cir. 2006) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)). In order to meet this burden, a complaint need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which its rests." *Amron*, 464 F.3d at 343 (internal quotations omitted). This standard also requires a plaintiff to allege those facts sufficient to establish liability. *See id.* at 344 (citing *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346-47, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)).

Plaintiffs correctly note that their Amended Complaint alleges that the State provided the Oneida Indian Nation with inadequate compensation for certain land transfers. *See* Plntfs' Mem. of Law (Dkt. No. 599, Attach. 1) at 4. Paragraph 31 of the Amended Complaint alleges facts sufficient to establish the State's liability based on an agreement the State entered into with the Oneida Indian Nation on September 15, 1795 to purchase approximately 100,000 acres of land; the Amended Complaint asserts that the State paid approximately fifty (50) cents per acre for the land, but obtained seven (7) times that amount when it resold the land to white settlers over a two-year period. Amended Complaint (Dkt. No. 582, Attach. 6, Ex. A) at ¶ 3 1. Moreover, Paragraph 35 alleges that after each of the twenty-six (26) agreements at issue, "the State made substantial profits on its purported sales of the subject lands." *Id.* at ¶ 35. The Amended Complaint seeks relief based on the benefit the State received from the land sales in the form of "disgorgement" of the "difference in value be-

tween the price at which New York State acquired or transferred each portion of the subject lands from the Oneida Indian Nation and its value." *Id.* at 26 ¶ 6. Under the liberal standard set forth in Rule 8, Plaintiffs have provided the State with adequate notice of their challenge to the consideration the Oneida Indian Nation received for the land transferred to the State pursuant to the twenty-six (26) agreements at issue in this action.

ii. Plaintiffs' Non-Possessory Claims Are Consistent with Cayuga and Federal Common Law

In addition to providing the State fair notice, Plaintiffs must also have alleged a cause of action consistent with federal common law in light of the *Cayuga* decision. The Second Circuit has made clear that Indian claims seeking damages for the loss of use and possession of land are as disruptive as ejectment claims would be, and, therefore, are subject to laches. *See Cayuga*, 413 F.3d at 275-78. In the instant matter, Plaintiffs claim that the State inadequately compensated the Oneida Indian Nation for land transferred to it. This claim is best styled as a contract claim that seeks to reform or revise a contract that is void for unconscionability. This type of contract claim is not disruptive. As explained below, this type of claim only seeks retrospective relief in the form of damages, is not based on Plaintiffs' continuing possessory right to the claimed land, and does not void the agreements. As a result, the Court would reform the agreements through an exercise of its equitable power, which implicitly recognizes and confirms the transfer of property made pursuant to the agreements subject to attack. Therefore, Plaintiffs may pursue this cause of action while conforming to the Circuit's mandate in *Ca-*

yuga that Defendants' settled expectations not be disrupted.

iii. Federal Common Law Precedent

Cayuga did not foreclose Plaintiffs from bringing non-disruptive federal common law claims against the State. The history of federal regulation of relations with the Indian tribes and the unique federal policy concerns related to Indian land claims makes it unnecessary to adopt state law as the federal rule of decision in this case. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979); *Oneida II*, 470 U.S. at 235-41, 105 S. Ct. 1245. Additionally, federal courts have examined Indian claims and developed a body of law for situations that are nearly identical to the contract claims presented by Plaintiffs. In those cases, tribal claimants sought additional compensation for land ceded to the United States by treaty for which they received unconscionable consideration, which is similar to Plaintiffs' fair compensation claim against the State. As explained below, a quasi-adjudicatory body and the Court of Claims developed rules that preserved the land transactions, but revised the challenged treaties to allow the tribal claimants to seek damages so that they would be adequately compensated for their land transfers.

In 1946, Congress enacted the Indian Claims Commission Act (the "ICCA") and created a quasi-judicial body, subject to appellate review by the Court of Claims, to hear and determine all tribal claims against the United States that accrued before August 13, 1946. *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1460 (10th Cir. 1987). The Indian Claims Commission

(the "Commission") construed the ICCA to limit available relief "to that which is compensable in money"; legislative history attached to congressional bills extending the Commission's mandate confirmed that "[t]ribes with valid claims would be paid in money. No lands would be returned to a tribe." *Id.* at 1461 (internal quotations omitted). The ICCA granted the Commission jurisdiction over a variety of tribal claims against the United States, 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 of law or fact, or any other ground cognizable by a court of equity."[5] ICCA § 2(3), 25 U.S.C.

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[5] Section 2 of the ICCA granted jurisdiction to the Commission over claims both normally cognizable at law and over those grounded in considerably broader allegations. Section 2 stated:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the Unites States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable

§ 70a(3) (1976) (repealed). Pursuant to the ICCA, the Commission and the Court of Claims adjudicated claims seeking to revise contracts with the United States based on a claimant's receipt of unconscionable consideration in various treaties transferring tribal land to the United States. *See*, *e.g.*, *Crow Tribe v. United States*, 151 Ct. Cl. 281, 284 F.2d 361 (1960), cert. denied, 366 U.S. 924, 81 S. Ct. 1350, 6 L. Ed. 2d 383 (1961); *Miami Tribe of Oklahoma v. United States*, 150 Ct. Cl. 725, 281 F.2d 202 (1960), *cert. denied*, 366 U.S. 924, 81 S. Ct. 1350, 6 L. Ed. 2d 383 (1961), *overruled in part on other grounds by Pawnee Indian Tribe v. United States*, 157 Ct. Cl. 134, 301 F.2d 667, *cert. denied*, 370 U.S. 918, 82 S. Ct. 1556, 8 L. Ed. 2d 498 (1962).

While claims based on unconscionable consideration were brought pursuant to statutory right, the Court of Claims fashioned a common law rule based on preexisting precedents to determine when Indian claimants could prevail on related claims.[6] *See Coast Indian Com-*

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dealings that are not recognized by any existing rule of law or equity. . . .

ICCA § 2; 25 U.S.C. § 70(a) (repealed).

[6] Moreover, the language of the ICCA supports the proposition that the grounds listed in Section 2, clause 3 were to be based on common law precepts. Clause 3 specifically lists certain jurisdictional grounds and adds jurisdiction based on "any other ground cognizable by a court of equity," and, thus, implies that the other grounds were assumed to be those recognized by courts of equity. Additionally, clause 5 grants jurisdiction over "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity"; this language means that Congress did delineate between legal/equitable claims recognized by courts and those claims based on moral grounds and expected the courts to adhere to common law rules when jurisdiction existed pursuant to other clauses. *Cf. Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1112-13 (Fed. Cir. 1992) (judi-

munity v. United States, 213 Ct. Cl. 129, 550 F.2d 639, 653 n.45 (1977). In *Osage Nation of Indians v. United States*, 119 Ct.Cl. 592, 97 F. Supp. 381, *cert. denied*, 342 U.S. 896, 72 S. Ct. 230, 96 L. Ed. 672 (1951), the Court of Claims established the rule governing unconscionable consideration claims. The Osage Nation initiated the case in order to seek additional compensation for nearly 870,000 acres in southeastern Kansas ceded to the United States by treaty on September 29, 1865. *Osage Nation*, 97 F. Supp. at 384.

Legal Claim and Standard in Osage Nation: In reaching its decision, the Osage Nation court appears to have relied on an earlier Supreme Court case to fashion an unconscionable consideration standard. The *Osage Nation* decision cites *Klamath & Moadoc Tribes v. United States*, 296 U.S. 244, 56 S. Ct. 212, 80 L. Ed. 202 (1935), which discusses claims seeking to invalidate contracts based on the inadequacy of consideration.[7] The *Klamath* court stated that if Indian plaintiffs had asserted a judicially cognizable claim against the United States for inadequate compensation, a showing of mere inadequacy of consideration would not have been enough to invalidate the contract. *Id.* at 255, 56 S. Ct. 212. Instead, to sustain such a claim, plaintiffs would need to show "inadequacy of consideration coupled with lack of business capacity and inferiority of position in respect of

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cial inquiry of a "fair and honorable dealings" cause of action, brought pursuant to clause 5, should be undertaken in light of moral basis of the claim and not strictly analyzed in connection with the boundaries of the law).

[7] The Supreme Court ultimately held that the congressional statute authorizing suit did not grant the courts jurisdiction over the type of inadequate compensation claim asserted by plaintiffs. *Klamath*, 296 U.S. at 255, 56 S. Ct. 212.

the transaction or in relation to that of the other party." *Id.* at 254, 56 S. Ct. 212. According to the Supreme Court, the Klamath and Moadoc Tribes could not sustain an inadequate consideration claim because "the findings fail to show that any person acting for the United States deceived or misled plaintiffs as to the value of the land or, indeed, had knowledge of any fact bearing upon its value that was not well known by plaintiffs when they made the settlement and gave the release." *Id.* at 255, 56 S. Ct. 212.

While relying on *Klamath*, the *Osage Nation* decision supports a holding that when the record shows that an agreement resulted in a gross disparity between the fair market value and the price paid for the land transferred, a claim of unconscionable consideration presumptively exists and supports the revision of contract. Consistent with *Klamath*, the *Osage Nation* court did revise the treaty with the Osage on unconscionable consideration grounds because of the very low price paid to the Osage coupled with the finding that agents acting for the United States in the negotiation of the treaty with the Osage had knowledge of facts bearing upon the value of the land that was not known to the Osage. *Osage Nation*, 97 F. Supp. at 422. However, at the same time, the *Osage Nation* court suggested that when the price paid for the transferred land is exceptionally low, that fact alone is sufficient to find that tribal plaintiffs received unconscionable consideration for their lands. *Id.* The *Osage Nation* court reasoned, "If these Indians had been more versed in the ways of civilization' or had been represented, as were some other tribes, by astute white attorneys, it would have been impossible to seriously suggest that 34 cents an acre was a fair price for this land." *Id.* Accordingly, this reasoning, though anti-

quated, suggests that courts may find the consideration offered to tribal plaintiffs so unreasonable that it is unnecessary for plaintiffs to make any additional showing regarding the purchasers' intent or knowledge of the facts surrounding the transaction.

Determination of Unconscionable Consideration in Osage Nation: In order to determine the fair market value of the lands ceded by the Osage Nation, the Court of Claims listed a number of factors that should be considered: the prices at which the land sold, the extent of the demand, the quality of the land and its use at the time, the price paid by the Government for similar land at about the same time under treaties with other Indians, and the prices paid by persons other than Indians buying similar land in the locality from private citizens. *Id.* at 403. As part of its inquiry into these factors, the Court of Claims undertook a detailed review of the congressional acts and debates authorizing the purchase and sales of the Osage territory. *Id.* at 403-19.

The *Osage Nation* court found that the record indicated a vigorous demand for the Osage Nation's land, much of which was sold even before the Osages' title was extinguished. *Id.* at 420. Moreover, the Court of Claims found that the congressional debates indicated that the price set for the Government's resale of the land, $1.25 per acre, did not represent the market value of the lands, and that all considered it to be worth much more. *Id.* Instead, the Court of Claims stated that the Government resale price was low because "the real purpose of the Resolution seems to have been to give the Kansas settlers a bargain both in price and in the terms of payment." *Id.* Moreover, the *Osage Nation* court found that the Government price was exceptionally low be-

cause by 1863, when the treaty with the Osage was negotiated, the Government had granted half the land in question to the State of Kansas for railroad purposes—which greatly increased the demand and the value of the land. *Id.* at 420-21. Therefore, the Court of Claims found that when the United States paid the Osage Nation thirty-four (34) cents per acre for the land, the fair market value was significantly higher: Government sales were uniformly at $1.25 per acre, which was a price intentionally set to benefit white settlers, and the railroads, which also sold the land in question, sold parcels of the land in question for an average of $6.00 per acre. *Id.* The Court of Claims concluded that the Osage Nation was entitled to damages representing the fair value of the land as determined on the treaty date, less the amount already received and any expenses incurred by the Government. *Id.* at 422.

Additional Unconscionable Consideration Guidance: The Court of Claims further clarified what amount of consideration might be considered unconscionable. In *Miami Tribe*, the court reviewed the Commission's determination that the Miami Tribe did not receive unconscionable consideration for land ceded to Kansas in 1854. *Miami Tribe*, 281 F.2d at 206. The Government and the Miami Tribe introduced evidence related to the cost of similar tracts of land at the time of the cession; based on a review of this evidence, the Court of Claims affirmed the Commission's valuation of the land in question. *Id.* at 206-08. However, the Court of Claims found that the Miami Tribe received a smaller payment for the land than the Commission had originally determined. *Id.* at 208. As a result, the *Miami Tribe* court reversed the Commission and held that the claimant was paid unconscionable consideration when

they received $121,974.23 for land that the Commission found to be worth $317,697.93. *Id.* The Court of Claims explained that the consideration received by the Miami Tribe was:

> only 38% of the value of the land. It is true that there is no exact dividing line between what is unconscionable and what is not. The disparity between the price paid and the fair market value of the land must be very great. We think that the Commission was correct when it said in this case that payment of less than half the true value is unconscionable.

Id. at 208-09. Accordingly, in certain situations, consideration received by tribal claimants found to worth less than half of the market price for similarly situated land has been deemed unconscionable.

In *Crow Tribe*, the Court of Claims affirmed the Commission's finding that the Crow Tribe received unconscionable consideration when it received less than $0.054 per acre, when market value was $0.40 per acre, for approximately 30 million acres ceded to the United States in south central Montana and north central Wyoming. *Crow Tribe*, 284 F.2d at 362. The Court of Claims determined that it did not have to find that the Crow Tribe was induced under mistaken facts to accept inadequate compensation under the unconscionable consideration standard. *See id.* at 371. Accordingly, the Court of Claims held that the Crows received $1,111,768.07 for their land, but were entitled to receive $12,212,305.00; therefore, the court found damages for the Crows in the amount of $10,242,984.70, which was the difference between the two amounts minus additional offsets. *Id.* at 373.

After reviewing the unconscionable consideration cases, this Court finds 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. In order to prevail on such a claim, Plaintiffs must show either: (1) the inadequacy of consideration they received coupled with evidence of the inferiority of the Oneida Indian Nation's negotiating position, which can be established by evidence demonstrating that the State deceived or misled Plaintiffs as to the value of the land or had knowledge of any fact bearing upon its value that was not well known by Plaintiffs; or (2) in light of the precedent above and elsewhere, the gross inadequacy of the consideration received by Plaintiffs in comparison to the fair market value of the land such that it is unnecessary for Plaintiffs to make any additional showing regarding the State's actions or knowledge. The Court will consider several factors when determining the fair market value of the land, which is critical to any finding regarding the inadequacy of the consideration; these are: the prices at which the land sold, the extent of the demand, the quality of the land and its use at the time, the price paid by the Government for similar land at about the same time under treaties with other Indians, and the prices paid by persons other than Indians buying similar land in the locality from private citizens. If Plaintiffs can establish their fair compensation claim for the challenged transactions, they are entitled to damages in the amount of the difference between the fair market value of the land at the time and the consideration received by the Oneida In-

dian Nation minus any offsets, including, but not limited to, sales costs incurred by the State.[8]

iv. Plaintiffs' Factual Allegations

Plaintiffs have presented to the Court evidence in connection with their non-possessory claim that is sufficient to allow a reasonable jury to find in their favor. *See Brown*, 257 F.3d at 251. Therefore, Defendants Motion for summary judgment is denied with respect to Plaintiffs' common law fair compensation claim.

In support of their fair compensation claim, Plaintiffs cite previous rulings that the State paid the Oneida Indian Nation "approximately fifty cents per acre" in 1795

[8] Plaintiffs and the United States also argue that the common law has long recognized that when equity bars restoration of land to a plaintiff after it has been transferred to innocent third parties, equity also requires a damage award for the difference between the price the defendant paid the plaintiff for the land and its true value when the defendant obtained it. Plntfs' Mem. of Law (Dkt. No. 599, Attach. 1) at 7-10; United States Mem. of Law (Dkt. No. 601, Attach. 1) at 19-22. Both Plaintiffs and the United States cite ample case law, including cases involving Indian land claims, for this proposition and it may serve as an alternative theory for a damages award. However, the Circuit dismissed the Cayugas' trespass damages claim because it found that the basis for the claim necessitated a finding of constructive possession or Plaintiffs' immediate right of possession; such a finding would be disruptive and barred by laches. *See Cayuga*, 413 F.3d at 278. The Circuit'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 land necessarily implicates the Oneidas' historical claim to the land in question. In light of the Circuit's reasoning, the Court instead finds that Plaintiffs' and the United States' contract claim does not rely on any present or future claim to the land in question and does not run afoul of the *Cayuga* court's decision.

to purchase about a third of the reservation and resold the land "to white settlers for about $3.53 per acre." Plntfs' Mem. of Law (Dkt. No. 599, Attach. 1) at 11 (quoting *Oneida Indian Nation*, 719 F.2d at 529). Additionally, Plaintiffs submitted evidence along with a declaration from James P. Costigan, a real estate appraiser versed in historical land use and valuation records, regarding the valuation of the land transferred pursuant to the agreements at issue. *See* Costigan Decl. (Dkt. No. 599, Attach. 3). Plaintiffs' appraiser reviewed county records and records in the State Archives, such as the Surveyor General's Books of Sales of State Lands 1786-1927 and the Comptroller's Ledgers for Bonds and Mortgages held by the State of New York 1796-1916. Plntfs' Mem. of Law (Dkt. No. 599, Attach. 1) at 11; Costigan Decl. (Dkt. No. 599, Attach. 3) at ¶¶ 8-9. Plaintiffs attached voluminous exhibits compiling data from these documents to their submission. *See* Costigan Decl. (Dkt. No. 599, Attach. 3).

Based on a review of these records, Mr. Costigan asserts that for the 199,000 acres acquired by the State prior to February 11, 1829, the Oneidas were paid $113,213.00 for land the State sold for $626,067.00, a $512,854.00 difference. Costigan Decl. (Dkt. No. 599, Attach. 3) at ¶ 11. Moreover, Mr. Costigan claims that the State received a range of about three (3) to twelve (12) times more for this land than it paid to the Oneidas. *Id.* In order to determine if the State received all the money due it from these transactions, Mr. Costigan undertook research to confirm that the State was paid in full for all 264 lots in the lands acquired in the 1795 transaction. *Id*. at ¶ 12. Plaintiffs' experts have examined ten (10) percent of the State sales in each transaction and believe that the records exists to perform the

same verification of payment for all the lots in the land claim area. *Id.* at ¶ 14. For purposes of this Motion, the data submitted by Plaintiffs suggests that there are material facts indicating that the consideration paid to the Oneida Indian Nation by the State was significantly under the then-fair market price.

Furthermore, consistent with an unconscionable consideration claim, Plaintiffs allege that the State knowingly sought to underpay for the Oneidas' lands. Plaintiffs point to legislative resolutions and laws appropriating money for purchases from the Oneidas that indicate the State may have intentionally sought to deny the Oneidas' payment of the fair value of the land. Plntfs' Mem. of Law (Dkt. No. 599, Attach. 1) at 11-12; Smith Aff. (Dkt. No. 599, Attach. 29) at ¶¶ 15-40. The Court finds that Plaintiffs have adequately met their burden and have raised material facts as to the inadequacy of the consideration paid to the Oneida Indian Nation and the State's knowledge with respect to those payments. Accordingly, Defendants' Motion for summary judgment is denied with respect to Plaintiffs' fair compensation claim against the State.

D. Additional Pending Motions

The Court stayed this action pending the final outcomes in the *Sherrill* and *Cayuga* cases. *See*, *e.g.*, Sept. 2005 Order (Dkt. No. 575). As a result, in addition to the Motion for summary judgment currently before the Court, there are several other pending Motions in this action. However, in light of this Order and the *Sherrill* and *Cayuga* decision, three of those Motions can now be disposed.

The United States moves to dismiss the Counties' counterclaims in their Answer to the United States' Second Amended Complaint-in-Intervention. U.S. Motion to Dismiss Counterclaims (Dkt. No. 445). The Counties' Answer states three counterclaims against the United States seeking: (1) declaratory relief stating that the reservation guaranteed to the Oneida Nation pursuant to the Treaty of Canandaigua was disestablished; (2) contribution in the event the Counties are found liable to the Oneidas; and (3) recoupment from the United States for damages owed to the Oneidas. *See* Counties' Answer (Dkt. No. 410) at ¶¶ 112, 135-36, 142. The United States' Second Amended Complaint-in-Intervention does not assert a cause of action against the Counties. Moreover, as explained above, Plaintiffs' causes of actions against the Counties are all possessory claims and have been dismissed. Therefore, the Counties have been dismissed from the action, and, as a result, their counterclaims are moot. **Accordingly, the United States' Motion to dismiss the Counties' counterclaims is dismissed as moot**.

Plaintiffs, joined by the United States, move to strike the defense that the Nonintercourse Act does not apply to Oneida land in New York because the State allegedly acquired full title to such lands under the 1788 Treaty of Ft. Schuyler. Plntfs' Motion to Strike (Dkt. No. 522). Plaintiffs correctly note that the Court has already struck this defense. *See* Plntfs' Mem. in Support of Motion to Strike (Dkt. No. 522, Attach. 2) at 2; *Oneida 2002*, 194 F. Supp at 139-40. In response, Defendants filed a Motion to reconsider the Court's Order striking Defendants' affirmative defense regarding the Treaty of Ft. Schuyler. Defts' Motion to Reconsider (Dkt. No. 546). Defendants' defense asserts that this pre-Constitution treaty effectively ceded and granted all

Oneida lands to the State and extinguished the Oneidas' aboriginal title. *See* Defts' Mem. in Support of Motion to Reconsider (Dkt. No. 546, Attach. 2) at 4. **The Court has now dismissed Plaintiffs' and the United States' possessory land claims; therefore, Defendants' affirmative Ft. Schuyler defense is moot and both Plaintiffs' Motion to strike and Defendants' Motion to reconsider are dismissed as moot.**

IV. Conclusion

In *Oneida II*, the Supreme Court reviewed the history of promises made by the United States to the Oneidas. Beginning with the Treaty of Ft. Stanwix in 1784, the United States promised the Oneidas would be secure "in possession of the lands on which they are settled"; and in 1789, the United States reaffirmed in the Treaty of Ft. Harmar that the Oneidas were "again secured and confirmed in the possession of their respective lands"; and again in 1794, the Treaty of Canandaigua provided, "[t]he United States acknowledge the lands reserved to the Oneida . . . in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof . . ." *Oneida II*, 470 U.S. at 231 n.1, 105 S. Ct. 1245. As explained above, the Second Circuit's *Cayuga* decision holds that equity bars the Oneidas' attempts to vindicate their rights to the lands promised to them by the United States and the State because of the disruption that would be caused to Defendants' expectations and those innocent third parties who now reside related lands. However, the equities also mandate that the Court not pass judgment without noting that the Oneidas and their ancestors have been sub-

jected to historic levels of disruption—disruption that forms the heart of this action and merits this Court's consideration. This Order permits the Oneidas to reform and revise the twenty-six (26) agreements with the State and to receive fair compensation for lands transferred by their ancestors. Nothing in this Order questions settled expectations or projects remedies into the future; the claims and the remedies are entirely retrospective in nature.

While this Order is consistent with Second Circuit and Supreme Court precedent, the Court recognizes that other courts have thoughtfully considered some of the issues discussed above and reached different conclusions. *See*, *e.g.*, *Shinnecock Indian Nation v. New York*, No. 05-CV-2887 (TCP), 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2006) (Platt, D.J.). This Order involves a controlling question of law as to which there is substantial ground for difference of opinion, and, pursuant to 28 U.S.C. § 1292(b), an immediate appeal would clarify the law and materially advance the termination of the litigation. Therefore, while this Order does not dispose of the case in its entirety, the Court certifies this Order and the issues raised herein for immediate appeal. Any party wishing to appeal this Order must apply to the Court of Appeals within ten (10) days. 28 U.S.C. § 1292(b).

Accordingly, it is hereby

ORDERED, that Defendants' Motion for summary judgment (Dkt. No. 582) is **GRANTED IN PART and DENIED IN PART**; and it is further

ORDERED, that Defendants' Motion for summary judgment (Dkt. No. 582) is **GRANTED with respect to Plaintiffs'** possessory land claims; and it is further

ORDERED, that Defendants' Motion for summary judgment (Dkt. No. 582) is **DENIED with respect to Plaintiffs' fair compensation claim** as explained above; and it is further

ORDERED, that Defendant Counties are DISMISSED; and it is further

ORDERED, that Defendant Counties' Counterclaims are DISMISSED AS MOOT; and it is further

ORDERED, that the United States' Motion to dismiss Defendant Counties' counterclaims (Dkt. No. 445) is **DISMISSED AS MOOT**; and it is further

ORDERED, that Plaintiffs' Motion to strike the defense that the Nonintercourse Act does not apply to Oneida land in New York (Dkt. No. 522) is **DISMISSED AS MOOT**; and it is further

ORDERED, that Defendants' Motion to reconsider the Court's Order striking their affirmative defense regarding the Treaty of Ft. Schuyler (Dkt. No. 546) is **DISMISSED AS MOOT**; and it is further

ORDERED, that, pursuant to 28 U.S.C. 1292(b), this Order is **CERTIFIED FOR APPEAL**; and it is further

ORDERED, that the Clerk serve a copy of this Order on all parties.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

No. 74-CV-187

THE ONEIDA INDIAN NATION OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN; AND THE ONEIDA OF THE THAMES, PLAINTIFFS

AND

UNITED STATES OF AMERICA, PLAINTIFF-INTERVENOR, AND THE NEW YORK BROTHERTOWN INDIAN NATION, PLAINTIFF-INTERVENOR

v.

THE STATE OF NEW YORK; COUNTY OF MADISON, NEW YORK; AND COUNTY OF ONEIDA, NEW YORK, DEFENDANTS

Filed: Mar. 29, 2002

MEMORANDUM-DECISION AND ORDER

KAHN, District Judge.

BACKGROUND

I. *Factual Background*

This action is brought by three Indian nations, the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin and the Oneida of the Thames (collectively, the "Oneidas" or "Plaintiffs"), who claim to be descendants of the original Oneida Indian Nation that inhabited land in what is now central New York State "from time immemorial to shortly after the Revolution." *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 230, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985). The Oneidas bring this action in order to regain possession of approximately 250,000 acres of land in New York State that they claim was unlawfully taken from the Oneida Indian Nation by New York State.

The Oneidas' troubles with New York State, for purposes of this action, began in 1788 with the Treaty of Ft. Schuyler, in which the State purchased the majority of the Oneidas' aboriginal land and left the Oneidas with a reservation of approximately 300,000 acres in central New York State. In 1794, in the Treaty of Canandaigua, the United States recognized that the Oneida Indian Nation had been granted this reservation of land in New York State. In this action, the Oneidas allege that following the Treaties of Ft. Schuyler and Canandaigua, New York State proceeded to illegally purchase for itself the Oneida Indian Nation's reserved land. Specifically, the Oneidas challenge the validity of 30 land transactions entered into by the Oneida Indian Nation and New York State between 1795 and 1846. In these transactions, the original Oneida Indian Nation sold portions of the land reserved to it in the Treaties of Ft. Schuyler and Canandaigua to New York State. The Oneidas' cur-

rent claim is based on their argument that these transactions are barred by the 1793 Nonintercourse Act, 25 U.S.C. § 177, that prohibits the conveyance of Indian land without the express approval of the federal government.

II. *The "Test Case"*

In 1970, the Oneidas filed suit in the Northern District of New York against Madison an Oneida Counties (the "Counties") challenging the validity of a 1795 land transaction in which the Oneida Indian Nation sold a large part of its original land reservation to New York State. In this action, titled *Oneida Indian Nation of New York v. County of Oneida* (the "test case"), the Oneidas sought the fair rental value for a two-year period of portions of the disputed land now occupied by the Counties. The test case was initially dismissed by the district court for lack of federal jurisdiction, and this decision was affirmed by the Second Circuit. *See Oneida Indian Nation of New York v. County of Oneida*, 464 F.2d 916 (2d Cir. 1972). However, the Supreme Court reversed, finding that the Oneidas' claim asserted a federal controversy because Indian possessory rights to tribal lands are governed by federal law. *See Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 667, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974) ("*Oneida I*").

The district court judge conducted a bench trial in the test case and found that the 1795 land transfer did violate the Nonintercourse Act. *See Oneida Indian Nation of New York v. County of Oneida*, 434 F. Supp. 527 (N.D.N.Y. 1977) ("*Oneida Test Case*"). This ruling was affirmed by the Second Circuit and the Supreme Court.

See Oneida Indian Nation of New York v. County of Oneida, 719 F.2d 525 (2d Cir. 1983) ("*Oneida Test Case—Circuit*"); *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985) ("*Oneida II*").

The test case involved facts and legal theories quite similar to those present in this action. In fact, many of the legal theories and defenses set forth by the parties in this action were discussed extensively by the courts issuing decisions in the test case. The fundamental difference between the two actions lies in their scope. While the test case dealt with only one transaction and a smaller area of land, this action concerns a series of transactions over several years and a much larger area of land. In addition, while the plaintiffs in the test case are identical to Plaintiffs in this action, New York State was not a defendant in the test case, and the United States and the New York Brothertown Indian Nation did not intervene in the test case.

Following *Oneida II*, the test case was remanded to the district court for further consideration of the Counties' claimed off-set against damages. The test case is currently pending in the Northern District of New York before Judge McCurn.

III. *Procedural History*

This action was filed by Plaintiffs in 1974 against the Counties and essentially lay dormant for many years while the Plaintiffs actively pursued the test case and while the parties engaged in extensive settlement discussions. In 1998, the United States was permitted to intervene as a plaintiff. In September 2000, Judge McCurn permitted Plaintiffs and the United States to

amend their Complaints to add New York State as a defendant and the Oneida of the Thames as a plaintiff. In that same decision, Judge McCurn denied Plaintiffs' motion to add private landowners as defendants. In May 2001, this Court permitted the Brothertown Indian Nation to intervene in this action. The Brothertown claim that the Oneidas granted them a portion of the land at issue in this action in a 1774 treaty between the two nations. They further claim that their right to this land was recognized in the 1794 Treaty of Canandaigua. The Brothertown have intervened in this action in order to protect their rights to this parcel of land.

IV. ***Motions Before The Court***

In November 2001, the parties presented oral argument on several motions to the Court. This decision addresses eight of those motions.[1] In this decision the Court addresses (1) Defendants' motion to dismiss for nonjoinder of indispensable parties, (2) Plaintiffs' motion to strike Defendants' defenses, (3) the United States' motion to strike Defendants' defenses, (4) Brothertown's motion to strike Defendants' defenses, (5) Plaintiffs' motions to dismiss Defendants' counterclaims, and (6) the United States' motions to dismiss Defendants' counterclaims.

DEFENDANTS' MOTION TO DISMISS

I. ***Standard***

Federal Rule of Civil Procedure 19(a) first requires the Court to determine whether an absent party is nec-

[1] The Court will address the United States' motion for leave to amend its Amended Complaint at a later date.

essary to the action. An absent party is necessary and shall be joined in the action if:

> (1) in the person's absence complete relief cannot be accorded among those already parties; or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest. Fed. R. Civ. Proc. 19(a).

Defendants contend that the New York Brothertown Indian Nation, the Brothertown Indian Nation of Wisconsin, the Marble Hill Oneida Indians, and the Iroquois Confederacy are all necessary parties to this action. Defendants urge the Court to either compel these parties to join in the action or dismiss the action under Rule 19 for failure to join indispensable parties.

The facts presented to the Court do not support a finding that any of the absent parties are necessary parties under Rule 19(a)(1). The absence of these parties will not result in a denial of complete relief to the parties currently present in this action. *See Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York*, 762 F.2d 205, 209 (2d Cir. 1985) (stating that Rule 19(a)(1) does not contemplate relief that might be awarded to the absent party, but only whether the parties already present can be awarded full relief). There is no reason why the current parties cannot be awarded complete relief without the addition of the absent parties.

This leaves the Court to examine Defendants' claims under Rule 19(a)(2) and to determine whether the absent parties in fact claim an interest relating to the subject of this action. If the absent parties do in fact claim an interest in this action, the Court must determine whether deciding this action in their absence would impair their ability to protect that interest or leave Defendants open to the possibility of multiple suits and inconsistent judgments. The Court will analyze Defendants' Rule 19(a)(2) claims separately for each absent party.

II. ***New York Brothertown Indian Nation***

On May 21, 2001, the Court granted the New York Brothertown Indian Nation's motion to intervene in this action. Because the New York Brothertown Indian Nation is a party to this action, Defendants' motion as to it is moot.

III. ***Brothertown Indian Nation of Wisconsin***

The Brothertown Indian Nation of Wisconsin has expressly disavowed any interest in the land involved in this action. The Wisconsin Brothertown have submitted an affidavit stating that their land claim, under the Treaty of Fort Schuyler, is outside of and to the east of the land at issue in this action. Because the Wisconsin Brothertown have specifically disavowed any interest in the land at issue in this action, they are not a necessary party for Rule 19 purposes. *See Oneida Indian Nation of New York v. Madison County*, 145 F. Supp. 2d 268, 270 (N.D.N.Y. 2001) (denying defendants' motion to dismiss for Rule 19 nonjoinder of an indispensable party and finding that the absent party itself is the "best judge of whether it [has] an interest in the subject" of

the action); *ConnTech Dev. Co. v. University of Conn. Educ. Properties, Inc.*, 102 F.3d 677, 683 (2d Cir. 1996) ("It is the absent party that must claim an interest for Rule 19(a)(2) purposes.") (citations and internal quotations omitted).[2]

IV. *Marble Hill Oneida Indians*

On November 7, 2001, the Marble Hill Oneidas moved to intervene in this action. Through their request for intervention, the Marble Hill Oneidas have indicated that they claim an interest in the land at issue in this action. Therefore, the Court must determine whether this purported interest would be impaired if this suit were to continue in their absence or if it would leave Defendants open to multiple or inconsistent obligations. The Court finds that it would not.

Any interest that the Marble Hill Oneidas might have in this action would not be impaired if the suit continued in their absence. Furthermore, leaving the Marble Hill Oneidas out of this action would not leave Defen-

[2] Defendants make much of the statement in the Wisconsin Brothertown's Affidavit that "[a]ny claims to Brothertown lands in New York State rightfully belong to the Brothertown Indians of Wisconsin as the sole successor in interest to the lands under the 1788 Treaty of Fort Schuyler." Judge Aff., Ex. 1. The Court does not find this statement to be an indication of interest in this lawsuit by the Wisconsin Oneidas. The fact that the Wisconsin Brothertown express an interest in a hypothetical portion of land in New York State (while simultaneously disavowing any interest in the land at issue in *this* action) is not relevant to the disposition of Defendants' motion. The Court's decision with respect to Defendant's motion is based on the fact that the New York Brothertown have expressed an interest in the land at issue in this action and have been permitted to intervene to protect this right, while the Wisconsin Brothertown have expressly disavowed any such interest.

dants open to multiple or inconsistent obligations. The Marble Hill Oneidas are official members of the Oneida Indian Nation of New York, a Plaintiff in this action. Any interest they might have in this action is identical to that of the New York Oneidas and is represented by the New York Oneidas. *See Canadian St. Regis Band v. New York*, 573 F. Supp. 1530, 1533 (N.D.N.Y. 1983) (finding that "whatever title the Indians have is in the tribe, and not in the individuals") (citations omitted). It was for this very reason that the Marble Hill Oneidas were denied intervention in the test case by Judge Port. *See Oneida Indian Nation of New York v. County of Oneida*, 70-CV-35, June 17, 1979 Order at 4 (finding that the Oneida Plaintiffs adequately represented the Marble Hill Oneidas' individual interest in the action), *aff'd* 620 F.2d 285 (2d Cir. 1980). The interests of the Marble Hill Oneidas are fully represented by the tribe of which they are a member, the New York Oneidas. The presence of the Marble Hill Oneidas in this action is therefore not necessary.[3]

V. *Iroquois Confederacy*

Defendants contend that the Confederacy has asserted a claim relating to the subject matter of this action. In support of this contention, Defendants cite a statement by the Confederacy asserting that it "is the only legitimate body authorized to conduct land transactions" on behalf of the Six Nations that make up the

[3] It is doubtful that the Marble Hill Oneidas, as individual tribe members, would even be eligible to pursue a land claim under the Nonintercourse Act. *See Canadian St. Regis Band*, 573 F. Supp. at 1533 (dismissing land claims by individual members of Indian tribe because claims on the part of individual Indians or their representatives are not cognizable in federal courts under the Nonintercourse Act)

Confederacy.[4] Roberts Aff., Ex. 14. Defendants also quote the Confederacy as stating that the territories of its constituent nations "became Confederacy land" and "must be dealt with legally by the Council of Chiefs of the Confederacy." Roberts Aff., Ex. 16. Plaintiffs argue that the Confederacy has specifically disavowed any interest in the current action and that the statements cited by Defendants are antiquated and irrelevant to this action.

The Court finds that the Confederacy has not in fact claimed an interest in the subject matter of this action or in the action itself. *See Zwack v. Kraus Bros. & Co.*, 93 F. Supp. 963, 966 (S.D.N.Y. 1950) (finding that where the existence of an absent party's interest is disputed, the Court must make an appraisal of the substantiality of such interests). The Defendants' attempt to assert an interest in this action on behalf of the Confederacy is insufficient under Rule 19(a)(2). *See ConnTech Dev. Co. v. University of Conn.Educ. Properties, Inc.*, 102 F.3d 677, 682 (2d Cir. 1996) (stating that it is the absent party that must itself claim an interest under Rule 19(a)(2)).

The Confederacy's conduct with regard to Indian land claim actions stands in direct contradiction to its previous statements as cited by Defendants. The statements cited by Defendants on behalf of the Confederacy were, for the most part, made decades ago and have certainly not been acted upon by the Confederacy in the years since, at least not in the context that confronts the

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[4] The Confederacy is a governing body comprised of the following six Indian nations: Oneida, Seneca, Cayuga, Onondaga, Mohawk and Tuscarora.

Court in this action.[5] Several Indian land claim cases involving the constituent tribes of the Confederacy have proceeded in the federal courts without the Confederacy. *See*, *e.g.*, *Cayuga Indian Nation v. Cuomo*, Nos. 80-CV-930 & 80-CV-960 (N.D.N.Y.); *Seneca Nation v. New York*, 85-CV-411C & 93-CV-0688 (W.D.N.Y.); *Canadian v. St. Regis v. New York*, 82-CV-783 (N.D.N.Y.). Neither the courts nor the Confederacy itself have ever suggested that the Confederacy's presence was necessary in those actions. Furthermore, the Confederacy has not attempted to intervene in any of these actions in order to assert the purported interests that Defendants ascribe to it.

Since the Confederacy has sought to intervene in cases where it has an interest, its failure to intervene in the many Indian land claim cases involving its constituent nations supports a finding that the Confederacy does not have an interest in those actions, nor in the action before this Court. *See Oneida Indian Nation of Wis. v. State of New York*, 732 F.2d 261, 265 n.6 (2d Cir. 1984) (recognizing that the Seneca Nation "has conducted recurrent and successful litigation in its own right in the federal courts, without [Confederacy] participation and with no deference shown to Gayanerakowa [Confederacy law]").

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[5] The Confederacy did assert its land claim interests in *Oneida Nation of Wisconsin v. State of New York*, 732 F.2d 261 (2d Cir. 1984), and was permitted to intervene in that action, but the circumstances in that case were different than those present here The Confederacy intervened in that case with five of its constituent Indian nations, all of whom had competing interests in the huge tract of land at issue in that action. Here, the land claim at issue is solely that of the Oneidas. There are no competing claims to the land among the other constituent nations of the Confederacy.

The Confederacy has also submitted an affidavit in this action, specifically indicating that it has no objections to this case going forward in its absence. *See* Judge Aff., Ex.2. While this affidavit does not specifically state that the Confederacy has no interest in this action, it does contradict the Confederacy's prior statements in other contexts implying that it is the sole arbiter of land claim disputes for its constituent tribes. The Court finds the Confederacy's lack of objection to this action persuasive and consistent with the evidence discussed above indicating that the Confederacy claims no real interest in this action.

In summary, there is no indication, based on the evidence submitted to the Court, that the Confederacy has any real interest in the land at issue in this action. The statements attributed to the Confederacy by the Defendants about the Confederacy's power of government over the Oneidas and its other constituent nations are belied by the Confederacy's own actions and the actions of its constituent nations. The Confederacy's failure to participate in similar Indian land claim actions and its lack of objection to this action are also telling. Because the Confederacy has no real interest in this action, it is not a necessary party under Rule 19.[6]

[6] Because the Court finds that none of the absent parties are necessary parties under Rule 19(a), it need not determine whether the absent parties are indispensable under Rule 19(b).

PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' AFFIRMATIVE DEFENSES

I. ***Standard***

Motions to strike affirmative defenses under Rule 12(f) of the Federal Rules of Civil Procedure are not generally favored. Despite a general disfavor for motions to strike, courts should grant these motions when the defenses presented are clearly insufficient. Motions to strike have been found to "serve a useful purpose by eliminating insufficient defenses and saving the time which would otherwise be spent in litigating issues that would not affect the outcome of the case." *Simon v. Manufacturers Hanover Trust Co.*, 849 F. Supp. 880, 882 (S.D.N.Y. 1994) (internal citations and quotations omitted). They are to be granted only when "it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense." *Salcer v. Envicon Equities Corp.*, 744 F.2d 935, 939 (2d Cir. 1984), *vacated on other grounds*, 478 U.S. 1015, 106 S. Ct. 3324, 92 L. Ed. 2d 731 (1986). In deciding a Rule 12(f) motion, a court "must accept the matters well-pleaded as true and should not consider matters outside the pleadings." *County Vanlines, Inc. v. Experian Info. Solutions, Inc.*, 205 F.R.D. 148, 152 (S.D.N.Y. 2002) (internal quotations omitted).

Even when the facts are not in dispute, it is generally accepted by courts of this Circuit that it is not appropriate to decide substantial issues of law on a motion to strike. *See Salcer*, 744 F.2d at 939. This is particularly true where there has been little or no discovery, as in the present case.

Additionally, in order to grant a motion to strike a defense, the inclusion of the defense must result in prejudice to the plaintiff. *See S.E.C. v. Toomey*, 866 F. Supp. 719, 722 (S.D.N.Y. 1992). The requirement of prejudice to the plaintiff may be satisfied if the inclusion of the defense would result in increased time and expense of trial, including the possibility of extensive and burdensome discovery. *See id.* at 722. That element of prejudice is certainly present in this extremely complicated action that has already been pending for well over two decades. *See Mohegan v. Connecticut*, 528 F. Supp. 1359, 1362 (D. Conn. 1982) (granting a motion to strike in an "extraordinarily complex" action and concluding that "[t]he legal issues presented by [the] defenses would greatly complicate the pre-trial process" and that "early resolution of defenses that could not possibly prevent recovery by the plaintiff will facilitate the orderly progress of this protracted litigation towards either trial or settlement") (internal quotations omitted).

In this action, Plaintiffs argue that Defendants have asserted several defenses that are insufficient both legally and factually. In all, Plaintiffs challenge the validity of 37 affirmative defenses raised by the State and 32 affirmative defenses raised by the Counties.

II. *Defenses*

A. *Plaintiffs' Standing*[7]

Defendants challenge the Plaintiffs' standing to bring this action. To bring a claim under the Nonintercourse Act, a plaintiff must show that it is or represents an Indian tribe within the meaning of the Act. *See*

[7] Counties' Defenses 1-4. State's Defenses 24-27.

Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 58 (1994). Defendants dispute Plaintiffs' assertion that they are the successors in interest to the original Oneida Indian Nation or to the factions of the Oneida Nation that entered into the land transactions at issue in this action. Plaintiffs contend that their standing has been conclusively determined through government recognition of their tribal status and by the findings of the courts in the test case. Because the test case concerned the same plaintiffs and the same type of claim present in this action, Plaintiffs argue that there are no outstanding factual or legal questions as to their standing to bring this action. Therefore, Plaintiffs argue that Defendants' standing defense should be stricken as legally insufficient.

1. *The Test Case*

All three Plaintiffs in this action were plaintiffs in the test case, in which Plaintiffs sued the Counties under the Nonintercourse Act, challenging a 1795 land transaction between the Oneida Nation and the State of New York. In the test case, Judge Port explored extensively the tribal status of all three Oneida Plaintiffs. *See Oneida Indian Nation of New York v. County of Oneida*, 70-CV-35, Transcript of Proceedings on Nov. 12-13, 1975. After a full presentation of evidence from both sides, and after considering the tribal status factors outlined in *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd*, 592 F.2d 575 (1st Cir. 1979), Judge Port found that all three tribal plaintiffs, including the Oneida of the Thames, were "direct descendants" of the original Oneida Nation. *Oneida Test Case*, 434 F. Supp. 527, 538 (N.D.N.Y. 1977). Judge Port's finding was directly acknowledged by the Second

Circuit and the Supreme Court in their review of the case. *See Oneida Test Case—Circuit*, 719 F.2d 525, 539 (2d Cir. 1983) (observing that "[t]he district court found that the three plaintiffs are the direct descendants of the Oneida Indian Nation"); *Oneida II*, 470 U.S. 226, 230, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985) (identifying the Oneida plaintiffs as "direct descendants of members of the Oneida Indian Nation").

The acceptance by the courts in the test case of Plaintiffs' standing to sue under the Nonintercourse Act has a significant effect on this action. The material components of Plaintiffs' claims in both actions, the treaties upon which their claims are based, and the statute they alleged was violated are identical. Because the factual and legal issues arising in this action and the test case are nearly identical, the Court cannot see how Plaintiffs could be found to have standing in the test case but somehow not be found to have standing in this action. In fact, Defendants have raised no issues of fact with regard to Plaintiffs' assertions that they are successor tribes to the Oneida Indian Nation or that they currently exist as tribes in their own right. They have instead concentrated their argument on asserting that the determination of Plaintiffs' standing made by the courts in the test case is not applicable to this action. A challenge to Plaintiffs' standing at this point is only possible if there exists some material difference between the two cases that would make this Court's determination of standing different from that of Judge Port.

The one difference between this action and the test case, for purposes of Plaintiffs' standing, is the number of transactions alleged to be in violation of the Nonintercourse Act. In the test case the Oneida Plaintiffs chal-

lenged the validity of only one transaction. In this action they challenge the validity of twenty-six different transactions. Defendants contend that Plaintiffs' standing in this action (unlike the test case) requires them to prove their connection to the original Oneida Indian Nation or to factions of the original Oneida Indian Nation at all twenty-six points in time when the disputed land transactions were consummated.

The Court rejects this contention. The rights alleged by Plaintiffs in this action do not involve the rights of the individual groups or sects of Oneida Indians that Defendants allege completed the disputed land transactions with the State of New York. The rights alleged by Plaintiffs are rights protected by the Nonintercourse Act for the Oneida Indian Nation and its successors as a whole. Plaintiffs allege that these rights stem not from treaties signed with individual sects or factions of the original Oneida Indian Nation, but from the 1794 Treaty of Canandaigua, which preserved land for the whole of the Oneida Indian Nation. Indeed, the United States government, in later dealings with the Oneidas, treated the Oneidas as one nation.[8] *See* Treaty of Buffalo Creek, Jan. 15, 1838, U.S.-New York Indians, art. 2, 7 Stat. 550. The claims asserted by Plaintiffs are matters of collective tribal ownership. It would defy logic to force the Plaintiffs in this action to trace their lineage back to individual members or factions of the original Oneida Nation at particular points in time when Plain-

[8] The United States' post-1805 treatment of the Oneidas as a unified nation specifically runs counter to Defendants' insistence that the Court consider the Plaintiffs' connections to two Oneida factions created in 1805, known as the "Christian Party" and the "Pagan Party," in order to establish standing.

tiffs' claim concerns rights granted to the Oneida Indian Nation as a whole and is based on a statute granting protection to entire Indian nations.

Because there is no material difference for purposes of standing between this case and the test case, the Court will give significant weight to the determination by Judge Port that Plaintiffs are direct descendants of the original Oneida Indian Nation.

2. *Federal Recognition*

There is no dispute among the parties that both the New York Oneidas and the Wisconsin Oneidas are federally recognized tribes. The Bureau of Indian Affairs ("BIA") began a formal program of tribal recognition in 1978. Through this program, the BIA makes a determination, based on the modern Indian tribe's history and lineage, as to whether the modern tribe is indeed a successor in interest to an ancient Indian tribe. The New York and Wisconsin Oneidas are considered by the United States government to be successors in interest to the original Oneida Indian Nation.

Courts have consistently found that recognition of a tribe by the United States government is to be given substantial weight in determining an Indian plaintiff's tribal status for Nonintercourse Act claims. *See*, *e.g.*, *Cayuga Indian Nation v. Cuomo*, 667 F. Supp. 938, 942 (N.D.N.Y. 1987) (finding that federal recognition of tribal status is to be accorded "great significance" in determining standing under the Nonintercourse Act); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 (1st Cir. 1979) (acknowledging that courts have generally been able to accept tribal status as a given on the basis of the doctrine that the courts will accord substantial

weight to federal recognition of a tribe); *see also Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60 (2d Cir. 1994) ("[T]he BIA is better qualified by virtue of its knowledge and experience to determine at the outset whether Golden Hill meets the criteria for tribal status. This is a question at the heart of the task assigned by Congress to the BIA and should be answered in the first instance by that agency.").[9] In *Cayuga v. Cuomo*, the court gave great deference to the government's recognition of the tribal plaintiffs and found it unnecessary to consider the factors applied in *Mashpee*, 592 F.2d at 582, since the *Cayuga* plaintiffs, unlike the Mashpee plaintiffs, were federally recognized tribes. *See Cayuga*, 667 F. Supp. at 943. The *Cayuga* court concluded that based on the explicit federal recognition of the Plaintiff tribes as successors in interest to the original Cayuga Indian Nation, it had "little hesitation in holding that there is no genuine issue of material fact regarding [their] tribal status." *Id.* The Court finds the reasoning of the court in *Cayuga v. Cuomo* to be applicable to this action.

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[9] At least one court has even gone so far as to suggest that courts have little or no role to play in determining tribal status once the executive branch has made such a determination. *See Oneida Indian Nation of New York v. State of New York*, 520 F. Supp. 1278, 1301 (N.D.N.Y. 1981) (stating that whether the tribal plaintiffs are the proper parties is to be resolved through executive determinations of tribal status whenever possible), *aff'd in part and rev'd in part*, 691 F.2d 1070 (2d Cir. 1982); but *see Golden Hill*, 39 F.3d at 57 ("[T]ribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Nonintercourse Act.").

3. *The Mashpee Case*

Defendants contend that the Court should apply the factors outlined in *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979), and require Plaintiffs to prove their continuous tribal existence by showing that the Oneida Indian Nation existed as a tribe at the time of each land transaction at issue in this action. In support of this contention, Defendants have asked the Court to take judicial notice of several statements concerning the Oneida Indian Nation's tribal existence, one by a court in 1877 and the others by assorted federal bureaus in the late nineteenth and early twentieth centuries. These statements include a citation to the 1892 census, which Defendants note contains no map of the Oneida reservation, a 1906 report from the Department of the Interior stating that the New York Oneida "can hardly be said to maintain a tribal existence," and a quotation from a book about the Wisconsin Oneida in which is chronicled the Wisconsin Oneidas' loss of land and governing power to white society.[10] Defs. Br. at 21-22; Schraver Aff., Exs. 2-5, 8-9.

Even if the Court were to take judicial notice of these statements, they would have no effect on Plaintiffs' standing in this action. There is no need to require Plaintiffs to prove their tribal existence at the time of

[10] Defendants' argument that Plaintiffs lack standing in part because they lack land and tribal government is contradictory, since Plaintiffs are asserting in this action that they were deprived of this very land by the state of New York. In challenging Plaintiffs' standing on this basis, Defendants are asking the Court to find that Plaintiffs are not tribes because they possessed no land in New York, even though Plaintiffs are alleging that their New York land was unlawfully taken from them by New York itself.

each relevant land transaction, as required in *Mashpee*, because unlike the *Mashpee* plaintiffs, two of the Oneida Plaintiffs have been federally recognized and the standing of all three Plaintiffs to bring a claim under the Nonintercourse Act has been accepted by previous courts.[11] The *Mashpee* plaintiffs were a United States based tribe who were not recognized by the United States government. They had not previously brought a claim in which their standing and tribal status had been explicitly recognized. The *Mashpee* court was therefore forced to consider other evidence of tribal status to determine the plaintiffs' standing. This is not analogous to the situation facing this Court. In a case like this one, where the Plaintiffs' standing under the Nonintercourse Act has been accepted in a previous action and in which two of the Plaintiff tribes are federally recognized, Plaintiffs have standing as a matter of law.[12]

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[11] All of the cases cited by Defendants in support of their argument that Plaintiffs should be required to prove continuous tribal existence and their connection to the ancient Oneidas at several different points in time are cases in which the tribes at issue were not federally recognized tribes and in which the issue of plaintiffs' standing to bring a land claim was being decided for the first time. *See, e.g., Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979); *Canadian St. Regis Band of Mohawk Indians v. New York*, 146 F. Supp. 2d 170, 184 (N.D.N.Y. 2001).

[12] The Court recognizes that the Oneida of the Thames is based in Canada, and is thus unable to obtain U.S. recognition. However, it appears to be undisputed by the parties that the Oneida of the Thames is recognized by Canada.

The Court also notes that some of Defendants' own statements, provided in their brief, seem to argue in favor of a finding that the Oneida of the Thames is indeed a successor tribe to the ancient Oneidas. *See* Def. Br. n.20 (quoting a book that describes the path taken by the Thames Oneida from New York to Canada).

The facts outlined in the pleadings and the law governing standing in Indian land claim actions do not support a defense challenging Plaintiffs' standing in this action. In addition, the prejudice that would result to Plaintiffs by forcing them to respond to burdensome discovery requests on an issue which is not legitimately in dispute argues in favor of striking the defense. Defendants' standing defenses are therefore stricken.

B. *Disestablishment, Diminishment and Ft. Schuyler* [13]

These defenses are discussed below as part of the Court's discussion of Plaintiffs' and the United States' motions to dismiss Defendants' counterclaims. *See* discussion *infra* p. 130, Part II. In accordance with that discussion, Defendants' disestablishment and diminishment defenses remain and the Ft. Schuyler defense is stricken.

C. *Ratification and U.S. Consent*[14]

Defendants contend that ratification of the land transactions at issue in this action can come from a number of federal sources and that Plaintiffs are required under the Nonintercourse Act to prove that the United States never consented to the alienation of their land. Plaintiffs counter that ratification of the disputed land transactions must be by federal statute or treaty, and that Defendants' failure to plead the existence of any such statute or treaty causes their ratification defenses to fail.

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[13] Counties' defenses 7 and 23. State's defenses 28 and 33-34.

[14] Counties' defenses 5-6. State's defenses 4-5.

While the law is clear that congressional intent to terminate title to Indian land must be plain and unambiguous, *see Oneida II*, 470 U.S. at 247, it is far from clear that ratification of Indian land transactions must necessarily be by treaty or statute. *See*, *e.g.*, *Seneca Nation of Indians v. State of New York*, 26 F. Supp. 2d 555, 571 (W.D.N.Y. 1998) (finding that federal ratification of an Indian land transaction must be explicit but not necessarily by federal treaty or statute); *Oneida Test Case—Circuit*, 719 F.2d at 539 (same); *Cayuga Indian Nation of New York v. Cuomo*, 667 F. Supp. 938, 944-45 (N.D.N.Y. 1987) (same). In *Cayuga v. Cuomo*, the court found that a complete factual record of the land transactions at issue was necessary prior to a determination of whether the land transactions had indeed been ratified by the federal government.[15] *Cayuga v. Cuomo*, 667 F. Supp. at 944-45. In light of the uncertainty of the law in this area and the lack of facts before the Court supporting either party's position, substantial issues of law and fact relating to this issue remain unresolved. It would therefore be inappropriate to strike the Defendants' ratification defenses at this time.

D. *Adequacy of Consideration, Estoppel, Estoppel by Sale, Bona Fide Purchaser and Payment*[16]

Defendants contend that the equitable remedies of adequacy of consideration, estoppel, estoppel by sale, bona fide purchaser, and payment are available to them under federal law. Plaintiffs contend that if Defendants

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[15] After two years of discovery, the court determined that the transactions had not been federally ratified. *Cayuga Indian Nation of New York v. Cuomo*, 730 F. Supp. 485, 485 (N.D.N.Y. 1990).

[16] Counties' defenses 8, 13 and 20. State's defenses 10, 13 and 29.

are found to have violated the Nonintercourse Act, these defenses are not available because under the Nonintercourse Act the land transactions at issue can only be validated by federal ratification.

These defenses rely on the principle that conduct by Plaintiffs or Defendants can validate Indian land transactions even if those transactions were not approved by the United States as required by the Nonintercourse Act. By prohibiting land transactions with Indians that were not sanctioned by the United States, the Nonintercourse Act precludes inquiry into the fairness of the transactions. *See Oneida Test Case*, 434 F. Supp. at 541 ("By prohibiting all unauthorized dealings with Indians, [the Nonintercourse Act] cuts off any inquiry into the fairness of such dealings insofar as the validity of the resulting transfer is concerned."). In other words, even if the land transactions are somehow shown to be fair in price, as these defenses would allow, they would still be unlawful under the Nonintercourse Act unless approved by the United States. *See id.* at 530 ("Although the present owners of the [land] may have acted in good faith when acquiring their property, such good faith will not render good a title otherwise not valid for failure to comply with the Nonintercourse Act."). Thus, as a matter of law, the defenses of bona fide purchaser, adequacy of consideration, estoppel, estoppel by sale, and payment are unavailable to Defendants, at least for purposes of determining Defendants' liability. *See Cayuga Indian Nation v. Cuomo*, 565 F. Supp. 1297, 1301-02 (N.D.N.Y. 1983) (striking the defenses of estoppel and estoppel by sale in Indian land claim action arising under the Nonintercourse Act)*; Seneca Nation of Indians v. State of New York*, 93-CV-688A, 1994 WL 688262, at *5 (W.D.N.Y. Oct. 28, 1994) (same).

However, as Defendants note, the defenses of adequacy of consideration, payment and bona fide purchaser may be relevant to a determination of damages. These defenses remain for the limited purpose of determining damages.

E. *Mitigation*[17]

Defendants contend that delay in bringing a case to trial can be seen as failure to mitigate and can affect the value of the land in question. Plaintiffs argue that mitigation is simply laches by another name and that delay-based defenses are not permissible in suits brought by Indian tribes under the Nonintercourse Act.

The defense of mitigation is not relevant to Defendants' liability. Defendants cannot rely on Plaintiffs' delay in bringing suit to escape liability in this action. *See* discussion *infra* p. 123, Part II.G. However, the defense of mitigation is relevant to issue of damages in this action. The defense will therefore remain for the limited purpose of determining damages.

F. *Collateral Estoppel*[18]

Collateral estoppel, or issue preclusion, bars a party from relitigating an issue that was "actually litigated and necessary to the outcome" of a prior adjudication. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.5, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979). Defendants argue that determinations made by the Indian Claims Commission ("ICC") and the Court of Claims, in actions brought before those courts by Plaintiffs, preclude

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[17] Counties' defense 9. State's defense 3.

[18] Counties' defenses 10 and 17. State's defense 18.

Plaintiffs from re-litigating the same issues in this action.

In *Cayuga Indian Nation of New York v. Cuomo*, 667 F. Supp. 938 (N.D.N.Y. 1987), the court found that prior findings of the ICC regarding the United States' knowledge of certain treaties between the plaintiff Indians and the State of New York did not bar the *Cayuga* court from determining on its own the issue of whether the United States ratified the treaties. *Id.* at 948. However, prior to deciding the issues on its own, the *Cayuga* court ordered the development of a full factual record regarding the circumstances of the conveyances and stated that the findings of the ICC might indeed have relevance to future issues in the action before it. But *see Seneca Nation of Indians v. State of New York*, 26 F. Supp. 2d 555, 569-70 (W.D.N.Y. 1998) (noting that the United States cannot be barred from re-litigating previously litigated issues in a case of nonmutual collateral estoppel and finding that where plaintiffs' claims are identical to those of the United States, it makes no difference whether the plaintiffs are barred from re-litigating the issue). The situation before this Court is similar to that before the *Cayuga* court.

It is not appropriate at this time to strike Defendants' defense of collateral estoppel, since further development of the factual and legal record may reveal issues to which the prior determinations of the ICC and the Court of Claims may prove relevant. If such instances do arise, the defense of collateral estoppel will of course be limited to issues actually litigated and decided in those prior actions, and will apply only to issues that were necessary to the outcome of those actions.

G. *Laches and Adverse Possession*[19]

Courts analyzing Indian land claim actions have consistently rejected the use of delay-based defenses. *See Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1084, 1097 (2d Cir. 1982) (rejecting the validity of delay-based defenses, specifically laches, in Indian land claim action); *Oneida Test Case—Circuit*, 719 F.2d 525, 538 (2d Cir. 1983) (recognizing that "we have recently rejected that [Indian land claim] actions are time barred"); *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1149 (2d Cir. 1988) (recognizing its previous rejection of laches and other delay-based defenses in Indian land claim actions); *Oneida II*, 470 U.S. at 262 n.10, 105 S. Ct. 1245 (Stevens, J., dissenting) ("The Court of Appeals' rejection of delay-based defenses, 719 F.2d 525, 538 (2d Cir. 1983), will remain the law of the Circuit until it is reversed by this Court, and will no doubt apply to the numerous Indian claims pending in the lower courts."); *Seneca Nation of Indians v. State of New York*, 93-CV-688A, 1994 WL 688262, at *2 (W.D.N.Y. Oct. 28, 1994) ("The Second Circuit has definitively ruled that delay-based defenses founded on both state law and federal law are inapplicable to claims under the Nonintercourse Act."); *Seneca v. New York*, 26 F. Supp. 2d 555, 573 (W.D.N.Y. 1998) (following the Supreme Court's reasoning in *Oneida II* and rejecting the defense of laches). The law on this issue overwhelmingly supports striking Defendants' laches and adverse possession defenses as legally insufficient.

Defendants maintain that the Supreme Court's reasoning in *Oneida II* leaves open the question of whether

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[19] Counties' defenses 11 and 29. State's defenses 2 and 8.

the defense of laches applies to claims by Indian tribes. However, even though the Supreme Court did not definitively decide the issue, the strong language it used in contemplating a laches defense has been recognized by lower courts as effectively barring the defense of laches in Indian land claims. The Supreme Court noted that the "statutory restraint on alienation of Indian tribal land adopted by the Nonintercourse Act of 1793 is still the law" and stated that this fact suggests that the application of laches is inconsistent with established federal policy. *Oneida II*, 470 U.S. at 245 n.16, 105 S. Ct. 1245. The reasoning of the Supreme Court has been adopted by lower courts in determining whether laches is an available defense in Indian land claim actions. In *Oneida Indian Nation of New York v. City of Sherrill*, 145 F. Supp. 2d 226, 259 (N.D.N.Y. 2001), the court denied defendant's motion to amend its answer to add a defense of laches. Laches, the court stated, "is not an available defense in actions brought by Indians . . . to protect their rights to their land." *Id.* (basing its determination in part on the "federal statutory protection against the alienation of Indian land without Congressional action"). Judge Port also found that the doctrines of laches and adverse possession could not validate the land transaction at issue in the test case. *See Oneida Test Case*, 434 F. Supp. at 542 ("Adverse possession and laches are no defense to a suit by the government to protect restricted land."); *see also Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1083 (2d Cir. 1982) ("Defenses [in Indian land claim cases] based upon state adverse possession laws and state statutes of limitations have been consistently rejected.").

In light of the extensive law rejecting the laches and adverse possession defenses in Indian land claims, the

Court finds that Defendants' defenses of laches and adverse possession are insufficient as a matter of law.

H. *Failure to Exhaust Remedies and Election of Remedies*[20]

Defendants argue that Plaintiffs have failed to exhaust the remedies available to them. Defendants base this contention on the decision of Plaintiffs to withdraw claims similar to those in this action that they brought before the ICC. Plaintiffs withdrew their claims from the ICC after a favorable finding of liability but prior to a determination of damages.

A failure to exhaust remedies defense is generally asserted in a case where a plaintiff has failed to pursue administrative or state remedies available to it. The doctrine of failure to exhaust remedies provides that a plaintiff is not entitled to judicial relief for an alleged injury until the prescribed administrative remedy has been exhausted. *See McKart v. United States*, 395 U.S. 185, 193, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969). Exhaustion of remedies "is based on the need to allow agencies to develop the facts [and] to apply the law in which they are peculiarly expert." *Schlesinger v. Councilman*, 420 U.S. 738, 756, 95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975).

Plaintiffs argue that their decision to pursue remedies before the ICC and the Court of Claims should not preclude them from pursuing this action. This argument is based in part on Plaintiffs' contention that ICC proceedings do not bar remedies against anyone but the federal government. *See Oneida Test Case*, 434 F. Supp.

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[20] Counties' defense 14. State's defenses 19-20.

at 531 n.9 (finding that the establishment of the ICC evidences "no intent to supplant Indian claims against other parties, governmental or private"). However, the Second Circuit has found that even in cases where an administrative court was established without exclusive or mandatory jurisdiction over the claims before it, a plaintiff who pursued remedies both in that forum and in federal court could be subject to an exhaustion defense. *See Miss America Org. v. Mattel, Inc.*, 945 F.2d 536, 541 (2d Cir. 1991) (recognizing that a failure to exhaust defense has been applied by the Supreme Court where the federal courts had concurrent jurisdiction over the issue under collateral attack with an executive agency). Because there is an outstanding issue of law as to whether Defendants are entitled to an exhaustion defense, the Court will not strike it.

Defendants also assert a defense of election of remedies, presumably also arising out of Plaintiffs' decision to file claims against the United States with the ICC. An election of remedies defense is an equitable doctrine that protects a party from being forced to respond to charges in two different fora. *See Flynn v. Goldman Sachs & Co.*, 91 Civ. 0035, 1993 WL 336957, at *2 (S.D.N.Y. Sept. 2, 1993). The Court does not see how this defense applies to Defendants. Defendants were not parties to the ICC action and are responding to Plaintiff's charges in federal court only. Therefore, the defense of election of remedies is stricken with leave to replead.

I. *Claim Splitting*[21]

The Defendant Counties argue that by initiating the test case in 1970, and then initiating this action in 1974, Plaintiffs are guilty of claim splitting. Plaintiffs argue that a claim splitting defense does not apply where the parties have acquiesced to the claim splitting. There are unresolved issues of fact as to whether the Counties acquiesced to the splitting of Plaintiffs' claims between this case and the test case. A determination of whether or not counties acquiesced in the Plaintiffs' claim splitting requires a factual determination that is not appropriate for the Court to make on a motion to strike. The Counties' defense of claim splitting therefore remains.

J. *Res Judicata*[22]

Under the doctrine of res judicata "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979). Res judicata applies to any claim or defense previously available, whether or not it was actually litigated or determined. *See Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 727 (2d Cir. 1981). The main concern underlying the doctrine of res judicata is to bring litigation to an end after the parties have had a fair opportunity to litigate their claims. *See Seneca Nation of Indians v. State of New York*, 26 F. Supp. 2d 555, 566 (W.D.N.Y. 1998).

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[21] Counties' defense 15.

[22] Counties' defense 16. State's defense 17.

It is somewhat unclear to which prior actions Defendants claim res judicata applies. In Defendants' brief, the defense of res judicata is connected to their defense of claim splitting, thus leading the Court to believe that Defendants assert a res judicata defense as to issues resolved in the test case.

There are unresolved issues of fact as to what claims may have been resolved in the test case and would therefore be barred by res judicata in this action. There is also a substantial outstanding issue of law as to whether the State is in privity to the defendants in the test case such that res judicata would apply. *See Seneca v. New York*, 26 F. Supp. 2d 555, 567 (W.D.N.Y. 1998) (outlining privity concerns). Defendants' res judicata defense therefore survives.[23]

K. *Judicial Estoppel*[24]

The doctrine of judicial estoppel prevents a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by him in a prior legal proceeding." *Bates v. Long Island R.R.*, 997 F.2d 1028, 1037 (2d Cir. 1993). The elements are (1) the party against whom judicial estoppel is asserted must have argued an inconsistent position in a prior proceeding, and (2) the prior inconsistent position must

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[23] The Court notes, however, that if res judicata is found to apply to the test case, it will be applied to any issue fully and fairly litigated and determined in that action, and the State will therefore be bound by decisions in the test case even if those decisions are adverse to it. The Court makes this point because the State takes pains in its brief to point out its status as a non-party to the test case, implying that the determinations in that action cannot bind it.

[24] Counties' defense 18.

have been adopted by the court in some manner. *See id.* at 1038.

Defendants have not set forth any specific reasoning behind this defense, nor have Plaintiffs come forward with any reason why this defense is invalid other than to allege that it is conclusory. In the absence of any argument on the merits of this defense, the Court finds that it is factually and legally possible that Defendants will be able to use this defense in this action. It will therefore not be stricken.

L. *Accord and Satisfaction, Unclean Hands and Waiver*[25]

All three of these defenses are based on a presumption that Plaintiffs' behavior following a land transaction can validate the transaction even in the absence of federal approval. In *Oneida I* the Supreme Court interpreted the Nonintercourse Act to require federal approval of Indian land transactions in order to validate them. *See Oneida I*, 414 U.S. at 678, 94 S. Ct. 772 (stating that the Oneida Plaintiffs' land claims arise from "treaties guaranteeing their possessory rights until terminated by the United States"); *see also Oneida II*, 470 U.S. at 244, 105 S. Ct. 1245. In light of the Supreme Court's interpretation of the Nonintercourse Act, the Court finds that "the application of state law-based defenses of accord and satisfaction and unclean hands would contravene established policy pertaining to Indian's ability to enforce their property rights." *Seneca v. New York*, 93-CV-688A, 1994 WL 688262, at *1 (W.D.N.Y. Oct. 28, 1994). Allowing these types of de-

[25] Counties' defenses 19, 21 and 22. State's defenses 11-12 and 14.

fenses in an Indian land claim action would contradict federal policy regarding the requirements under the Nonintercourse Act for the validation of Indian land transactions. *See Oneida I*, 414 U.S. at 670, 94 S. Ct. 772 (finding that Indian title to land can be extinguished only with federal consent); 470 U.S. at 247-48, 105 S. Ct. 1245 (finding that federal intent to extinguish tribal possessory rights to land must be plain and unambiguous).

M. *Abandonment and Release and Relinquishment*[26]

The Defendant Counties claim specifically that the Wisconsin Oneida and the Thames Oneida abandoned their land and that all three Plaintiffs are subject to a defense of release and relinquishment. The State alleges that all three Plaintiffs are subject to a defense of release, relinquishment, and abandonment.

By asserting these defenses, Defendants are contending that by moving away from their New York lands, Plaintiffs gave up any rights they may have had in those lands. Defendants find some support for the availability of these defenses in *Cayuga Indian Nation of New York v. Cuomo*, 758 F. Supp. 107 (N.D.N.Y. 1991), which discusses the availability of an abandonment defense in an Indian land claim action. The *Cayuga* court determined that the viability of the abandonment defense hinged on the type of title to the land held by the Indian plaintiffs. *Id.* at 110. The court concluded that there are two types of title, aboriginal title and fee title, and that while fee title cannot be abandoned, aboriginal title can. *Id.* Plaintiffs admit that aboriginal

[26] Counties' defenses 24-26. State's defenses 6-7.

title may be abandoned, but contend that Indians may not abandon land given to them in a treaty with the United States by entering into an unlawful land transaction with the State.

The question that must be resolved in order to determine the validity of Defendants' defense is whether the Oneida Nation possessed aboriginal rights over the land at issue or whether it possessed actual fee title to the land. This issue requires further discovery and a thorough statutory and treaty interpretation. The Court is unwilling at this point to rely on the legal and factual determinations of the test case and other Indian cases when this action presents unresolved issues of fact dealing with entirely different land transactions and requires an interpretation of the relevant treaties as they apply to the Oneida Nation specifically. *See Oneida Test Case*, 434 F. Supp. at 541 (stating that the Oneidas had never abandoned their claim to their ancestral homeland but not defining the term abandonment or interpreting any statute or treaty in that regard); *see also United States v. Boylan*, 265 F. 165, 167-68 (1920) (holding that Oneidas possessed a New York reservation of land, but not determining what that meant for an abandonment defense). Defendants' abandonment, release and relinquishment defenses therefore remain.

N. *Statute of Limitations*[27]

Defendants assert statute of limitations as an affirmative defense both generally, and, in the case of the Counties, specifically as to the Oneida of the Thames.

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[27] Counties' defenses 27-28. State's defense 15.

Courts in Indian land claim cases have consistently held that no statute of limitations defense is available to defendants in these actions. In the test case, the Supreme Court rejected the Counties' statute of limitations defense, noting that there is no federal statute of limitations in Indian land claim cases, and stating that "the borrowing of a state limitations period in these cases would be inconsistent with federal policy." *Oneida II*, 470 U.S. at 241, 105 S. Ct. 1245; *see also Seneca Nation of Indians v. State of New York*, 93-CV-688A, 1994 WL 688262, at *1 (W.D.N.Y. Oct. 28, 1994) (citing *Oneida II* and striking defendants' statute of limitations defense in Indian land claim action); *Oneida Indian Nation of New York v. City of Sherrill*, 145 F. Supp. 2d 226, 260 (N.D.N.Y. 2001) (citing *Oneida II* and refusing defendants' motion to amend their answer to include a statute of limitations defense in Indian land claim case); *Oneida Indian Nation of New York v. State of New York*, 691 F.2d at 1083 ("Defenses [in Indian claim cases] based upon . . . state statutes of limitations have been consistently rejected."). The Supreme Court supported its finding by discussing 28 U.S.C. § 2415, which defines timeliness for suits brought by the United States on behalf of tribes for which it is a trustee.[28] *See Oneida II*, 470 U.S. at 241, 105 S. Ct. 1245; *see also Oneida v. New York*, 691 F.2d at 1083. The Supreme Court noted that 28 U.S.C. § 2415 reaffirmed the general federal policy that there is no statute of limitations applicable to Indian land claims. The Supreme Court

[28] Subsections a and b of 28 U.S.C. § 2415 provide that actions for the recovery of tort or monetary damages that accrued prior to the statute's enactment on July 18, 1966 are timely if filed prior to December 31, 1982. Subsection c states that there is no statute of limitations for the establishment of title to or rights to possession of property.

then went on to discuss legislative history, unrelated to the United States' trust relationship with Indian tribes, that further supports this general policy. In finding that the statute of limitations defense was unavailable to the test case defendants, the Supreme Court concluded decisively that "Indian land claims [are] exclusively a matter of federal law" and that "there is a congressional policy against the application of state statutes of limitations in the context of Indian land claims." *Oneida II*, 470 U.S. at 241, 105 S. Ct. 1245.

Defendants attempt to distinguish the Supreme Court's ruling in the test case from this action. They argue that this case involves more land transactions and involves at least one plaintiff (the Oneida of the Thames) that does not have a trust relationship with the United States. Defendants argue that because the Supreme Court based its reasoning partly on federal policy implemented by its trust relationship with Indian tribes, its ruling does not apply to Indian tribes, such as the Thames Oneida, that lack this relationship. The Court does not find these differences compelling. The Thames Oneida was also a plaintiff in the test case, and the Supreme Court surely would have specified that its ruling was inapplicable to the Thames Oneida if that were the case. The Supreme Court's ruling is sufficiently broad to cover the circumstances present in this action. The Supreme Court was not analyzing the statute of limitations defense only in the context of the one particular land transaction at issue in that case. Instead, its language is worded broadly, to apply to all land claims brought by or on behalf of Indian tribes. The ruling of the Supreme Court regarding congressional policy governing statute of limitations defenses in Indian land

claims is clear and directly applicable here. Defendants' statute of limitations defense is therefore stricken.

O. *Indispensable Parties*[29]

The Court has addressed the Defendants' motion to dismiss in which they claim that there are absent parties who are necessary and indispensable to this action. Since the Court has determined that none of the parties named by the Defendants are in fact necessary to this action, the Defendants' affirmative defenses dealing with indispensable parties are stricken.

P. *Abatement*[30]

Defendant New York State argues that since the Nonintercourse Act of 1793 was replaced by subsequent acts, the new statutes replaced the old and any cause of action under the old statute abated on its expiration date. In *Oneida II* the Supreme Court rejected this interpretation of the Nonintercourse Act, finding that in the subsequent revised acts, the pertinent provisions of the Act remained in force, containing "substantially the same restraint on Indian lands." *Oneida II*, 470 U.S. at 245-46, 105 S. Ct. 1245 (citing *Bear Lake and River Waterworks and Irrigation Co. v. Garland*, 164 U.S. 1, 11-12, 17 S. Ct. 7, 41 L. Ed. 327 (1896) (finding that where similar provisions of an act have remained in force, a new act is considered to be a continuation of the old)). In *Oneida I* the Supreme Court performed a similar analyses of the Nonintercourse Act, concluding that it "put in statutory form what was or came to be the ac-

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[29] Counties' defenses 30-33. State's defenses 35-38.

[30] State's defenses 16.

cepted rule-that the extinguishment of Indian title required the consent of the United States." *Oneida I*, 414 U.S. at 678, 94 S. Ct. 772. In summary, the Supreme Court in *Oneida II* stated, "the precedents of this Court compel the conclusion that the Oneida's cause of action has not abated." *Oneida II*, 470 U.S. at 246, 105 S. Ct. 1245. There is no reason that the Supreme Court's interpretations of the Nonintercourse Act in *Oneida I* and *Oneida II* do not apply to this action. Defendants' abatement defense is therefore stricken.

Q. *Eleventh Amendment*[31]

When litigation is brought by or could have been brought by the United States on behalf of an Indian Nation and the claims made by the United States are identical to those made by the Indian tribe, the Eleventh Amendment has been found not to apply. *See, e.g., Oneida Nation of New York v. State of New York*, 691 F.2d 1070, 1080 (2d Cir. 1982) (finding that where the United States could have sued, "raising the same claims asserted by the Oneida Nation," Eleventh Amendment immunity does not apply); *see also Seneca Nation of Indians v. State of New York*, 26 F. Supp. 2d 555, 564 (W.D.N.Y. 1998) (same, and stating that "the Senecas' and the United States' claims are virtually identical"). However, it is also a well established rule of law that the State should retain its immunity to the extent that the Plaintiffs raise any claims that conflict with those of the United States. *See Seneca Nation of Indians v. State of New York*, 178 F.3d 95, 97 (2d Cir. 1999) (affirming defendants' Eleventh Amendment immunity defense but noting that New York retains immunity to the extent

[31] State's defenses 22-23.

that the Plaintiffs raise any claims or issues not identical to those made by the United States). In this action it appears that Plaintiffs may potentially have claims that conflict with those of the United States. It is too early in the proceeding to disregard the possible immunity of the State on issues in which there may be conflict. The State's Eleventh Amendment immunity defense therefore remains to the extent that Plaintiffs' claims conflict with those of the United States.

R. *Lost Title Presumption*[32]

The defense of lost title allows a defendant to substitute presumptions about title to land for formal instruments or records. The defense "recognizes that lapse of time may cure the neglect or failure to secure the proper muniments of title." *United States v. Fullard-Leo*, 331 U.S. 256, 270, 67 S. Ct. 1287, 91 L. Ed. 1474 (1947). A presumption of lost title defense is based largely on the same principles that underlie the defense of adverse possession, that a land grant "will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for 20 years." *Id.* at 271, 67 S. Ct. 1287 (citation omitted). The defense of adverse possession is not available to Defendants in this action for the reasons stated above. *See* discussion *supra* p. 123, Part II.G. These principles apply equally to a presumption of lost title as they do to the defense of adverse possession. For this reason, Defendants' presumption of lost title defense is stricken.

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[32] State's defense 9.

S. *Lack of Notice*[33]

The State contends that Plaintiffs' claims are barred or mitigated by Plaintiffs' failure to notify the State of any potential liability as a result of the land transactions at issue. Plaintiffs attack this defense as arising under state law and therefore inappropriate as a defense to an Indian land claim action.[34] The Court can find no precedent for this type of defense under federal law. Furthermore, the Court agrees with Plaintiffs that such a defense under state law is unavailable to Defendants in light of the Supreme Court rulings in *Oneida I* and *Oneida II*. The Court orders this defense stricken with leave to replead if Defendants are able to present some scenario under federal law through which this defense could succeed.

T. *Failure to State a Claim*[35]

It is well settled that a failure to state a claim defense is an appropriate affirmative defense. *See*, *e.g.*, *County Vanlines, Inc. v. Experian Info. Solutions, Inc.*, 205 F.R.D. 148, 153 (S.D.N.Y. 2002). There are several outstanding issues of law and fact in this action that preclude an early finding that Defendants' failure to state a claim defense is unavailable to them. In addition, unlike the other defenses asserted by Defendants, there is no prejudice presented by this defense. Therefore, the defense remains.

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[33] State's defense 32.

[34] There are several notice of claim requirements arising in various state court contexts in New York. *See* David D. Seigel, New York Practice § 32 (1999)

[35] State's defense 1.

BROTHERTOWN'S MOTION TO STRIKE DEFENDANTS'AFFIRMATIVE DEFENSES

I. ***Overlap with Plaintiffs' Motion to Strike***

The Court has addressed most of the issues raised in Brothertown's motion to strike in its decision on Plaintiffs' motion to strike. Many of the defenses asserted by the Defendants against Brothertown are identical to those asserted by Defendants against Plaintiffs. Except for the issues unique to Brothertown, addressed below, Brothertown is bound by the Court's ruling on Plaintiffs' motion.[36] In this section, the Court will discuss those issues unique to Brothertown's motion or specifically raised by Defendants in their opposition papers to Brothertown's motion. The legal standard to be applied to Brothertown's motion is identical to the standard applicable to Plaintiffs' motion.

II. Brothertown's Defenses

A. *Statute of Limitations*[37]

Defendants argue that their statute of limitations defense should survive as to Brothertown's claims specifically because Brothertown is not a federally recognized tribe. In their opposition papers, Defendants repeat their argument, see discussion *supra* p. 127, Part II.N, that the Supreme Court's rejection of a statute of limitations defense based on a state statute of limitations in

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[36] The defenses asserted against Brothertown that have already been resolved by the Court in its decision on Plaintiffs' motion to strike are State Defenses 1-14, 16, 19, 24, and 27-32 and Counties Defenses 1, 3-7, 9, 12-19, and 22-25.

[37] State Defense 15 and Counties Defenses 20-21.

Oneida II does not apply to Indian tribes that are not federally recognized. The Court has rejected this interpretation of *Oneida II*. The Supreme Court's ruling in *Oneida II* regarding the use of a state statute of limitations defense in an Indian land claim action was worded broadly and applies to all land claims brought on behalf of Indian tribes, not just federally recognized tribes. *See Oneida II*, 470 U.S. at 240-44, 105 S. Ct. 1245.

Defendants also argue that the federal statute of limitations mandated by 28 U.S.C. § 2415(b) should apply to Brothertown's claim. Defendants contend that since Brothertown's claim is not specifically included in a list of actions exempt from this statute of limitations and since Brothertown did not bring its claims within six years and ninety days after the right of action accrued, Brothertown's claims are time barred. This argument is without merit. The "Oneida Nonintercourse Act Land Claim" is specifically excluded from this statute of limitations. *See* 48 Fed. Reg. 13920. Brothertown is a party to this action as an intervenor. It bases its claims on land that was already part of the Oneidas' land claim and relies on the same laws and treaties as the Oneidas to support its requests for relief. Defendants' federal statute of limitations defense could be viable in a situation where Brothertown initiated its own separate action against Defendants, or even where Brothertown asserted claims to land that was not already included in the Oneidas' land claim. However, under the circumstances of this action, Brothertown's claims are not subject to the statute of limitations in 28 U.S.C. § 2415(b).

B. *Res Judicata, Collateral Estoppel and Failure to Exhaust*[38]

In support of its argument to strike these defenses, Brothertown states in conclusory fashion that it has not been a party to any other action in which it has asserted the claims it asserts in this action and that no final judgment has been entered in any case involving the land transactions challenged by Brothertown in this action. In response, Defendants claim that striking these defenses would be premature. They argue specifically that under res judicata and failure to exhaust, Brothertown could be found to be in privity with the Plaintiffs, and thus subject to decisions issued in Plaintiffs' prior, related actions. The Court agrees that striking these defenses at this time would be premature.

C. *Eleventh Amendment*[39]

The State specifically argues that its Eleventh Amendment immunity defense should survive as to Brothertown's claims because Brothertown is not a federally recognized tribe and the United States has not stated that it specifically represents the interests of Brothertown in this action. The State has cited no law to support this proposition, and has set forth no authority that would justify distinguishing Brothertown's situation from that of Plaintiffs. *See* discussion *supra* p. 129, Part II.Q. Whether or not the United States specifically states that it is representing the interests of Brothertown in this litigation, the United States is clearly suing to enforce federal law on which Brothertown

[38] State Defenses 17-18, 20 and Counties Defenses 10-11.

[39] State Defenses 21-22.

relies. To the extent that the United States' claims are the same as Brothertown's claims, the State is not immune. *See*, *e.g., Oneida Nation of New York v. State of New York*, 691 F.2d 1070, 1080 (2d Cir. 1982) (finding that where the United States could have sued, "raising the same claims asserted by the Oneida Nation," Eleventh Amendment immunity does not apply). However, to the extent that Brothertown's claims diverge from those of the United States, the State's Eleventh Amendment immunity defense survives.

D. *Standing*[40]

Significant questions of fact exist as to whether Brothertown has standing to sue as an Indian tribe under the Nonintercourse Act. Unlike Plaintiffs, Brothertown is not a federally recognized tribe, nor has it been party to a lawsuit asserting the same land claims as this action in which its standing was asserted, inquired into, and accepted by the court. Brothertown argues that it has been recognized by the United States through treaties and agreements for many years, and that its lack of formal BIA recognition does not mean that it is not a "tribe" for the purpose of suing under the Nonintercourse Act. While Brothertown is correct that BIA recognition is not the only factor that determines tribal status at this point in time the Court need not reach the question of whether Brothertown actually has standing to bring a Nonintercourse Act claim. Instead, on a motion to strike, the Court must determine whether Brothertown would succeed "despite any state of the facts which could be proved in support of the defense." *Salcer v. Envicon Equities Corp.*, 744 F.2d 935, 939 (2d

[40] State Defense 23 and Counties Defense 2.

Cir. 1984). The evidence presented by Brothertown in its moving papers is not so overwhelming as to warrant dismissing Defendants' standing defense as a matter of law. Many factual questions regarding Brothertown's standing remain.

The Court's conclusion is similar to that reached by Judge McCurn in *Canadian St. Regis Band of Mohawk Indians v. New York*, 146 F. Supp. 2d 170 (N.D.N.Y. 2001). In Canadian St. Regis, Judge McCurn found that plaintiffs had met their minimum constitutional standing requirements by asserting (1) their own legal rights, (2) a particularized grievance and a redressable injury, and (3) a claim falling within the zone of interests that the statute aims to protect. *See Canadian St. Regis*, 146 F. Supp. 2d at 183-84. Likewise, Brothertown seems to have met this initial burden. However, the standing inquiry does not end here. Judge McCurn noted that if the plaintiffs' standing was challenged by the defendants at a later date, the plaintiffs "will need to produce specific facts to support [their] general allegations." *Id.* at 184. As this Court noted in its ruling on Brothertown's intervention motion, Brothertown may also be subject at some point in this litigation to a specific factual inquiry as to its standing. *See Oneida Indian Nation of New York v. New York*, 201 F.R.D. 64, 68 & n.9 (N.D.N.Y. 2001). Whether Brothertown has standing to bring a claim under the Nonintercourse Act is a fact-intensive inquiry whose resolution is not appropriate on a motion to strike. *See Canadian St. Regis*, 146 F. Supp. 2d at 184. Defendants' standing defense as to Brothertown therefore remains.

E. *Damages Defenses*[41]

Defendants raise a few defenses that request a set-off of any damages that might be awarded to Brothertown as a result of this action. These defenses have no effect on Defendants' liability, and they will not be stricken at this time because they are relevant to a calculation of damages.

UNITED STATES' MOTION TO STRIKE DEFENDANTS' AFFIRMATIVE DEFENSE

I. ***Motion for Leave to File and Motion to Stay Discovery***

The United States has filed a motion for an order allowing it to file a motion to strike Defendants' standing defense. The United States failed to comply with Magistrate Judge Homer's schedule, which mandated that the United States would be required to serve any motions in response to the Defendants' answers (including any motions to strike) by May 18, 2001. A request by the United States for an extension of time to respond to the pleadings was denied by Judge Homer on May 16, 2001. A request to this Court for an extension of time to respond to the pleadings was denied on May 18, 2001. On June 18, 2001, the United States finally served the instant motion to strike Defendants' standing defense.

The United States asserts that the Court may consider its motion even though it was submitted late. In support of this argument, the United States notes that Rule 12(f) provides that the Court may "at any time, [ ] strike any redundant, immaterial, impertinent or scandalous references" in an answer. *See Wine Mkts. Int'l, Inc. v. Bass*, 177 F.R.D. 128, 133 (E.D.N.Y. 1998) (find-

[41] State Defenses 25-26 and Counties Defense 8.

ing that granting the court this discretion renders the time limit in Rule 12(f) "essentially unimportant").

Ordinarily the Court would not look favorably on the United States' attempt to circumvent the established schedule and orders of the Court. However, in this case the Court has already ruled on most of the substantial issues raised in the United States' motion to strike since many of the same issues were raised in Plaintiffs' motion to strike. For this reason, and in accordance with the Court's discretion to do away with redundant and immaterial information contained in the pleadings, the Court grants the United States' motion for leave to serve its motion to strike Defendants' standing defense.

The United States also moves for a stay of discovery pending the outcome of this motion. A stay of discovery in this action pending the determination of the parties' outstanding motions concerning standing was granted by Magistrate Judge Homer on July 2, 2001. The United States' request for a stay of discovery is therefore denied as moot.

II. ***Standing***

The United States bases its motion to strike on two grounds. First, the United States claims that it has independent standing to sue under the Nonintercourse Act in order to enforce federal laws designed to protect Indian lands. Second, the United States argues that there is no question that the Oneida Plaintiffs have standing to bring this action. Since the United States represents their interests, it also has standing.

Defendants do not deny the United States' second premise. The Defendants argue, however, that the United States' standing to sue on behalf of Indian tribes

is dependant on a finding that the Oneida Plaintiffs have standing. Neither party disputes that if the Oneida plaintiffs have standing in this action, the United States also has standing. *See* Def.'s Memo of Law at 12 ("The United States can only represent the interests of the historic Oneida Nation to enforce the [Nonintercourse Act] where the Tribes themselves have standing to sue.").

This Court has found that Plaintiffs have standing to bring this claim as a matter of law. Therefore, the Court need not resolve the issue of whether the United States has independent standing to bring a claim in this action. Because Plaintiffs have standing, there is a tribal claim on the land at issue in this action, and the United States has standing to intervene as a fiduciary on behalf of the Plaintiff tribes. *See, e.g., Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975) ("That the Nonintercourse Act imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act seems to us beyond question. . . . The purpose of the Act has been held to acknowledge and guarantee the Indian tribes' right of occupancy, and clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances.") (citations omitted). The United States has standing to intervene in this action as a matter of law. The Defendants' standing defense is therefore stricken.

PLAINTIFFS' AND THE UNITED STATES' MOTIONS TO DISMISS DEFENDANTS' COUNTERCLAIMS

Defendants assert one counterclaim against Plaintiffs and five counterclaims against the United States.

I. ***Standard***

Plaintiffs and the United States move to dismiss Defendants' counterclaims pursuant to Fed. R. Civ. P. 12(f). A court's duty when examining a motion to dismiss a counterclaim pursuant to Rule 12(f) is "merely to determine whether the pleading itself is legally sufficient," not to weigh all of the evidence that may be presented at trial. *Song v. Dreamtouch, Inc.*, No. 01 Civ. 0386, 2001 WL 487413, at *1 (S.D.N.Y. May 8, 2001). A motion to dismiss a counterclaim is analyzed in the same manner as a motion to dismiss.

Plaintiffs and the United States argue that Defendants' counterclaims fail for lack of subject matter jurisdiction under Rule 12(b)(1) and fail to state a claim under Rule 12(b)(6). Under Rule 12(b)(6) a claim must be denied "unless it appears beyond doubt that the [claimant] can prove no set of facts in support of his claim [that] would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). In assessing the sufficiency of a pleading, "all factual allegations in the [pleading] must be taken as true," *LaBounty v. Adler*, 933 F.2d 121, 123 (2d Cir. 1991), and all reasonable inferences must be construed in favor of the claimant. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1098 (2d Cir. 1988). The

Rules do not require the claimant to set out in detail the facts upon which the claim is based, but only that the party against whom the claim is asserted be given "fair notice of what the claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), a court must accept as true all material factual allegations in the complaint and refrain from drawing inferences in favor of the party contesting jurisdiction. *See Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992). However, the court may consider evidence outside the pleadings, such as affidavits, documents and testimony. *See Dajour B. v. City of New York*, 00 Civ.2044, 2001 WL 830674, at *2 (S.D.N.Y. July 23, 2001). The standard is therefore similar to a motion for summary judgment. *See id.* Defendants must show by a preponderance of the evidence that subject matter jurisdiction over their claims exists. *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

It is with these standards in mind that the Court addresses the issues presented.

II. *Discussion*

A. *Disestablishment*

Defendants assert a disestablishment counterclaim against both Plaintiffs and the United States. Defendants request a declaration by the Court that any reservation of land claimed by the Oneidas has been disestablished and is no longer in existence. Defendants base this counterclaim on their own interpretation of the

treaties at issue in this action. Defendants first contend that in the 1788 Treaty of Fort Schuyler Plaintiffs ceded all of their land to the State of New York. While Defendants concede that some land was set aside for the Oneidas in the Ft. Schuyler Treaty, they contend that the Oneidas' right to this land was only possessory and that title was actually ceded to New York State. Second, Defendants argue that the 1794 Treaty of Canandaigua recognized only the Oneidas' right to possess the land that was set aside in 1788. Finally, Defendants contend that the Oneida's loss of their land was made final in the 1838 Treaty of Buffalo Creek, which gave the Oneidas land in Kansas. Defendants assert that the Treaty of Buffalo Creek is premised on the condition that those Oneidas remaining in New York leave New York and move to Kansas. In addition, under the Treaty of Buffalo Creek, the Oneidas who had moved to the land given to them in Wisconsin were to leave that land and move to Kansas. As a result of these transactions, the Defendants argue, none of the land at issue in this action belongs to the Oneidas or should be under federal jurisdiction as Indian land. Instead, it is New York State land and has been recognized as such for hundreds of years.

1. *Immunity*

Plaintiffs and the United States challenge this Court's subject matter jurisdiction over Defendants' disestablishment counterclaim they claim that they are immune from suit on this issue, and there has been no waiver of their immunity. That the United States and Indian tribes possess sovereign immunity from suit is a well-accepted principle of law. *See Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994) ("Absent a waiver, sovereign immu-

nity shields the Federal Government and its agencies from suit."); *Kiowa Tribe v. Manufacturing Tech.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."). However, both the United States and Indian tribes may waive their immunity. Defendants argue that Plaintiffs and the United States have in fact waived their immunity to a disestablishment counterclaim by bringing this action against Defendants.[42]

According to the doctrine of sovereign immunity, the United States may not be sued absent "specific statutory consent." *United States v. Shaw*, 309 U.S. 495, 500-01, 60 S. Ct. 659, 84 L. Ed. 888 (1940). While sovereign immunity may be waived, by statute or other means, any waiver of sovereign or tribal immunity must be unequivocally expressed. *See United States v. King*, 395 U.S. 1, 4, 89 S. Ct. 1501, 23 L. Ed. 2d 52 (1969); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). There is no automatic waiver of immunity as to counterclaims when the United States or an Indian tribe brings a lawsuit, and thus no general right of defendants to bring counterclaims against the United States or an Indian tribe. *See Presidential Gardens Assocs. v. United States ex rel. Sec. of Hous. and*

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[42] Because the law governing tribal immunity is largely equivalent to the law governing the United States' sovereign immunity for purposes of this claim, the Court discusses the law of immunity applicable to both claims together. *See Catskill Dev., L.L.C. v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 87-88 (S.D.N.Y. 2002) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers, such as the United States.") (citations and internal quotations omitted).

Urban Dev., 175 F.3d 132, 140 (2d Cir. 1999); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991). However, it is well established that when the United States or an Indian tribe initiates a lawsuit, a defendant may assert counterclaims that sound in recoupment even absent a statutory waiver of immunity. *See*, *e.g.*, *United States v. Forma*, 42 F.3d 759, 764 (2d Cir. 1994); *United States v. Tsosie*, 92 F.3d 1037, 1043 (10th Cir. 1996); *Rosebud Sioux Tribe v. Val-U Constr. Co. of South Dakota*, 50 F.3d 560, 562-63 (8th Cir. 1995); *Livera v. First Nat'l State Bank of New Jersey*, 879 F.2d 1186, 1195-96 (3d Cir. 1989).

Defendants contend that their disestablishment counterclaim sounds in recoupment and that the United States and Plaintiffs have therefore waived their immunity to such a claim by bringing this action. In order for the Court to exercise subject matter jurisdiction over Defendants' counterclaim as a claim sounding in recoupment, the counterclaim must arise "out of the transaction that grounds the main action" and must request only a set-off of damages, not affirmative recovery. *Forma*, 42 F.3d at 765. The rule governing sovereign immunity in recoupment actions is that "a party sued by the United States may recoup damages . . . so as to reduce or defeat the government's claim . . . though no affirmative judgment . . . can be rendered against the United States." *Id.* (citations omitted); *see also United States v. Frank*, 207 F. Supp. 216, 221 (S.D.N.Y. 1962) (finding that "recoupment may be set up in a counterclaim against the United States without statutory authority" and allowing defendant's counterclaim to proceed because defendant claimed nothing more than the value of the goods claimed by the government and did

not seek affirmative recovery). Thus, as long as Defendants' counterclaim does not "venture outside the subject of the original cause of action," the United States and the tribal Plaintiffs can be considered to have waived their immunity to such a counterclaim. *Tsosie*, 92 F.3d at 1043 (citations and internal quotations omitted).[43]

The factual situation in *Tsosie* is similar to the situation confronting this Court, and is instructive as to the circumstances under which the United States can be found to have waived its immunity to a recoupment counterclaim. In *Tsosie*, the United States brought a trespass and ejectment action against the defendant on behalf of an Indian who claimed the land at issue. *Id.* at 1039. The defendant asserted a counterclaim seeking a declaratory judgment that she had an unextinguished aboriginal right of occupancy in the land. *Id.* The *Tsosie* court rejected the United States' contention that it was immune to the defendant's counterclaim. *Id.* The court found that because defendant's counterclaim asserted claims and sought relief "based on issues asserted by the United States in its complaint, sovereign immunity has been waived." *Id.* at 1043.

In this action, Plaintiffs have requested a determination from the Court that they have possessory rights to the lands at issue and that Defendants' interests in these lands are void. The United States has joined in that ac-

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[43] Some courts have equated this inquiry with the inquiry governing compulsory counterclaims under Fed. Rule of Civ. Proc. 13(a). *See United States v. Isenberg*, 110 F.R.D. 387, 391 (D. Conn. 1986). Defendants' disestablishment counterclaim meets the standard for a compulsory counterclaim.

tion on behalf of Plaintiffs, also asserting Plaintiffs' rights to the land at issue. Defendants in turn have counterclaimed, requesting a declaration by the Court that any rights Plaintiffs may have had in the land have been disestablished and that Plaintiffs therefore have no rights to the subject lands. Counterclaims such as this one have been held to be permissible against Indian plaintiffs. *See Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550, 552-53 (8th Cir. 1989) (concluding that the plaintiff tribe specifically waived its immunity to a counterclaim that arose out of the same transaction and sought relief similar to, and in an amount not in excess of, the plaintiff tribe's claim); *cf. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 508-10, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) (finding that plaintiff tribe did not waive its immunity as to defendants' counterclaim for taxes because the counterclaim requested relief beyond that sought by plaintiff, who sought only injunctive relief). This counterclaim arises out of the same transactions and seeks relief similar to that sought by Plaintiffs and the United States. In addition, the relief sought by Defendants is for an amount no more than that sought by Plaintiffs and the United States. Defendants do not seek any monetary or other relief beyond a finding that the land at issue does not belong to Plaintiffs and is not under federal jurisdiction.

For these reasons, the Court finds that Defendants' disestablishment counterclaim sounds in recoupment and that such a claim may proceed against the United States and Plaintiffs despite their claims of immunity.

2. *Sufficiency and Ripeness of Defendants' Claim*

Both Plaintiffs and the United States argue that there is no substantial controversy present in this action sufficient to warrant the issuance of a declaratory judgment on Defendants' counterclaim. Specifically, Plaintiffs argue that Defendants' claim is insufficient to merit a request for declaratory relief. Similarly, the United States argues that Defendants' claim is not ripe for adjudication. The standard under which both of these arguments are analyzed is the same. The Court must determine whether the facts alleged by Defendants show that there is an actual controversy of sufficient immediacy to justify a declaratory judgment.[44] *See* 28 U.S.C. § 2201(a); *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 17 (2d Cir. 1993) (stating that a declaratory judgment may issue when there is a "substantial controversy" between the parties of "sufficient immediacy and reality"); *Pedre Co. v. Robins*, 901 F. Supp. 660, 663 (S.D.N.Y. 1995) (stating that "the standard for ripeness in a declaratory judgment action is 'whether . . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment'") (citing *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941)). Ultimately, the Court has discretion to accept or reject Defendants' request for declaratory judgment. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 288, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995) ("By the Declaratory Judgment

[44] The actual controversy requirement for declaratory judgment purposes is the same as the "case and controversy" requirement of Article III, § 2 of the Constitution. *See Bath Petroleum Storage, Inc. v. Sovas*, 136 F. Supp. 2d 52, 57 (N.D.N.Y. 2001).

Act, Congress . . . created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants.").

Defendants assert that a real controversy as to the disestablishment of any Oneida reservation exists because members of the Oneida Nation have purchased parts of the land in dispute in this action. Upon purchasing the land, the Indian owners have refused to accept the sovereignty of the State of New York over the land, refuse to pay taxes, and refuse to comply with state and local ordinances on the land. A case involving these issues is currently pending in this district under the caption *Oneida Indian Nation of New York v. City of Sherrill*. According to Defendants, the controversy over the land bought by the Oneidas constitutes a present controversy in this action. The Court agrees.

This case brings into question the status of the land disputed in this action. There is a fundamental controversy between the parties as to whether the subject land was unlawfully purchased from the Oneidas by the State, and is therefore Indian land properly subject to federal jurisdiction, or whether the land was properly purchased by the State and therefore subject to State and local laws and regulations. The uncertainty as to these issues has significant real effects on the State, the counties affected, and the landowners in these areas.[45]

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[45] The Court notes that several actions have been filed recently by the Wisconsin Oneida seeking ejectment against private landowners in the disputed area. *See, e.g., The Oneida Tribe of Indians of Wisconsin v. Barretta Brothers LLC*, 02-CV-00236. The existence of these actions further supports Defendants' argument that there is a real and immediate conflict as to the status of the disputed lands.

Plaintiffs do not dispute that the above controversy exists. Instead, they argue that this type of controversy is best resolved in the *Sherrill* action currently pending before Judge Hurd. They therefore urge the Court to use its discretion and dismiss Defendants' counterclaim for declaratory judgment in this action. In support of this argument, Plaintiffs cite *Fusco v. Rome Cable Corp.*, 859 F. Supp. 624 (N.D.N.Y. 1994), which states that the purpose of a declaratory judgment action is to decide rights not already determined, and not to determine whether previously determined rights were adjudicated properly. *Fusco*, 859 F. Supp. at 629. However, Plaintiffs fail to acknowledge that the *Sherrill* action concerns only a portion of the land at issue in this action. A declaration on behalf of the defendants in this action would provide a measure of security with regard to the entire parcel of land claimed by the Oneidas and would prevent wasteful and duplicatory piecemeal litigation regarding the status of the land.

The United States argues that the Court should not allow Defendants' counterclaim to proceed because "reservation" is a complex term and the United States has not definitively determined how the disputed land would be categorized should Plaintiffs prevail in this action. The Court does not believe that this argument warrants a dismissal of Defendants' claim.

It is difficult for the Court to accept the United States' argument when its Amended Complaint, and that of the Plaintiffs, so clearly put at issue the jurisdictional status of the disputed land. Plaintiffs and the United States specifically request that the Court declare any and all interests of Defendants in the land null and void. *See* Pls. Am. Compl., Prayer for Relief ¶ 1(e); U.S. Am.

Compl., Prayer for Relief ¶ 2. This request in the Amended Complaints of Plaintiffs and the United States can only be understood as a request for a finding that vests any and all interests in the land in the Plaintiffs and the United States as their representative and trustee. The Amended Complaints of Plaintiffs and the United States make clear that they consider the land at issue in this action to be Indian land, and thus an Indian reservation according to a broad definition of that term. *See Felix S. Cohen's Handbook of Federal Indian Law* Ch. 9, § Ala (1982) (outlining general principles of reservation status including the fact that some reservations are created not by formal statute but by treaty).

The complexity and uncertainty as to the status of the disputed lands lends support to Defendants' argument that their disestablishment counterclaim should not be dismissed. Substantial issues of fact and law remain to be determined as to the status of the disputed land. 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. For this reason, the Court declines to dismiss Defendants' disestablishment counterclaim on the ground that it is inappropriately asserted as a request for declaratory judgment or that it is not ripe for review.

3. *Validity of Counterclaim*

Both Plaintiffs and the United States attack Defendants' disestablishment counterclaim based on its validity under Rule 12(b)(6). Plaintiffs argue that Defendants' claim fails to state a cause of action as a matter of law based on the treaties under which the claim is

brought. The United States argues that Defendants' counterclaim should be dismissed because Defendants assert no factual allegations against the United States in support of their disestablishment claim.[46] Under Rule 12(b)(6), Defendants' counterclaim will be dismissed only if it is clear that "no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984).

a. *Treaty of Ft. Schuyler*

Defendants' first theory of recovery with regard to their Counterclaim is that in the 1788 Treaty of Ft. Schuyler, between New York State and the Oneidas, the Oneidas ceded all of their New York land to New York State. In support of their argument, Defendants cite Article 1 of the Treaty, which states that "the Oneidas do cede and grant all their lands to the people of the State of New York forever." Taylor Aff., Ex. 4. However, Defendants fail to read the Treaty as a whole, considering the other Articles of the Treaty along with Article 1. Article 2 specifically states that the Oneidas "hold to themselves and their posterity forever" the "reserved lands." *Id.* Treaties with Indians are to be interpreted

[46] The United States argues that Defendants' counterclaim should be dismissed because no facts are asserted directly against the United States. The United States has cited no law in support of its argument nor has it expounded on its reasons for requesting dismissal on this basis. In its Amended Complaint, the United States puts the status of the disputed land directly at issue and claims that the Oneidas have a right to possess the land. In their disestablishment counterclaim, Defendants ask for a declaration regarding the status of that same land. The United States' argument that it should not be subject to a counterclaim by Defendants on this basis is rejected by the Court.

as the Indians would have understood them. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999); *Oneida II*, 470 U.S. at 247, 105 S. Ct. 1245 ("[I]t is well established that treaties should be construed liberally in favor of the Indians.").

Defendants' interpretation of the Treaty of Ft. Schuyler simply makes no sense when considered the Treaty's words, later treaties, the United States' treatment of the Oneidas and their lands, and the fact that Defendants later purchased this very land from the Oneidas. In *Oneida II*, the Supreme Court acknowledged the effect of the Ft. Schuyler Treaty when it found that in the Treaty, "[t]he Oneidas retained a reservation of about 300,000 acres." *Oneida II*, 470 U.S. at 231, 105 S. Ct. 1245. This is the land at issue in this action. This land, which had been reserved to the Oneidas, was recognized in later treaties, including the 1794 Treaty of Canandaigua, on which this action is based. *See* Taylor Dec. Ex. 5. The land at issue was also recognized as Oneida land by New York State when the State purchased this land in a series of transactions from 1795-1846.

Construing the Treaty of Ft. Schuyler "liberally in favor of the Indians," as is required under law, and taking into account the findings and interpretations of courts that have addressed this issue previously, the Court finds that the Treaty of Ft. Schuyler cannot reasonably be understood to have divested the Oneidas of their aboriginal title in the subject lands. *See Oneida II*, 470 U.S. at 247, 105 S. Ct. 1245 (finding that "congressional intent to extinguish Indian title must be plain and unambiguous") (internal quotations omitted).

b. *Treaty of Buffalo Creek*

Defendants claim that even if the Oneidas' interest in the disputed land was not disestablished by the Treaty of Ft. Schuyler, it was later disestablished by the 1838 Treaty of Buffalo Creek. Defendants contend that this Treaty was one of many obligatory removal treaties that disestablished tribal sovereignty over the land from which the Indians were to remove. In the Treaty of Buffalo Creek, the Oneidas were required to leave New York, give up lands that had previously been given to them in Wisconsin, and move to Kansas.

Regardless of the origin of the Oneida's land rights, whether they stem from aboriginal title that was never taken away, or whether they stem from federally-protected treaty rights, it is clear from the Treaties of Ft. Schuyler and Canandaigua that the Oneida were understood to have some form of possessory interest of use and occupancy in the land at issue in this action. The Treaty of Canandaigua acknowledges these rights clearly by stating that the federal government "acknowledges the lands reserved to the Oneida . . . in their respective treaties with the State of New York, and called their reservations, to be their property." Taylor Aff., Ex. 5.

It is clear from Plaintiffs' briefs and Amended Complaint that they seek a return of the disputed land to full Indian and federal control, a status equivalent to a reservation. *See Felix S. Cohen's Handbook of Federal Indian Law* Ch. 9, § A (1982) (discussing Indian land ownership and the resulting reservation status of land under such ownership, and stating that such land is subject to federal, not state, jurisdiction). Plaintiffs state in

their brief that "'[o]nce a block of land has been set aside for an Indian reservation,' as the United States did in the Treaty of Canandaigua, 'and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.'" Pls. Br. at 14 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984)). There is therefore no real dispute between the parties that the reservation status of the land is at issue in this action. In addition, Plaintiffs' Amended Complaint, their arguments in support of their claims, the concrete actions they have taken once they own the land, and the actions they have taken against individual landowners, all lead to a conclusion that Plaintiffs are in fact seeking a finding that the land in dispute is reservation land. *See Oneida Indian Nation of New York v. City of Sherrill*, 145 F. Supp. 2d 226, 238 (N.D.N.Y. 2001) (stating plaintiffs' contention that the land at issue is part of the Oneida reservation set aside in the Treaty of Canandaigua). Resolution of Plaintiffs' claims requires a determination by the Court as to whether the federal government ever granted the Oneidas the subject land as their reservation and whether their rights in that land were ever taken away.

Defendants respond to Plaintiffs' claims with a counterclaim for disestablishment. Defendants argue that the Oneidas' reservation of land was effectively disestablished by language in the Treaty of Buffalo Creek indicating that the Oneidas living in New York would be removing to a "permanent home" in Kansas. Taylor Aff., Ex. 6 at Art. 2. In order to determine whether a reservation has been diminished or disestablished, it is necessary to look to (1) the statutory or treaty language used to open the Indian lands, (2) the historical context

surrounding the congressional acts, and (3) the use and ownership of the lands since that time. *See Hagen v. Utah*, 510 U.S. 399, 410-11, 114 S. Ct. 958, 127 L. Ed. 2d 252 (1994) (quoting *Solem*, 465 U.S. at 470-71, 104 S. Ct. 1161); *see also Solem*, 465 U.S. at 471, 104 S. Ct. 1161 ("Where non-Indian settlers flooded into the open portion of a[n Indian] reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred."). Defendants argue that application of these factors to this case requires the development of a full factual record and precludes dismissal of their disestablishment counterclaim as a matter of law. The Court agrees.

As an initial matter, there is some support for Defendants' argument that a removal treaty may disestablish an Indian reservation. In *Menominee Indian Tribe v. Thompson*, 943 F. Supp. 999 (W.D. Wis. 1996), the plaintiff Indian tribe sought a finding that it had aboriginal rights to hunt and fish without state restriction in certain lands located in Wisconsin. The court was called upon to interpret a removal treaty in the context of a motion to dismiss by the defendant. In that treaty, the plaintiff Indian tribe ceded and agreed to remove from its Wisconsin land within one year after ratification of the removal treaty. *Id.* at 1014. The removal treaty clearly stated that the tribe ceded all of its Wisconsin land in exchange for new lands in Minnesota. *Id.* The court found that the treaty language clearly anticipated removal of the tribe from the land at issue and extinguishment of the tribe's right to that land. *Id.* The court further stated that whether tribe actually removed from the land did not change the effect of the treaty. *Id.*; *see also New York Indians v. United States*, 170

U.S. 1, 26, 18 S. Ct. 531, 42 L. Ed. 927 (1898) (interpreting the treaty of Buffalo Creek and finding that "forfeiture is conditioned, not upon the actual removal of the Indians . . . but upon their accepting and agreeing to removal"). Ultimately, the court found as a matter of law that the removal treaty disestablished the plaintiff tribe's usufructory rights in the land at issue. *See New York Indians*, 170 U.S. at 35-36, 18 S. Ct. 531; *see also Solem v. Bartlett*, 465 U.S. 463, 470, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984) (stating that "explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment") (citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977)); *see also Thompson v. County of Franklin*, 987 F. Supp. 111, 125-27 (N.D.N.Y. 1997) (applying the *Solem* factors and finding that an Indian reservation granted by treaty could be disestablished as a result of land conveyances by the Indian tribe).

The other two factors set forth in *Solem* and *Hagen* as necessary for a finding of diminishment or disestablishment are heavily fact-based, making dismissal of Defendants' counterclaim as a matter of law inappropriate at this time. Neither the history surrounding the Treaty of Buffalo Creek nor the history of the use and occupancy of the subject land is before the Court at this time. Plaintiffs and the United States instead rely mainly on their own interpretation of the treaties at issue to support their motions to dismiss Defendants' disestablishment counterclaim. Because the Court has determined that their interpretation of the treaties at issue is not the only legally viable interpretation, their arguments are insufficient to support a dismissal of Defendants' disestablishment counterclaim as a matter of law.

There is treaty language to support the arguments of both Defendants and Plaintiffs on the issue of disestablishment. The Treaty of Buffalo Creek was a removal treaty that referred to the Indians living in New York leaving that land for Kansas and making a new home there. However, the specific arrangements and deadlines for the Oneidas to remove to Kansas were never made, and in fact many Oneidas never left their land in New York and Wisconsin. In addition, the Treaty of Buffalo Creek refers only to the Oneidas giving up land in Wisconsin for land in Kansas; it does not mention any land in New York. The Supreme Court has found that in interpreting an ambiguous treaty, in order "to ascertain [a treaty's] meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535, 111 S. Ct. 1489, 113 L. Ed. 2d 569 (1991) (internal quotations omitted). Evidence of the intent and understanding of the parties at the time of contracting are not before the Court in their entirety. As a matter of law, the Court cannot find that the Treaty of Buffalo Creek conclusively supports the argument of either Defendants or Plaintiffs.

The Court agrees with Defendants that it cannot equitably dismiss Defendants' disestablishment counterclaims without fully considering the many issues relevant to a determination of reservation status. A resolution of these issues and a determination of the appropriate status of the land requires a full factual and historical record, something that was not before the court in the test case and something that is not before the court in *Sherrill*. Both of these cases dealt with small portions of the land at issue. In this action, the Court has the

opportunity to make a comprehensive determination as to the status of the entire parcel of land claimed by the Oneidas. The Court does not take this responsibility lightly. It would not be appropriate at this point to dismiss Defendants' disestablishment claim.

B. *Contribution*

1. *Defendants' Standing*

The United States argues that Defendants lack standing to bring a claim for contribution because in doing so they are in fact attempting to bring a breach of trust case on behalf of Plaintiffs. The United States urges the Court to apply the standards governing third-party liability outlined in *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) to find that Defendants lack standing to bring their contribution claim.

Powers is not applicable to this action. In *Powers*, the Supreme Court was confronted with the issue of whether a party had standing to assert the equal protection rights of a juror excluded from service. *Powers*, 499 U.S. at 410, 111 S. Ct. 1364. Defendants' counterclaim is brought as a claim for contribution against the United States as a third-party tortfeasor whom Defendants allege is jointly and severally liable for Plaintiffs' injury. As a third-party claim for contribution, Defendants have standing to bring their claim.[47]

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[47] Counterclaims for contribution are permitted under Fed. Rule of Civ. Proc. 13(a) "in order to facilitate the litigation of all the claims arising from the same occurrences in the same lawsuit." *Index Fund, Inc. v. Hagopian*, 91 F.R.D. 599, 605 (S.D.N.Y. 1981). This is despite the fact that a cause of action for contribution technically does not accrue until resolution and payment of the primary liability, and Rule 13(a) requires that a counterclaim state a claim the pleader had at the time of

It is well established that the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), allows for contribution claims against the United States by an alleged tortfeasor, when both the United States and the alleged tortfeasor are jointly responsible for the same injury. *See United States v. Yellow Cab Co.*, 340 U.S. 543, 71 S. Ct. 399, 95 L. Ed. 523 (1951). The United States' liability is determined under the law where the alleged wrongful act occurred, in this case, New York. *See* 28 U.S.C. § 1346(b) (stating that the United States will be liable where a private person would be liable "in accordance with the law of the place where the act or omission occurred"). A tortfeasor's liability for contribution may stem from a breach of duty to the plaintiff. *See Schauer v. Joyce*, 54 N.Y. 2d 1, 444 N.Y.S. 2d 564, 429 N.E. 2d 83 (1981) ("finding that under New York state law, the relevant question for contribution purposes is whether [the joint tortfeasor] and [the defendant] each owed a duty to [the plaintiff] and by breaching their respective duties contributed to [the plaintiff's] ultimate injuries"). It is not necessary, as the United States claims, that Defendants assert that the United States breached a duty towards Defendants. In addition, a claim for contribution is valid even if the two tortfeasors are liable to the plaintiff under different theories of liability. *See Wood v. City of New York*, 39 A.D. 2d 534, 330 N.Y.S. 2d 923, 924 (N.Y.A.D. 1st Dept. 1972) (stating that the critical test for contribution is a shared responsibility for causing

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serving the pleading. *See Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78, 90 (S.D.N.Y. 1973) (allowing a counterclaim for contribution because it arose "out of the occurrences which are the subject matter of the opposing plaintiff ['s] claim" and because "[t]he Federal Rules of Civil Procedure are designed to encourage the litigation of all the claims arising out of the same occurrences in the same lawsuit").

the same injury, even thought the theories of liability were different).

Defendants in this action have alleged that the United States breached a fiduciary duty owed to Plaintiffs. There is ample caselaw supporting a finding that the United States owed such a duty to the Oneidas during the time period relevant to this action. *See*, *e.g.*, *United States v. Oneida Nation*, 201 Ct. Cl. 546, 477 F.2d 939, 940-42 (1973); *Oneida Indian Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 406-07 (1978); *Oneida Indian Nation of New York v. United States*, 26 Ind. Cl. Comm. 138, 145 (1971). While the United States may have some discretion in the help that it offers to Indian tribes as part of its fiduciary duty, this alone is not sufficient to defeat a finding that Defendants state a valid cause of action for contribution. *See Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476 (D.C. Cir. 1995) (finding that Attorney General had discretion as to whether or not the United States must asserts tribes' water rights on their behalf).

2. *Previous Adjudication of United States Liability*

The United States claims that its liability as to Plaintiffs' claims in this action has already been litigated before the Indian Claims Commission ("ICC"), and thus may not be relitigated here.[48] The United States claims that the Oneidas' claims against it were adjudicated with finality and dismissed with prejudice. A closer look at the proceedings reveals that this representation by the United States is misleading. Defendants note that out

[48] In 1951, the Oneidas initiated a breach of trust action against the United States before the ICC titled *Oneida Indian Nation of New York v. United States.*

of eight total claims, the claim referred to by the United States as being dismissed with prejudice is unrelated to the land at issue in this action. The claims that are related to the land in this action were voluntarily withdrawn by the Oneidas and dismissed without prejudice. Dismissal without prejudice has no res judicata effect and does not bar Defendants' counterclaim in this action.[49] *See Camarano v. Irvin*, 98 F.3d 44, 47 (2d Cir. 1996). In addition, a third-party claim for contribution may lie even if the plaintiff's claim against the joint tortfeasor has been dismissed. *See Londino v. Health Ins. Plan of Greater New York, Inc.*, 93 Misc. 2d 18, 401 N.Y.S. 2d 950 (1977); *Conklin v. St. Lawrence Valley Educ. Television Council, Inc.*, 93-CV-984, 1995 U.S. Dist. LEXIS 3420, at *4 (N.D.N.Y. March 8, 1995) (finding that New York law allows for an action for contribution from parties even if they are not directly liable to the original plaintiff). In this action, the United States makes no argument that it was found by any court to not be liable to Plaintiffs on any claim related to this action. In such a situation, there is no support for a dismissal of Defendants' claim for contribution.

C. *Recoupment*

Defendants assert a counterclaim against the United States for recoupment of any damages they may be liable for as a result of this action. The United States argues that it is immune from suit on Defendants' recoup-

[49] In addition, the United States was in fact found liable in the ICC action prior to the voluntary withdrawal of the Oneidas' claims. This result tends to support, rather than detract from, Defendants' claim for contribution based on a breach of fiduciary duty towards the Plaintiffs. *See Oneida Indian Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 407 (1978).

ment claim. As discussed above, the Second Circuit has found that "[d]espite sovereign immunity, a defendant may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim. . . . A counterclaim may be asserted against a sovereign by way of set off or recoupment to defeat or diminish the sovereign's recovery." *United States v. Forma*, 42 F.3d 759, 764 (2d Cir. 1994). The United States argues that this legal principle, which would allow Defendants' recoupment counterclaim to proceed without specific statutory waiver, does not apply in this action because the United States is not suing on its own behalf and will not collect damages for itself from Defendants should it prevail.

There is some support for a finding that a defendant may not assert a counterclaim against a party in its individual capacity if that party brought suit in a representative capacity. *See United States v. Karlen*, 476 F. Supp. 306, 309 (D.S.D. 1979) (dismissing counterclaim because "a permissive counterclaim may not be indirectly maintained against a Tribe by pointing it at the United States as Trustee for the Tribe"). However, this principle does not apply to recoupment counterclaims such as the one asserted by Defendants. *See United States v. Timber Access Indus. Co.*, 54 F.R.D. 36 (D. Or. 1971) (dismissing permissive counterclaims asserted against the United States in its individual capacity but allowing compulsory counterclaims sounding in recoupment to survive); *see also Klinzing v. Shakey's, Inc.*, 49 F.R.D. 32, 34 (E.D. Wis. 1970) (finding that the "rule against counterclaiming plaintiffs who sue in representative capacity" is subject to exceptions and that the "controlling philosophy" behind counterclaims is to encourage parties to resolve all of their pending disputes

in one action as long as the counterclaims are asserted against "real opponents" in the litigation).

The court's ruling in *Timber Access* supports a finding that Defendants' recoupment counterclaim is permissible. In *Timber Access*, the United States sued as a trustee for an Indian tribe. The defendant asserted counterclaims against the United States for recoupment as well as permissive counterclaims against the United States for money owned it under other contracts with the United States. The court found that the recoupment claims were valid and were not barred by sovereign immunity, but it dismissed the defendant's permissive counterclaims seeking affirmative relief from the United States because "in an action by a trustee, a counterclaim against the trustee in its individual capacity is not a claim against an opposing party under Rule 13." *Timber Access*, 54 F.R.D. at 38-39. Defendants' recoupment counterclaim in this action is not in the nature of a action against the United States in its individual capacity. Instead, it relates directly to the events at issue in this action and seeks not independent recovery, but only a reduction of its potential liability.

The definition and description of recoupment as a form of recovery also supports the Court's findings. Recoupment is defined as a method by which a defendant may reduce the amount of damages it is liable to pay. *See* 20 Am. Jur. 2d Counterclaim, Recoupment, and Setoff § 5 (1995). The focus of recoupment, therefore, is on the diminishment of a defendant's monetary liability, not on the plaintiff's recovery. The United States' suggestion that Defendants should assert their recoupment claim against the Plaintiffs in this action is therefore nonsensical. A recoupment claim is designed to allow a

defendant to reduce its obligation to pay on a claim, so it is properly asserted against an opposing party that is liable to a defendant for part of the defendant's obligation.

Defendants' recoupment counterclaim against the United States is not subject to sovereign immunity. Therefore, the Court need not address the United States' argument that Defendants' recoupment counterclaim is improperly brought under the FTCA or that the FTCA statute of limitations applies to the claim.[50]

D. *Declaration of Title*

Defendants' declaration of title counterclaim requests that the Court quiet title to the disputed lands. The United States once again argues that it is immune from suit on this issue.

As discussed above, Defendants are entitled to direct counterclaims against the United States that sound in recoupment, encompassing those counterclaims that arise out of the same transaction and occurrence from which the United States' claims arise and that do not seek affirmative relief. Various courts have found that a defendant sued by the United States as representative for an Indian tribe, in an action to quiet title, may bring a counterclaim to quiet title in itself. *See United States v. Penn*, 632 F. Supp. 691, 692-93 (D.Vi. 1986) (finding that defendant property owner could validly assert a

[50] Even if the Court were to consider the United States' argument, Defendants' recoupment counterclaim would not be subject to a statute of limitations defense. *See Reiter v. Cooper*, 507 U.S. 258, 264, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993) (finding that a statute of limitations defense is not applicable to counterclaim for recoupment as long as the main action is timely).

counterclaim against the United States to quiet title in himself because the United States had brought suit in order to quiet title to land and as such defendant's claim sounded in recoupment and was not barred by sovereign immunity); *United States v. Drinkwater*, 434 F. Supp. 457, 461 (E.D. Va. 1977) (same); *United States v. Phillips*, 362 F. Supp. 462, 463 (D. Neb. 1973) (same, where United States was suing as representative of Indian tribe). None of these courts have applied the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a(a), to a defendant's counterclaims, as urged by the United States in this action. While the United States has not specifically requested that the Court quiet title to the land at issue in this action, it is clear from the complaint of the United States that it questions Defendants' claims of title to the land and that the title status of the land is indeed being put at issue in this action.

Because the United States does not possess immunity as to counterclaims that arise out of the same claims raised by the United States in its complaint, the Court need not consider the United States' argument that Defendants' counterclaim is barred by the QTA.

E. *Taking*

Defendants' final counterclaim requests that in the event the United States obtains possession of the disputed lands, the United States should be ordered to pay the State just compensation for taking the State's property pursuant to the Fifth Amendment. The State bases this counterclaim on its interpretation of the 1788 Treaty of Ft. Schuyler. The State argues that in order for the Court to find that the Oneidas have a property interest in the disputed lands, the Court must necessar-

ily find that the 1794 Treaty of Canandaigua granted the Oneidas a greater property interest than the Oneidas were granted by New York State under the Treaty of Ft. Schuyler.

Defendants simply cannot succeed on this claim. In order to state a takings claim, the State must establish that it possessed a property interest in the disputed lands that were taken from it by the United States. The issues surrounding Defendants' takings counterclaim have been ably addressed by Judge McCurn in *Cayuga Indian Nation of New York v. Cuomo*, 758 F. Supp. 107, 116 (N.D.N.Y. 1991), and the Court finds his analysis compelling.

As in *Cayuga v. Cuomo*, the land at issue in this action was reserved to the Oneidas in a pre-Constitutional treaty and subsequently recognized and guaranteed by the United States in the Treaty of Canandaigua. Under these circumstances, Judge McCurn found that any actions taken by the State while the United States was operating under the Articles of Confederation are irrelevant to an interpretation of the rights conferred by the 1794 Treaty of Canandaigua. *See Cayuga v. Cuomo*, 758 F. Supp. at 116. Any rights possessed by the State prior to ratification of the Constitution "were ceded by the State to the federal government by the State's ratification of the Constitution." *Id.* Thus, the State could possess no property rights to the Oneida's land once it ratified the Constitution and thereby recognized the United States' exclusive authority over Indian land. Defendants in this action claim that the State possessed title to the land at issue pursuant to a pre-Constitutional treaty. However, "[o]nce New York State ratified the United States Constitution, relations with Indian tribes

and authority over Indian lands fell under the exclusive province of federal law." *Id.* By arguing that the United States' recognition of the Oneida's land in the Treaty of Canandaigua was a taking rather than an assertion of federal control over Indian land by the United States, the State fails to acknowledge established federal law. This situation does not constitute a taking pursuant to the Fifth Amendment for which the State should be compensated.

CONCLUSION

For the reasons stated above, it is hereby:

ORDERED that Defendants' motion to dismiss is **DENIED**; and it is further

ORDERED that Plaintiffs' motion to strike Defendants' defenses is **GRANTED IN PART AND DENIED IN PART** as discussed above; and it is further

ORDERED that Brothertown's motion to strike Defendants' defenses is **GRANTED IN PART AND DENIED IN PART** as discussed above; and it is further

ORDERED that the United States' motion for leave to file a motion to strike is **GRANTED**; and it is further

ORDERED that the United States' motion to strike Defendants' standing defenses is **GRANTED**; and it is further

ORDERED that the United States' motion for a stay of discovery is **DENIED AS MOOT**; and it is further

ORDERED that Plaintiffs' motion to dismiss Defendants' counterclaims is **DENIED**; and it is further

ORDERED that the United States' motion to dismiss Defendants' counterclaims is **GRANTED IN PART AND DENIED IN PART** as discussed above; and it is further

ORDERED that the Clerk of the Court shall serve copies of this order by regular mail upon the parties to this action.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

No. 74CV187

THE ONEIDA INDIAN NATION OF NEW YORK STATE, ET AL., PLAINTIFFS

UNITED STATES OF AMERICA, PLAINTIFF-INTERVENOR

v.

THE COUNTY OF ONEIDA, NEW YORK, AND THE COUNTY OF MADISON, NEW YORK, DEFENDANTS

Filed: Sept. 25, 2000

MEMORANDUM-DECISION AND ORDER

MCCURN, Senior District Judge.

By its very nature Indian land claim litigation engenders inflamed passions on all sides; perhaps no more so than when the specter is raised, as it is by the present motions to amend, of mass ejectment or eviction of literally thousands of individuals who have been residing on this land for years, and in some instances for generations. Before delving into that highly volatile issue, as well as several other less volatile issues, it is necessary

to review at least some aspects of this quarter of a century old territorial dispute.

Background

Between 1778 and 1868, "the United States . . . ratified hundreds of treaties with Indian tribes or nations." *Cheung v. United States*, 213 F.3d 82, 89 (2d Cir. 2000) (citation omitted). In the present case, however, the court is concerned with a number of "treaties" which allegedly the United States did *not* ratify during that same time frame. This lawsuit is one of several wherein the Oneida Indian Nation of New York State ("the Nation"), the Oneida Indian Tribe of Indians of Wisconsin ("the Wisconsin"), and the Oneida of the Thames ("the Thames")[1] have sought to establish their rights to approximately six million acres of land located in central New York.

In 1970, the Oneidas commenced a "test case" challenging the validity of a 1795 agreement wherein their ancestors conveyed 100,000 acres to the State of New York ("the State") in violation of the Trade and Intercourse Act of 1793, 1 Stat. 329 ("the NIA"). Reversing the Second Circuit, in 1974 the Supreme Court unanimously held that for purposes of asserting federal question jurisdiction, the Oneidas had stated a possessory claim based upon federal common law. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675, 94 S. Ct. 772, 781, 39 L. Ed. 2d 73 (1974) ("*Oneida I*"). On

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[1] Except where necessary to distinguish between them, the court will collectively refer to the three Oneida entities as "the Oneidas" or "the Tribal plaintiffs." Herein, generic references to "plaintiffs" shall be read as referring to the Tribal plaintiffs and the plaintiff-intervenor, the United States of America ("the U.S.").

remand the district court found that the only named defendants, Oneida and Madison Counties ("the Counties"), who for two years in the late 1960s occupied the nearly 900 acres at issue, were liable to the Oneidas for $16,694.00.[2] That sum represented the fair rental value, as unimproved, of the land which was part of the Oneidas' 1795 cession of land to the State.

And although it would take another 11 years, eventually, in 1985, the Supreme Court further held in the test case that the Oneidas could maintain a federal common law based action for violation of their possessory rights in their ancestral homeland. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236, 105 S. Ct. 1245, 1252, 84 L. Ed. 2d 169 (1985) ("*Oneida II*"). Likewise, the *Oneida II* Court held that the Oneidas' claims were not barred by any of the following defenses: preemption, statute of limitations, laches, abatement, ratification or the doctrine of nonjusticiability. *See id.* at 240-250, 105 S. Ct. at 1254-1260. In affirming the viability of the Oneidas' claims to their ancestral land, the Supreme Court gave the Oneidas a federal forum for their claims, but it left unanswered many important questions.

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[2] In the test case the Oneidas sought to recover *only* monetary damages. As part of a deliberate litigation strategy in that case, they did not sue individual landowners; nor did they seek ejectment as a remedy. *See* George C. Shattuck, The Oneida Land Claims A Legal History 13, 67, & 79 (1991). "By limiting the claim, the parties hoped to settle the issues in a calmer political atmosphere." INDIAN TRIBES A CONTINUING QUEST FOR SURVIVAL (A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS) 110 (June 1981) (footnote omitted). This was a wise strategy because, as will be seen, even the mere possibility of adding the private landowners as defendants heightens community tensions almost to the boiling point, creating mounting levels of distrust and a loss of perspective by all concerned.

Especially significant in terms of the present motions is the Supreme Court's lack of guidance as to the scope of the relief to which the Oneidas eventually may be entitled. In an oft-quoted footnote, the Court explained that it did not address the issue of whether, for example, "equitable considerations should limit the relief available to the present day Oneida Indians[,]" because petitioners did not raise that issue in *Oneida II*; nor did the Second Circuit address it. *See id.* at 272 n.27, 105 S. Ct. at 1271 n.27. What is more, the Court pointedly "express[ed] no opinion as to whether other considerations may be relevant to the final disposition of this case should Congress not exercise its authority to resolve these far-reaching Indian claims." *See id.* These unanswered questions pertaining to remedies are at the heart of the motions currently before the court.

Meanwhile, on May 3, 1974, the Nation and the Wisconsin commenced the present action, again naming only the Counties as defendants. But this time, instead of only one treaty, at issue are roughly 30 separate "agreements," *see* Affidavit of William W. Taylor, III (Dec. 7, 1998) ("Taylor Aff."), exh. A thereto at 14-15, ¶ 38, and exhs. 3-32, wherein the State purportedly acquired or transferred from the Oneidas approximately 250,000 acres of land.[3] For most of the past 25 years this case

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[3] There is a discrepancy between the original and the amended complaint in terms of the acreage at issue. *Compare* Complaint at 4, ¶ 8 (describing the subject lands as a "Reservation," consisting of "a tract of land of about 300,000 acres"), *with* Taylor Aff., exh. A thereto at 3, ¶ 6 (amended complaint describing amount of acreage as "approximately 250,000"). Prior to submitting their revised amended complaints, both the Oneidas and the U.S. should carefully review same to ensure that no such discrepancies or inaccuracies appear therein.

lay dormant while the Oneidas doggedly pursued the test case.

Upon reassignment to this court from Northern District of New York Senior Judge Howard G. Munson, the stay which had been in effect for many years was lifted. When the Counties then refused to consent to the Oneidas and the U.S. amending their respective complaints, plaintiffs filed these motions to amend pursuant to Federal Rules of Civil Procedure 15(a), 20(a) and 21. After those filings but before oral argument, consistent with the parties' renewed interest in settlement negotiations, on February 24, 1999, the court signed an Order of Reference, appointing Ronald J. Riccio as Settlement Master. Shortly thereafter the parties began negotiating in earnest.

Given the long history of unproductive settlement efforts in all of these *Oneida* land claim actions, at that time the court decided that not to allow any further stays for settlement purposes. Settlement efforts and litigation would proceed on parallel tracks. Therefore, while settlement discussions were ongoing, on March 29, 1999, the court heard oral argument as to plaintiffs' motions to amend. Since then, despite yeoman-like efforts by Mr. Riccio, on June 9, 2000, settlement negotiations abruptly ended, forcing the court to declare an impasse. *See Oneida Indian Nation v. County of Oneida*, No. 74-CV-187 (N.D.N.Y. June 22, 2000). So, regrettably, this case is back on an active litigation track only, with no immediate prospect of renewed settlement efforts.

Although there is a marked similarity between the Oneidas' *proposed* amended complaint and the U.S.' *pro-*

posed amended complaint ("the amended complaints"),[4] there are differences between the two. Therefore, to decide the present motions to amend, it is necessary to separately examine each of those two complaints. Furthermore, while it is obvious that the most controversial proposed amendment is the requested addition of approximately 20,000 private landowners as defendants, there are other amendments which the court must also address and it will do so before turning to the polarizing issue of potential private landowner liability.

I. Oneidas' Amended Complaint[5]

A comparison of the Oneidas' original with their amended complaint demonstrates that there are two primary areas of difference between them. The first relates to the parties and the second to the relief sought. Only the Nation and the Tribe are named as plaintiffs in the original complaint, whereas the amended complaint also includes the Thames as a plaintiff. Then, in terms of the defendants, the Oneidas are seeking to add approximately 20,000 or more "persons or entities . . . that occupy or have or claim an interest in any of the subject lands . . . and their successors and assigns." Taylor Aff., exh. A thereto at 7, ¶ 19. They are further seeking to name the following as defendants: (1) the State of New York ("the State"); (2) the New York State Thruway Authority; (3) Niagara Mohawk Power Corpo-

[4] As will be discussed more fully herein, due to the U.S.' change of position on the issue of ejectment, following oral argument it submitted a second proposed complaint in intervention, which supersedes its prior one.

[5] Originally, as will be seen, the Thames was not a named plaintiff in this action. Therefore, this particular reference to the Oneidas includes only the Nation and the Wisconsin.

ration; and (4) Oneida Valley National Bank.[6] These entities, as well as the defendant Counties, are being sued both individually and as representatives of the potential class of landholders described above.

By far the most troublesome difference between the original and the amended complaints, however, is the nature and scope of the relief which the Oneidas are seeking, especially in terms of the private landowners. Originally the relief which they sought was fairly circumscribed, and by most standards comparatively modest. Through these motions, however, the Oneidas are seeking to greatly broaden the scope of relief which they are seeking. Initially they sought the relatively insignificant sum of "at least" $10,000.00, *see* Taylor Aff., exh. F. thereto at 7; whereas now they are seeking an unspecified amount of monetary damages based upon several factors.

On the face of it, the monetary damages which the Oneidas are now seeking are quite broad, especially when considered in light of the potential liability of any single, individual private landowner. More specifically, they are claiming entitlement "to *damages* from *each member* of the Landholder Class . . . , *with interest*, in the amount of (a) the fair market rental value of the relevant portions of the subject lands, as improved, for the period of their occupancy *by that member* of the Landholder Class, (b) the amount by which the value of any relevant portion of the subject lands was diminished by any damage, pollution or destruction that occurred during the period of their occupancy *by that member* of the Landholder Class, (c) the value of all minerals and other

[6] These last three entities will be collectively referred to throughout as "the non-State entities."

resources taken from the subject lands *by that member* of the Landholder Class (and those purporting to act with that member's permission) during the period of that member's occupancy of the subject lands, equal to the price of such minerals and other resources in their final marketable state and (d) any diminution in value of the subject lands as a result of any injury to the subject lands arising from the taking of such resources." Taylor Aff., exh. A thereto at 25-26, ¶ 68 (emphasis added). Considering the extensive nature of these damages which they are claiming, and based upon the court's experience in similar litigation, in all likelihood, any amount which the Oneidas eventually may recover will far exceed the $10,000 specified in their original complaint.

Not only is the amount of damages which the Oneidas are seeking greater than the amount which they first sought 25 years ago, but they are expanding the length of the time for which they are seeking such damages. When they commenced this action, the Oneidas had pending before the Indian Claims Commission ("the ICC") claims against the U.S. "The theory of the ICC proceedings was that, by virtue of the NIA, the [U.S.] owed a fiduciary duty to the Oneida[s] . . . to protect them against unfair dealings by third parties when disposing of their lands." Taylor Aff., exh. J thereto at 2642. The Oneidas alleged that the U.S. breached that duty because purportedly the Oneidas received "grossly inadequate and unconscionable consideration for the sale of their lands to the State." *See id.* In that ICC proceeding, the Oneidas sought damages from the U.S. for the period prior to 1951. Consequently, when the Oneidas commenced this action in 1974, they limited their claims for monetary relief to 1951 onward. Since

then, however, the Oneidas have dismissed the ICC claims. Therefore in their amended complaint the Oneidas are now seeking pre-1951 damages, as well as damages incurred after that date. So now the Oneidas are seeking recovery of damages spanning over 200 years.

The Oneidas' amended complaint also differs significantly from its original insofar as declaratory relief is concerned. The original complaint does not seek declaratory relief at all. In contrast, the Oneidas' amended complaint seeks several explicit declarations, which will be discussed herein. Suffice it to say for now, that 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.

II. United States' Amended Complaint

Eventually, almost 24 years after the commencement of this action, the U.S. moved to intervene on behalf of the Oneidas. Based upon the court's experience in land claim litigation such as this, unfortunately this inexplicable delay on the part of the U.S. is typical and emblematic of its head-in-the-sand attitude which has dominated its handling of Indian land claims through the years, and indeed through the centuries. In any event, by order dated June 2, 1998, Judge Munson granted the U.S.' motion for permissive intervention pursuant to Fed. R. Civ. P. 24(b), but denied its motion for intervention as of right pursuant to Fed. R. Civ. P. 24(a). Thereafter, on September 3, 1998, one day after the case was reassigned to this court, the U.S. filed its complaint in intervention; and six months later, like the Oneidas, it filed a motion to amend its complaint.

In direct contravention of Local Rule 7.1(a)(4), formerly Local Rule 15.1,[7] the U.S. did not "set forth specifically the proposed amendments and identify the amendments in the proposed pleadings." L.R. 7.1(a)(4). Except to state that it is seeking to add as defendants the State and a landholder class the U.S. does not explain how its amended complaint differs, if at all, from the original. This omission is especially glaring because according to the U.S. its "proposed amended complaint contains a *number* of textual modifications[,]" yet, the U.S. did not bother to identify those modifications. *See* United States' Memorandum of Law in Support of Motion for Leave to File Amended Complaint ("U.S. Memo.") at 3 (emphasis added). Furthermore, despite the U.S.' declaration that it "has rewritten its Complaint to clarify and facilitate adjudication[,]" it has failed to identify those clarifications, and they are not readily apparent.

In any event, a comparison of the U.S.' amended complaint with the Oneidas' reveals that although there are similarities between the two, they are no identical. One similarity is that like the Oneidas, the U.S. is seeking to add the Thames as a plaintiff. Another similarity is that both the U.S. and the Tribal plaintiffs seek to add as defendants the State, along with a class comprised of current occupants of the subject lands, or those claiming an interest in the same. *See* U.S. Amend. Co. at 2, ¶ 2; *see also* Taylor Aff., exh. A thereto at 2-3, ¶ 3 and 7,

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[7] After the filing of these motions, effective January 1, 1999, Local Rule 15.1, pertaining to the "form of a motion to amend and its supporting documentation," was amended and can now be found in substantially the same form in Local Rule 7.1(a)(4).

¶ 19. But unlike the Oneidas, the U.S. is not seeking to add the three non-State entities as defendants.

In terms of relief sought, there is one particularly noteworthy contrast between the amended complaint of the U.S. and that of the Oneidas. The Oneidas do not specifically mention ejectment in their amended complaint. Initially the U.S. did, noting in passing that among other forms of relief it is "possibly" seeking "ejectment." U.S. Amended Co. at 20, Wherefore clause at ¶ (5); *see also* U.S. Memo. at 3 (same). In a frantic attempt to back paddle, and when prompted by questioning from the court, the U.S. "decided . . . to strike all references to ejectment from [its] amended complaint[ ] . . . as it applies to the private landowners." Transcript (Mar. 29, 1999) ("Tr.") at 21. The U.S. made this concession despite agreeing with the Oneidas that "[e]jectment *is* a proper remedy" in this "case of possession." *Id.* at 20 (emphasis added).

The reason for this about-face is that the U.S. believes that its original proposed amended complaint was "misinterpreted." *Id.* During oral argument, in a transparent but ineffective attempt to alleviate the fears of the private landowners, the U.S. emphatically declared that it has "*never*, *ever* intended that tens of thousands of private landowners and business owners would be forcefully removed from their property." *Id.* at 20 (emphasis added). Therefore, as part of its "fervent desire to end this suit in a negotiated settlement that is agreeable to all parties[,]" following oral argument, the U.S. submitted a revised proposed amended complaint, which the court deems to have superseded the U.S.' original amended complaint. *Id.* at 21. At the same time, the U.S. confirmed in writing that it had decided "to strike

all references to ejectment from the prayer for relief *as applied to individual landholders.*" Letter from Charles E. O'Connell, Jr., Attorney, U.S. Department of Justice, Indian Resources Section Environment and Natural Resources Division, to Court (Apr. 7, 1999) (emphasis added). The U.S. was careful though to "retain[] the right to seek . . . ejectment of the State and Counties from appropriate lands within the claim area." *Id.*; *see also* U.S. Amended Co. at 22, Wherefore Clause at ¶ (5).

Given the predictable maelstrom of controversy which surrounded the filing of these motions to amend, especially as they seek to add countless private landowners as defendants, this abrupt change of heart by the U.S. is not surprising. Indeed, at the risk of sounding jaundiced, this change of course by the U.S. appears to be nothing more than an unsuccessful attempt to placate a fearful public.

Discussion

I. Addition of the Thames and the State

Needless to say, the prospect of allowing amendment to add the Thames as a plaintiff and the State as a defendant is far less controversial than the prospect of allowing plaintiffs to amend their complaint to add some 20,000 private landowners. Indeed, not surprisingly, the Counties are eager to have the State as a co-defendant, and do not object to this aspect of plaintiffs' motion. *See* Defendants' Memorandum of Law in Opposition to Plaintiffs' and Intervenor's Motions for Leave to File Amended Complaints ("Co. Memo.") at 6, n.6; and Tr. at 25 and 77. The State takes no formal position with respect to these motions to amend. Evidently it viewed its

inclusion as a defendant in this lawsuit as a foregone conclusion because although not yet formally a party hereto, it actively participated at every step of the way in the aggressive mediation efforts led by Mr. Riccio. Regardless, the court grants the plaintiffs' motion to amend as to the State because, among other reasons, they "derive their title from the State . . . , [its] presence . . . as a defendant should facilitate rather than hinder the resolution of th[is] dispute[.]" *See* Co. Memo. at 6 n.6.

Furthermore, although the Counties do not specifically acquiesce in allowing amendment to include *claims* against the State based upon the federal common law, the NIA, and the Canandaigua Treaty, because they do not object to the addition of the State as a defendant, presumably they also do not object to the addition of *claims* against the State. Otherwise, the Counties' acquiescence to naming the State as a defendant would be meaningless. Therefore, the court hereby grants plaintiffs' motion to the extent they are seeking to add the State as a defendant herein and to assert claims against it.

On the other hand, the Counties do not readily agree to the addition of the Thames as a plaintiff. The Counties do not separately address their reasons for opposing inclusion of the Thames, but instead rely upon their general reasons in opposition to amendment, i.e. delay, expense, and prejudice. During oral argument, for the first time, the Counties asserted that supposedly the Thames is not a tribe recognized by the U.S. government, but rather it is a Canadian recognized Tribe, and hence not a proper plaintiff to this action. That is an argument best left for another day, however, when the

issue is properly before the court with full briefing. Given the history of the Thames' involvement in this action and the related test case, the court has little difficulty also allowing this particular amendment.

To be sure, only the Nation and the Wisconsin originally were named as plaintiffs here and in the test case. During the trial of the test case, however, an oral application was made to have the Thames added as a plaintiff therein. Declaration of Carey R. Ramos (March 18, 1999) at ¶ 3, and exh. A thereto. The court granted that relief "in the interest of justice, and in the interest of economy of judicial time and effort[.]" *See id.*, exh. A thereto at 158 and 162. As the Thames concedes, there is no indication in the trial record that that application was being made with respect to the present case as well. *Id.* at ¶ 3. Clearly that was the intent, however, given subsequent events outlined below.

As the Thames is quick to point out, for nearly 25 years, until the filing of the present motions, it certainly appears that all parties considered the Thames to have been a plaintiff herein. For example, in 1979, when the Counties filed a motion for summary judgment in this case and in the test case, the Thames and the Wisconsin *jointly* filed a brief in opposition thereto. *Id.*, exh. B thereto. Then, in 1983, attorney Locklear, who at that time was representing both the Thames and the Wisconsin, filed a motion to withdraw as counsel for the Thames, and sought substitution of another attorney to represent it. Reply Memorandum of Plaintiff Oneida of the Thames at 3. As the Thames astutely notes, in opposing that substitution motion the Counties filed a letter wherein they specifically refer to the Thames as a plaintiff, and further state that "[t]he . . . Thames

. . . *intervened as a plaintiff in this litigation* [the reservation case][.]" *Id.* (internal quotation marks and citation omitted). In fact, right at the beginning of that letter the Counties' attorney in this action referred to this withdrawal motion "filed by the current attorneys . . . for the *plaintiff* Oneida of the Thames[.]" *Id.*, exh. C thereto at 1 (emphasis added). Finally, in 1990, the Thames and the Wisconsin again jointly filed a memorandum of law in opposition to a motion to consolidate by the Nation. *Id.*, exh. D thereto. At no time during any of those proceedings, did any party challenge the Thames' status as a plaintiff to this action. As the foregoing shows, it certainly appears that until fairly recently the Counties considered the Thames to be a named plaintiff in this action, but now they are now objecting to adding the Thames as a plaintiff.

Quite simply, it is too late in the day for this challenge to the Thames' status as a plaintiff. Obviously the parties hereto, as well as the court, have been treating the Thames as a plaintiff for nearly a quarter of a century. The court declines to hold, as the Counties urge, that the Thames should not be deemed to be a plaintiff hereto based upon what was at most a procedural oversight which went unnoticed until the filing of the present motions. Consequently, to the extent the plaintiffs are seeking to add the Thames as a plaintiff to this action, the court grants such relief.

II. Addition of Private Landowners

A. Summary of Arguments

In a pithy opinion, the Supreme Court in *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962), identified several factors which have become the bench-

mark for courts faced with Rule 15(a) motions to amend. In deciding such motions the *Foman* Court instructed district courts to consider the following: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc[.]" *id*. at 182, 83 S. Ct. at 230.[8] Mechanically applying these factors, initially the plaintiffs argued that amendment should be allowed because they did not delay; there is no prejudice; and amendment would not be futile.[9]

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[8] Interestingly, although courts and litigants alike routinely invoke these factors with respect to motions to amend, because leave was *not* denied in that case, those factors are obiter dictum and not the Supreme Court's holding. *See Americold Corporation v. United States*, 28 Fed. Cl. 747, 751 (1993). Nonetheless, because over the years courts, including the Second Circuit, have routinely invoked these "*Foman*" factors in analyzing motions to amend, so too will this court.

[9] The court is compelled to briefly comment on both the Tribal plaintiffs' and the U.S.' initial supporting memoranda of law. First of all, a comparison of the two reveals that they are virtually identical, with only an occasional change in wording. In the future, when parties are taking substantially similar positions, it would behoove them to submit a joint memorandum, indicating, where necessary, any issues of disagreement. In this way the court is not required to waste scarce judicial resources by reading duplicative memoranda.

What is even more bothersome to the court, however, is the fact that both the Tribal plaintiffs' and the U.S.' supporting memoranda were almost completely bereft of any analysis. They contained only an extremely brief recitation of the standards governing motions to amend—standards with which this court is fully familiar. In short, these two memoranda were practically useless and indicative of the cavalier attitude of these parties, and the Nation in particular, which has pervaded

In an equally rote analysis, and also relying upon the *Foman* factors, the Counties conversely argued that amendment should not be allowed because it would result in "substantial[ ] prejudice" to them in terms of cost and delay. *See* Co. Memo. at 6. Furthermore, according to the Counties, it would be futile to allow amendment of plaintiffs' complaints, at least with respect to the 20,000 private landholders because supposedly that proposed class does not satisfy the requirements for class certification under Fed. R. Civ. P. 23. Finally, the Counties claim that these motions were brought in bad faith.

Shortly before the return date of the present motions, Oneida Ltd., who is not named as a putative defendant, despite the fact that it purports to be the "largest private landowner in the disputed area, . . . the largest private employer in the area, and has been an integral part of the Oneida-Madison County community for fully 150 years[,]" filed a motion to intervene. *See* Memorandum of Law in Support of Oneida Ltd.'s Renewed Motion for Leave to File its February 26, 1999 Memorandum of Law in Partial Opposition to the Plaintiffs' Motions to Amend their Complaints' as that of an *Amicus Curiae* ("Oneida Ltd. Memo.") at 2 (citations omitted).

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this litigation and settlement efforts since reassignment of this case in September 1998.

The court did gain some insight from the plaintiffs during oral argument and in subsequent memoranda which they filed with the court, but the fact remains that at a crucial point in these motions—*prior* to oral argument—the moving parties provided almost no assistance to the court, or for that matter, to the defendants and to other interested individuals. This is inexcusable, especially where, as here, so much is at stake—not just monetarily, but in terms of the potential impact the resolution of these motions could have on a sizeable portion of the Central New York community.

Alternatively, Oneida Ltd. requested that it be granted *amicus curiae* status; and there being no opposition to that request, the court granted same. *See* Tr. at 5.

In opposing plaintiffs' motions to amend, Oneida Ltd. is taking a different tack than the Counties. Focusing strictly upon the propriety of adding 20,000 private landholders, it asserts that there is no need to add that group as defendants because, broadly stated, plaintiffs can "obtain a just adjudication and the complete relief they say they seek" even in the absence of those individual defendants. *See* Oneida Ltd. Memo. at 2. Furthermore, Oneida Ltd. is taking the position that if the court agrees that "pursuant to the standards of federal Indian law and federal equity practice . . . , the plaintiffs do not have the right to eject, dispossess, or recover damages from the private landowners[,]" then plaintiffs should not be allowed to amend their complaints to add the 20,000 landowners. *See id.* at 8. Additionally, Oneida Ltd. maintains that amendment should not be allowed because "[t]he potential prejudice to the innocent landowners" here "is 'staggering.'" *Id.* at 17 (quoting *Oneida Indian Nation of New York v. State of New York*, 691 F.2d at 1070, 1082 (2d Cir. 1982) ("*Oneida Nation I*")). Oneida Ltd. also asserts that amendment "would result in a large, cumbersome defendant class action that would be difficult to manage and inevitably extend an already ancient case." *Id.* at 20. Lastly, Oneida Ltd. reasons that the Oneidas' motions to amend should be denied because they have unduly delayed in filing same some 25 years after the commencement of this action.

Characterizing the issue as "one of management," Tr. at 18, the Oneidas succinctly respond that they should

be allowed to amend their complaint because it would be the "most expeditious and fair way" to resolve this case. Plaintiffs' Memorandum of Law in Support of their Motion for Leave to File an Amended Complaint ("Oneida Memo.") at 13. Otherwise, the Oneidas posit, if amendment is disallowed, these claims will have to be resolved "in more than one lawsuit." Tr. at 8; and 10-11.

B. Governing Legal Standards

Given that plaintiffs are seeking to add new defendants as well as new claims, their motions to amend implicate not only Rule 15(a), which governs amendment of pleadings generally, but also Rule 20(a), governing permissive joinder, and Rule 21, allowing joinder "of a person, who through inadvertence, mistake or for some other reason, had not been made a party and whose presence as a party is later found necessary or desirable." *United States v. Hansel*, 999 F. Supp. 694, 697 (N.D.N.Y. 1998) (quotation marks and citation omitted); *Savine-Rivas v. Farina*, CV-90-4335, 1992 WL 193668, at *1 (E.D.N.Y. Aug. 4, 1992) (because the new complaint sought "to add not just new claims or updated facts[,] but also new parties[,]" along with Rule 15(a), Rules 20(a) and 21 were also involved). However, because "in practical terms [there is] little difference between" these three rules in that "[t]hey all leave the decision whether to permit or deny amendment to the district court's discretion[,]" *id.*, at *2, the court will not separately analyze the present motions under each of those three Rules.

No purpose would be served by that exercise because regardless of which Rule forms the basis for the court's analysis of the present motions to amend, the analysis is

substantially the same. *See Clarke v. Fonix Corp.*, 98 CIV. 6116, 1999 WL 105031, at *6 (S.D.N.Y. March 1, 1999) ("Although Rule 21, and not Rule 15(a) normally governs the addition of new parties to an action, the same standard of liberality applies under either Rule.") (internal quotation marks and citation omitted), *aff'd without published opinion*, 199 F.3d 1321 (2d Cir. Oct.14, 1999); *Sheldon v. PHH Corp.*, 96 Civ. 1666, 1997 WL 91280, at *3 (S.D.N.Y. March 4, 1997) (citation omitted) ("[w]hile plaintiffs' motion [to add a new defendant] properly [was] considered under Rule 21 rather than Rule 15, nothing material turns on this distinction[,]" because "[u]nder either rule, leave of the Court is required[,]" and "[to] the extent the limited case law under Rule 21 permits a conclusion, the standard under that rule is the same as under Rule 15[ ]"), *aff'd on other grounds*, 135 F.3d 848 (2d Cir. 1998); *H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc.*, 112 F.R.D. 417, 419 (S.D.N.Y.1986) (analyzing together under Rules 15, 20 and 21 proposed joinder of a defendant). Therefore, as did the court in *Expoconsul Intern., Inc. v. A/E Systems, Inc.*, 145 F.R.D. 336, 337 (S.D.N.Y. 1993), "[b]ecause Fed. R. Civ. P. 15(a) better suits the arguments put forth by the parties," this court will consider plaintiffs' motions to amend under that Rule alone. *Cf. State of New York v. Panex Industries, Inc.*, 94-CV-0440E, 1997 WL 128369, at *2 (W.D.N.Y. March 14, 1997) (footnote and citations omitted) (emphasis added) ("Inasmuch as responsive pleadings have been served and filed in this action the permissive standards and principles developed under Fed. R. Civ. P. 15(a) are to be used *regardless* of which rule is sought to be utilized.").

The principles governing amendment under Rule 15(a) are well established, easily stated, and for the most part not seriously disputed here. "Once a responsive pleading has been served, 'a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.'" *Jones v. New York State Div. of Military*, 166 F.3d 45, 50 (2d Cir. 1999) (quoting Fed. R. Civ. P. 15(a)) (other citation omitted). Because leave to amend "shall be freely given," generally "amendments are favored 'to facilitate a proper decision on the merits.'" *Black Radio Network, Inc. v. NYNEX Corp.*, 44 F. Supp. 2d 565, 573 (S.D.N.Y. 1999) (quoting *Conley v. Gibson*, 355 U.S. 41, 48, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957)) (other citations omitted). In fact, as plaintiffs note, in *Duffy v. Anitec Image Corporation*, 89-CV-1115, 1991 WL 44834 (N.D.N.Y. April 1, 1991), this court unequivocally stated that "[t]he obvious intent" of Rule 15(a) "is to evince a bias in favor of granting leave to amend." *Id.* at *1; *see also Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 234 (2d Cir. 1995) (quoting *Foman*, 371 U.S. at 182, 83 S. Ct. at 230) ("The Supreme Court has emphasized that amendment should normally be permitted, and has stated that refusal to grant leave without justification is 'inconsistent with the spirit of the Federal Rules.'"). Indeed, "[t]he Supreme Court has made clear that [Rule 15(a)'s] 'mandate is to be heeded[.]'" *Duffy*, 1991 WL 44834, at *1 (quoting *Foman*, 371 U.S. at 182, 83 S. Ct. at 230).

Given this liberal standard, "it is rare for an appellate court to disturb a district court's discretionary decision to allow amendment[,]" *Rachman Bag*, 46 F.3d at 235, in that such decisions are subject to an abuse of discretion standard of review. *See Lane Capital Man-*

agement, Inc. v. Lane Capital Management, Inc., 192 F.3d 337, 342 (2d Cir. 1999) (citation omitted). By the same token, however, as this court is acutely aware, "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion." *Foman*, 371 U.S. at 182, 83 S. Ct. at 230; *see also Anitec*, 1991 WL 44834, at *2 (quoting *U.S. v. Continental Illinois Nat. Bank and Trust*, 889 F.2d 1248, 1254 (2d Cir. 1989)) ("[A]s *Foman* makes equally and explicitly clear, that discretion must be exercised in terms of a justifying reason or reasons consonant with the liberalizing 'spirit of the Federal Rules.'"). In other words, despite the considerable latitude which Rule 15(a) grants in terms of allowing amendments, "leave to amend [should] not [be] granted automatically or reflexively." *See Desantis v. Roz-Ber, Inc.*, 51 F. Supp. 2d 244, 246 (E.D.N.Y. 1999).

Here the court will separately address each of the *Foman* factors, recognizing that ultimately no single factor is determinative. Rather, resolution of these factually unique motions requires the court to engage in a careful balancing process under *Foman* and its progeny.

1. Undue Delay

The first *Foman* factor, "undue delay," focuses upon whether the movant delayed in seeking leave to amend. Plaintiffs maintain that there is no undue delay here because they have not previously sought to amend their complaints. Moreover, this motion comes almost directly on the heels of the court lifting the stay, which had been in effect since January 1987. Plaintiffs also point to the fact that this action has been dormant for many years.

The Counties are not seriously challenging the timing of these motions to amend. In fact, during oral argument the Counties confirmed that they are not raising undue delay as a basis for denying these motions, because "we all know why this [case] has taken this long." *See* Tr. at 77. The Counties did not elaborate, but presumably they were referring to the fact that during most of the time between the May, 1974 filing of the complaint and the September, 1998 reassignment to this court, the present action was stayed due to sporadic settlement efforts in this case and other related Oneida land claim litigation, including the test case.

Unlike the Counties, who all but conceded the timeliness of these motions to amend, *amicus* Oneida Ltd. vigorously presses the undue delay argument. Characterizing the delay here as "unduly excessive" given that a *quarter century* has elapsed since this case was first filed[,] Oneida Ltd. contends such delay is "highly relevant" to the issue of whether plaintiffs should be allowed to amend their complaints to add the private landowners. Oneida Ltd. Memo. at 21 (emphasis in original). In arguing that the Tribal plaintiffs excessively delayed in bringing their motions to amend, Oneida Ltd. urges this court to deny their motions on that basis alone. *Id.* (citation omitted). Next, Oneida Ltd. objects to any suggestion by the Tribal plaintiffs that the delay in seeking amendment is somehow excused as part of a deliberate litigation strategy on the part of those plaintiffs.

As to the U.S., Oneida Ltd. contends that it too acted with undue delay in bringing its motion to amend. Disparagingly noting, among other things, that "it took the federal government over a generation to get around to making up its mind whether to intervene in this case,"

Oneida Ltd. deems "spurious" the U.S.' argument that it did not act with undue delay because it filed its motion to amend only six months after it was allowed to intervene herein, and only three months after the lifting of the stay. *Id.* at 23. Oneida Ltd. then attacks the U.S. for failing to "warn[ ] the innocent landowners off the land, [and] instead . . . actively benefit[ting] from the taxes it has levied on the rents, incomes, and profits generated from the use and development of the area." *Id.* at 23-24 (internal quotation marks and citation omitted). Reasoning that in its view the U.S. has delayed over 200 years in compensating "the Oneida for its large share of the original wrongdoing[,]"[10] and also pointing to the U.S.' "historic wrongdoing and its present refusal to waive sovereign immunity,"[11] Oneida Ltd. chides the U.S.' proffered justification for seeking amendment, which is "to bring to final judgment all possible claims, against all possible parties[.]" *See* U.S. Memo. at 2.

Delay must be considered in context; not all delay will result in denial of a motion to amend. However, "the district court plainly has discretion to deny leave to amend where the motion is made after an inordinate delay, no satisfactory explanation is made for the delay, and the amendment would prejudice the defendant." *MacDraw, Inc. v. CIT Group Equipment Financing, Inc.*, 157 F.3d 956, 962 (2d Cir. 1998) (citations and internal quotation marks omitted). Thus, "mere delay, absent a showing of bad faith or undue prejudice, does not provide a basis for denial of leave to amend[.]" *Messier v. Southbury Training School*, 3:94-CV-1706, 1999 WL 20907, at *3 (D. Conn. Jan. 5, 1999) (citing

[10] Oneida Ltd. Memo at 24.

[11] *Id.*

State Teachers Retirement Bd. v. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981)). In fact, "[g]enerally[,] [even] unexcused delay . . . will not bar [amendment] if no prejudice will ensue to the other parties." *H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc.*, 112 F.R.D. 417, 418 (S.D.N.Y. 1986) (citation omitted). By the same token, though, "if a lengthy delay [does] exist[ ] before a motion to amend is made, it is incumbent upon the movant to offer a valid explanation for the delay." *Deere v. Goodyear Tire and Rubber Co.*, 175 F.R.D. 157, 166 (N.D.N.Y. 1997) (citing, *inter alia, Evans v. Syracuse City School Dist.*, 704 F.2d 44, 47 (2d Cir. 1983)). Not surprisingly, the "longer the period of an unexplained delay, the less will be required of the nonmoving party in terms of a showing of prejudice." *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993).

Any case in which there has been a 25 year gap between the filing of the original complaint and a subsequent motion to amend must necessarily give the court pause. There is some superficial appeal to Oneida Ltd.'s arguments that it is simply too late in the day, especially for the Oneidas, to be amending their complaints to add some 20,000 new defendants. In the end, however, delay does not factor heavily into the court's analysis of whether to allow amendment herein. To be sure, a considerable amount of time has elapsed since the commencement of this action and the filing of these motions to amend. The court cannot ignore the realities of this unparalleled litigation though. This case is still in its initial stages, with no discovery having been conducted and until now motion practice had been minimal and of

no real import.[12] And, if the court's experience in other similar litigation is any indicator, a trial date easily could be years away. Thus, despite the fact that 26 years have passed since the commencement of this action, for all intents and purposes, it is still in the very early stages of what undoubtedly will be extremely protracted litigation.

What is more, the delay here is not attributable solely to the Tribal plaintiffs. It is a delay occasioned by all of the parties to his litigation. The Counties themselves acknowledged as much in 1990 when, in opposing consolidation, they explained that "although sixteen years old," the case "ha[d] not been litigated at all." Taylor Aff., exh. G thereto at 3. A decade ago the Counties further explained that the present case was "simply sitting awaiting the ultimate outcome in [the test case.]" *Id.* The Counties along with the other parties hereto willingly agreed, or at the very least sat silently by through the years, allowing this case to languish in wholly unproductive settlement efforts.[13] Thus, if blame is to be placed for the delay, it must be placed squarely at the feet of all litigants hereto who adopted a deliber-

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[12] Very early on in this litigation, in 1979, Madison County filed a summary judgment motion, which the court denied, on the narrow issue of whether an ICC decision constituted federal ratification of the treaties at issue herein. *See* Taylor Aff. at 3-4, ¶¶ 9 and 10, and exhs. H and I thereto. Upon certification to the Second Circuit, it dismissed the appeal "as improvidently granted." *See id.*, exh. J thereto at 2639 and 2648. For the next 19 years, with the exception of a motion to consolidate which was denied, no motions were filed in this case until the filing of the present motions in late 1998.

[13] This reference to futile negotiation efforts excludes the recent efforts by settlement master Riccio.

ate strategy of negotiating first and litigating second as a last resort.[14]

The nearly 25 year delay between the filing of the Oneidas' complaints and the filing of the present motions undoubtedly constitutes an inordinate delay. By the same token, however, "the amendment has not been delayed unduly, at least when measured within the life of the current federal suit[,]" which by any standards is far from the typical, run-of-the-mill federal action. *See Dodson v. The New York Times Company*, No. 97 Civ. 3838 LAP, 1998 WL 702277, at *5 (S.D.N.Y. Oct. 7, 1998) (footnote omitted). At some point "delay [does] become[ ] fatal," but that point has not been reached in this litigation. *See Cooper v. Lubell*, 83 Civ. 2506, 1987 WL 14468, at *2 (S.D.N.Y. July 13, 1987) (internal quotation marks and citation omitted). Moreover, although Oneida Ltd. strongly implies that delay alone is a sufficient basis for denying a motion to amend, the court disagrees. *See Rotter v. Leahy*, 93 F. Supp. 2d 487, 496 (S.D.N.Y. 2000) (citation omitted) ("Typically, the moving party's delay, standing alone, is not sufficient reason to foreclose amendment."). This is not to say that there

[14] Unfortunately this strategy failed miserably when recently this court was forced to declare an impasse in what had been the most constructive and hopeful prospect for settlement to date, conducted by Ronald J. Riccio, the settlement master chosen by the parties and approved by the court. The court would be remiss if it did not point out, yet again, the possibility that such divisive litigation could be avoided by a negotiated settlement. This litigation could also be avoided if Congress ultimately decides to resolve this land claim (and perhaps others) once and for all, by exercising its legislative prerogative and ratifying all of the challenged treaties. Ratification of the subject treaties is not a course of action which this court necessarily endorses, but from a practical standpoint it is a political reality of which plaintiffs, especially the Nation, should be fully aware.

will never be a case where delay alone is a sufficient basis for precluding amendment. *See*, *e.g.*, *Hickman v. U.S.*, 43 Fed. Cl. 424, 439 (1999) (and cases cited therein), *aff'd without published opinion*, 2000 WL 266486 (Fed. Cir. March 8, 2000). Nonetheless, in a case of this magnitude and atypical history, there is no basis for denying amendment based *solely* upon the Oneidas' delay in filing these motions.

Likewise, the court finds no undue delay on the part of the U.S. in seeking amendment. In fact, because the U.S. only became a party to this action in June 1998, and because it moved for intervention six months later, it is in a vastly different position than the Tribal plaintiffs. The relative speed with which the U.S. moved to amend—six months after being granted intervenor status—makes it nearly impossible for the court to take seriously Oneida Ltd.'s undue delay argument as it pertains to the U.S.

Having found no *un*due delay in the filing of these motions to amend, the court will next consider whether the Counties would be unduly prejudiced by allowing amendment.

2. Undue Prejudice

In response to the claims of undue prejudice, which will be more fully discussed momentarily, the Oneidas, but not the U.S.,[15] argue that "perhaps [the] most signif-

[15] Curiously, the U.S. did not bother to address the prejudice issue in its moving papers, except to baldly state that the Counties would not be prejudiced. The U.S. gave no consideration to the potential prejudice to the landowners, especially in terms of the fact that like the Oneidas, for years they too have taken the position that the private landowners

icant[ ]" reason that the Counties' claim of undue prejudice is without merit is because they, along with the proposed defendants, have been on notice of this action at least since 1970 when the test case was filed. *See* Oneida Memo. at 17. In particular, the Oneidas posit that the landowners should have had common knowledge of this litigation through the numerous newspaper articles which have been published through the years, as well as title insurance policies and purchase contracts on homes. The private landowners also should have had notice of this lawsuit well before now, the Oneidas assert, because in a related action this court certified a defendant class of landowners in accordance with Rule 23, and required notification of same. *See Oneida Indian Nation of Wis. v. State of N.Y.*, 85 F.R.D. 701 (N.D.N.Y. 1980) ("*Wisconsin*").

The court finds Oneidas' notice argument unpersuasive. In the first place, even *assuming* that the prospective defendants had prior notice of this litigation, the Oneidas have not explained how such notice would undermine the claims of prejudice which the Counties and Oneida Ltd. are raising. Moreover, the court has serious doubts as to whether all of the 20,000 prospective defendants had prior notice of this lawsuit.

Certainly the Oneidas cannot rely upon the notification which this court ordered in *Wisconsin* because there no notice was required to landowners residing on and using two acres or less of land as their principal residence. *See id.* at 709-10. This court in *Wisconsin* limited the class to exclude the residential landowners so that the resulting class would be relatively more man-

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would not become political pawns in this litigation. Yet that is precisely what has happened by the filing of these motions.

ageable—60,000, as opposed to 500,000 landowners. *See id.* at 706-08. Given that limitation, the private landowners in this case, many of whom the court assumes, as in *Wisconsin*, reside on less than two acres of property, reasonably could have assumed that they would *not* be named as defendants herein.

Nor is the court willing to impute knowledge to these private landowners based upon newspaper articles, title insurance and the like. Over the years, based upon such documents, as well as oral statements by the Oneidas themselves, the landowners also reasonably could have assumed that the Oneidas would *not* seek to eject their neighboring private landowners. For these same reasons, it would also have been reasonable for the private landowners to have assumed that the Oneidas would not seek to hold them financially responsible for alleged historical wrongs occurring over 200 years also. Thus, as will be seen, although the court finds that no *un*due prejudice will result from allowing plaintiffs to amend their complaints, lack of notice to the private landowners is not a basis for that finding.

"[P]rejudice alone is insufficient to justify a denial of leave to amend; rather the necessary showing *is* 'undue prejudice to the opposing party.'" *A.V. by Versace, Inc. v. Gianni Versace S.p.A.*, 87 F. Supp. 2d 281, 299 (S.D.N.Y. 2000) (quoting *Foman*, 371 U.S. at 182, 83 S. Ct. at 230) (emphasis added by *Versace* court) (other citations omitted). In determining what constitutes undue prejudice, courts "generally consider whether the assertion of the new claim or defense would (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent

the plaintiff from bringing a timely action in another jurisdiction." *Monahan v. New York City Dept. of Corrections*, 214 F.3d 275, *pet. for cert. filed* (Sept. 6, 2000) (internal quotation marks and citation omitted). Of these three factors, only the first two are at issue here.

Insofar as the potential to delay resolution of the dispute is concerned, the addition of numerous parties will "significantly delay resolution of this lawsuit," argue the Counties, causing them "substantial[ ] prejudice[.]" *See* Co. Memo. at 5. Plaintiffs counter that amendment will not cause such a delay because to date there has been no discovery, no motion practice to speak of, and no other meaningful litigation efforts, save the present motions. This action still is in the "very early stages[,]" so there is "nothing to reopen or relitigate." *See* Oneida Memo. at 17; *see also* U.S. Memo at 6.

It is beyond dispute that the Oneidas significantly delayed in bringing these motions to amend. An *un*explained delay means that the non-moving party has to show less in terms of prejudice. *See Brass Construction v. Muller*, No. 98 Civ. 5452, 1998 WL 755164, at *2 (S.D.N.Y. Oct. 28, 1998) (citing *Evans*, 704 F.2d at 46-47). This is so because "the risk of prejudice increases with the passage of time." *Schoenberg v. Shapolsky Publishers, Inc.*, 916 F. Supp. 333, 336 (S.D.N.Y. 1996) (internal quotation marks and citation omitted). But here, the Oneidas did explain their delay, albeit not entirely to the court's satisfaction. Further, although this case is the oldest on the court's docket, pending over 26 years, the court cannot ignore the fact that in terms of active litigation, this case is no farther along than more recently filed cases. Thus, because the Oneidas did offer an explanation for delaying in seeking amendment, and

because despite its 1974 filing date, this case still is in its infancy, the Counties, as the non-movants, must, make a greater showing in terms of prejudice.

In the end the prejudice inquiry involves a balancing process. The court must "weigh[ ] the potential for prejudice resulting from granting the amendment against the risk of prejudice to the moving party if the amendment is denied." *H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 112 F.R.D. 417, 419 (S.D.N.Y. 1986) (internal quotation marks and citation omitted). As the non-movants, the Counties carry the burden in this balancing process "of demonstrating that substantial prejudice would result were the proposed amendment to be granted." *See* (citations omitted) [*sic*]; *Anitec*, 1991 WL 44834, at *1 (same).

Attempting to satisfy that burden, the Counties identify a host of reasons as to why amendment will "significantly delay resolution" of this action: (1) possibility of "immediate[ ]" appeal of any class certification order which this court might grant, *see* Co. Memo. at 6; (2) necessity of new counsel becoming familiar with this action; (3) exacerbation and additional delay of already complex discovery; (4) "fact-specific defenses of private landowners[,]" *id.* at 8; and (5) an increase in motion practice, and in number of defenses, cross-claims, counterclaims and issues which result from the addition of new parties. The court is not satisfied however that any of these factors will significantly delay resolution of this action.

a. Potential Delay to Final Resolution

It is well settled that "one of the most important considerations in determining whether amendment would

be prejudicial is the degree to which it would delay . . . final disposition of the action." *Krumme v. WestPoint Stevens Inc.*, 143 F.3d 71, 88 (2d Cir.), *cert. denied*, 525 U.S. 1041, 119 S. Ct. 592, 142 L. Ed. 2d 534 (1998) (internal quotation marks and citation omitted). Thus, there is a relationship between delay and prejudice such that "prejudice tends to increase with delay[.]" *See Saxholm AS v. Dynal, Inc.*, 938 F. Supp. 120, 123 (E.D.N.Y. 1996) (and cases cited therein). Accordingly, "a proposed amendment . . . [is] especially prejudicial . . . [when] discovery ha[s] already been completed and [the non-movant] ha[s] already filed a motion for summary judgment." *Krumme*, 143 F.3d at 88 (internal quotation marks and citation omitted). Therefore, although the court is separately examining delay and prejudice, it cannot ignore the nexus between these two *Foman* factors. Below, the court will briefly examine each of these aspects of potential delay.

The court finds completely without merit any claimed delay which might result *if* the court grants these motions; certifies a defendant class; grants the Counties permission to file an interlocutory appeal of the certification order pursuant to 28 U.S.C. § 1292; and *if* pursuant to that statute, the Second Circuit agrees to consider such an appeal. Plainly, this whole scenario is speculative. Not only are the Counties assuming that this court will permit amendment and certify a defendant class, but they are assuming that this court will grant them leave to file an interlocutory appeal—an issue which this district court has "first line discretion" to grant or deny. *See Swint v. Chambers County Comm'n*, 514 U.S. 35, 47, 115 S. Ct. 1203, 1210, 131 L. Ed. 2d 60 (1995). The Counties are further assuming that the Court of Appeals would exercise its discretion and "permit an appeal to be

taken from such order" of the district court. *See* 28 U.S.C. § 1292(b) (West 1993). Even if such an appeal was not so highly speculative, the immediate delay which supposedly would result from same would be a delay occasioned by the Counties themselves. Surely this is not the type of delay which would establish undue prejudice so as to warrant denial of a Rule 15 motion to amend.

Nor does the court find persuasive the Counties' delay argument based upon the fact that the addition of new parties will require new counsel to become familiar with the prior proceedings in this action. Given the current posture of this case, the court is at a complete loss as to how the Counties can claim that amendment will cause delay because "[m]any *sophisticated* issues of law and fact have been litigated . . . over the years." *See* Co. Memo. at 7 (emphasis added). This comment is puzzling, to say the least, when there has been almost no active litigation in this case. Indeed, as land claim litigation goes, despite its age, the filings in this particular case are relatively few, so in that respect any competent lawyer should be able to quickly become familiar with this case in a relatively short time.

Next, the Counties' [*sic*] assert that the addition of new parties will require "*highly* fact-intensive" discovery, thus further complicating and prolonging discovery which the Counties anticipate will be complex enough as it is. *See id.* at 7. Such discovery may well be necessary irrespective of whether or not additional parties are joined, however. Therefore, this argument carries little weight with the court. Furthermore, delay attributable to discovery is not a very convincing reason for denying amendment here because if the individual landowners

are named as defendants herein, then, as in *Cayuga*, most likely a class would be certified, at least for purposes of establishing liability, if any. *See Cayuga Indian Nation v. Carey*, 89 F.R.D. 627, 633 (N.D.N.Y. 1981) ("*Cayuga I*") (McCurn, S.J.)[.] Thus, as in *Cayuga*, counsel for the class would coordinate all of the discovery efforts and motion practice on behalf of those landowners.

Equally weak is the Counties' argument that any delay attributable to "fact-specific defenses of private landowners" and equitable considerations "is sufficiently prejudicial to the[ir] . . . right to a speedy resolution" of this matter as to mandate denial of plaintiffs' motion to join the landowners as defendants. *See* Co. Memo. at 8. As *Cayuga* has shown, it is possible to structure these land claim cases so that individual defendants are effectively removed therefrom, both in terms of liability and damages.[16]

Several other reasons which the Counties assert will cause prejudicial delay in resolving this litigation fall into the category of grasping at straws. The Counties claim that additional parties will result in more motion practice, more and perhaps different defenses, more cross-claims and counterclaims, and more litigation pertaining to damages. Even assuming this worst case scenario, the Counties fail to recognize that "mere 'time, effort and money' do[ ] not rise to the level of 'substantial prejudice.'" *See Brass Construction*, 1998 WL 755164, at *2 (quoting *Block*, 988 F.2d at 351). This is especially true in the present case where, by statute,

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[16] *See* discussion *infra* at 93-94; and 95-97.

defense costs are borne by the State.[17] *See* N.Y. State L. § 10 (McKinney 1995). In any event, because this litigation already is so complex, regardless of the number of parties involved, the expenditure of time, energy, and money here undoubtedly will be *very* substantial. Simply put, try as they might, the Counties are unable to convince this court that allowing amendment will result in a significant delay in resolving this action, so as to rise to the level of undue prejudice to them.

b. Expenditure of Significant Additional Resources

The Counties fare no better with their argument that allowing plaintiffs to amend their complaint will force the Counties to expend "significant additional resources[.]" *See* Co. Memo. at 10. This particular factor is almost meaningless in this context where apparently money has been no object when it comes to either pursuing or defending these claims. Obviously, the court has not had occasion to review a billing statement from any of the counsel. It requires little imagination, though, even taking into account a matter as simple as number of lawyers present in court for any given proceeding, that money is being spent here without impunity. To the extent that granting the motions may require the Counties to expend additional resources such as time and effort, the court cannot find that such expenditures would

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[17] Section ten reads as follows:

> The governor *shall*, *at the expense of the State*, employ counsel and provide for the defense of any action or proceeding, instituted against the State, or against any person deriving title therefrom, to involve any lands within the State, undue pretence of any claim inconsistent with its sovereignty and jurisdiction.

N.Y. STATE L. § 10 (McKinney 1995) (emphasis added).

rise to the level of undue prejudice. By its very nature, land claim litigation is extremely complex and, regardless of the number of parties involved, it requires considerable time, energy, money, not to mention sheer will, to successfully pursue or defend such an action. Thus, the court cannot find, as the Counties urge, that the expenditure of additional resources would be so prejudicial as to mandate denial of plaintiffs' motions to amend.

In short, the court does not find that there is undue prejudice here in terms of either the potential for delay in resolving this action, or in terms of the expenditure of significant additional resources.

3. Bad Faith

In opposing these motions to amend, the Counties vigorously contend that all of the plaintiffs have acted in bad faith by employing Fed. R. Civ. P. 15(a) for purposes of impermissible "legal gamesmanship." *See* Co. Memo. at 12 (citation omitted). The Counties offer two reasons which they claim are indicative of plaintiffs' bad faith herein. The first is notice: because plaintiffs knew or should have known when they filed their respective complaints (the Tribal plaintiffs in 1974 and the U.S. in 1998) that they could have sought to repossess the subject property and name the individual private landowners as defendants, their failure to do so violates the spirit and intent of Rule 15. Secondly, the Counties maintain that plaintiffs have acted in bad faith because these motions to amend are nothing more than an oblique attempt to coerce the State into settlement. Hence, in the Counties' view, plaintiffs are invoking the liberal amendment provisions of Rule 15 for an impermissible motive—to force a settlement.

Oneida Ltd. is not making a bad faith argument *per se*. Many of the arguments which it makes in connection with undue delay are, however, tantamount to asserting bad faith in that they relate to plaintiffs' motives for seeking to amend at this juncture. Furthermore, as will become apparent, there are several striking similarities between Oneida Ltd.'s "undue delay" arguments and the Counties' bad faith arguments. Therefore, even though Oneida Ltd. is raising these arguments, such as notice and improper notice, in the context of undue delay, the court finds the same to be highly relevant to the bad faith inquiry which it must make under *Foman*; and hence it will address the same now.

Like the Counties, Oneida Ltd. seriously questions plaintiffs' motives in seeking to join the private landowners so many years after the filing of the complaints in this action. The Oneidas' decision not to join the private landowners as defendants some 25 years ago is, as Oneida Ltd. describes it, "a purely strategic move[,]" which even standing alone is "fatal" to these motions to amend. *See* Oneida Ltd. Memo. at 22. More specifically, like the Counties, in essence Oneida Ltd. contends that the Tribal plaintiffs' delay in seeking leave to amend constitutes bad faith because those plaintiffs were on notice at the filing of the original complaint in 1974 that the individual landowners could have been named as defendants therein. *Id.* (quoting 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1488, P. 688 (1990) (collecting cases)). Next, Oneida Ltd. directly attacks the Tribal plaintiffs' assertion that by waiting to file these motions to amend, they were doing nothing more than adopting a litigation strategy aimed at "minimal disruption." *See id.* at 22 (citation omitted). Then, again, as do the Coun-

ties, Oneida Ltd. asserts that the proposed addition of 20,000 private landowners is nothing but maneuvering on the part of the Oneidas "to gain a tactical advantage against the State so as '*to pressure [it] into reaching a settlement*.'" *Id.* at 23 (internal quotation marks and citation omitted) (emphasis in original).

The Oneidas strenuously dispute the charge of bad faith, explaining that once the Supreme Court held in 1985, *inter alia*, that they could maintain a federal common law based action for violation of their possessory rights, *see Oneida II*, 470 U.S. at 236, 105 S. Ct. at 1252, they chose negotiation in all of the related *Oneida* actions rather than further litigation. Failure of those negotiation efforts, argue the Oneidas, necessitated the filing of these motions. In light of the foregoing, the Oneidas disdainfully remark that the Counties' cries of bad faith are "simply wrong[,]" "[a]t best and [a]t worst, . . . irresponsible rhetoric[.]" Oneida Reply Memo. at 3 (footnote omitted).

Distancing itself from the Tribal plaintiffs, the U.S. refutes the bad faith arguments by reiterating that it only became a party to this action fairly recently when it was granted intervenor status in June 1998; and it filed its amendment motion six months thereafter. Accordingly, the U.S. reasons that its motion to amend was not filed in bad faith and it is not, as the Counties suggest, engaging in "legal gamesmanship." U.S. Response at 6 (internal quotation marks omitted).

Few courts have denied leave to amend on the basis of bad faith. *See Dodson v. The New York Times Company*, No. 97 Civ. 3838 LAP, 1998 WL 702277, at *9 (S.D.N.Y. Oct. 7, 1998); *but see Rotter*, 93 F. Supp. 2d at 496 (recognizing that "[t]he possibility of bad faith is, in

and of itself," justification for denying a motion to amend). As a result, there is little case law within this Circuit to guide this court in terms of what constitutes bad faith as a ground for denying leave to amend. It is well established, however, that "when the opponent of an amendment asserts that the movant is acting in bad faith, there must be something more than mere delay or inadvertence" to warrant denial of a Rule 15 motion. *See Primetime 24 Joint Venture and Primetime 24 Relay Corporation v. DirecTV, Inc.*, No. 99 CIV. 3307, 2000 WL 426396, at *5 (S.D.N.Y. April 20, 2000) (citing, *inter alia*, *Evans*, 704 F.2d at 47). By the same token, under certain circumstances "[d]elay as a predicate for a finding of bad faith is a sufficient reason to deny leave to amend[,]" especially when accompanied by undue delay or prejudice. *See Town of New Windsor v. Tesa Tuck, Inc.*, 919 F. Supp. 662, 676 (S.D.N.Y. 1996) (citation omitted).

A finding that a party is seeking leave to amend solely to gain a tactical advantage, also supports a finding that such an amendment is made in bad faith. *State Trading* v. *Assuranceforeningen Skuld*, 921 F.2d 409, 417-18 (2d Cir. 1990), is illustrative in this regard. The Second Circuit in *State Trading* affirmed the denial of a motion to amend where the plaintiff delayed raising certain claims to gain a strategic advantage over the defendant. There, only well after the defendant challenged the applicability of Connecticut law did the plaintiff attempt to amend its complaint to include foreign law based causes of action. The Second Circuit agreed with defendant's observation that plaintiff "deliberately chose not to amend its complaint earlier to include [such] causes of action because any admission that foreign law applied . . . would have increased the chance

of dismissal on forum selection clause or *forum non conveniens* grounds." *Id.* at 418. Thus, relying upon the fact that plaintiff's "decision not to plead the additional causes of action was a tactical one," combined with the fact that with no justification plaintiff waited an "unreasonably long" time in seeking leave to amend, the Second Circuit affirmed the district court's denial of the motion to amend. *Id.*; *see also Chitimacha Tribe of Louisiana v. Harry L. Laws Company, Inc.*, 690 F.2d 1157, 1164 (5th Cir. 1982) (citation omitted) (noting that "it is improper to amend solely to gain a tactical advantage[]").

The history of this litigation in terms of the private landowners, as set forth below, convinces the court that plaintiffs' "request for leave to amend reflects an evolutionary development that falls under the heading of bad faith." *See Lee v. Regal Cruises, Ltd.*, 916 F. Supp. 300, 304 (S.D.N.Y. 1996), *aff'd without published opinion*, 116 F.3d 465 (2d Cir. 1997).

a. Oneidas

As to the Oneidas, the primary basis for the court's finding of bad faith is that since even before the filing of this lawsuit, they have steadfastly maintained that they were *not* seeking to disrupt the current landowners in any way. Now, despite 30 years of assurances to the contrary, the Oneidas are completely abandoning their conciliatory attitude toward the private landowners. Through these motions the Oneidas are seeking, *inter alia*, a remedy which would allow them to dispossess the private landowners of the property upon which they are currently residing. The Oneidas also are seeking to hold

these landowners liable for monetary damages. *See* Taylor Aff., exh. A thereto at 25, ¶ 68.

Presumably the Oneidas have always intended to eventually regain possession of the subject land through transactions between willing sellers and buyers. Until the filing of these motions to amend, however, they did not specifically claim entitlement to possession. For example, even prior to the commencement of the test case, in 1968, in a Complaint and Petition to the President of the United States ("the 1968 Petition"), in language which could not be more definite, the Nation declared:

> Be it clearly understood that the Oneida Nation has *no purpose or wish to eject* from such lands the *innocent people* who now have record title to them and reside thereon. . . . The Oneida Nation wishes *to secure from the State . . . only fair and just compensation* for the lands unlawfully taken from them without due process of law.

Id. at 3 (quoting 1968 Complaint and Petition to the President of the United States) (emphasis added), *reprinted in* George C. Shattuck, *The Oneida Land Claims: A Legal History*, p. 90 (1991). In that same Petition, the Oneidas unequivocally declared that "[t]he people who now occupy the former Reservation *should be left peacefully there*, but the Oneida Nation should have justice too." 1968 Petition at 106 (emphasis added). The Oneidas now have abandoned these laudable goals by bringing the present motions—a course of action which this court cannot condone.

When the Oneidas commenced this action more than 25 years ago, they were aware of tensions which would

likely result from litigation such as this. Indeed, so eager were the Oneidas to assuage public concern about litigation of this nature that they explicitly averred in their 1974 complaint that "[i]t has always been the policy of the Oneida Indians to live in peace and trust and friendship with their neighbors." Taylor Aff., exh. F thereto at 6, ¶ 19. The Oneidas' initial approach was wise and tempered and until these motions the court had no reason to believe that the Oneidas would seek to evict private property owners; or, for that matter, that they would seek to hold current landowners individually liable for monetary damages.

In what can only be described as a drastic change of heart, now the Oneidas are expressly seeking "*possession* of the subject lands to which the proof demonstrates their entitlement[.]" *Id.*, exh. A thereto at 26, ¶ 69 (emphasis added). Elaborating, the Oneidas are seeking a declaration that they "are the owners of and have the legal and equitable title as well as *the right to possession* of the subject lands claimed or held by any defendant or member of the defendant class[.]" *Id.*, exh. A thereto at 28, Prayer for Relief at ¶ (3) (emphasis added). Similarly, the Oneidas seek a declaration "that the subject lands were acquired or transferred from [them] in violation of Federal law, and that the 30 Agreements and Letters Patent Transfers were void ab initio[.]" *Id.*, exh. A thereto at 28, Prayer for Relief at ¶ (2). In other words, the Oneidas are seeking a judicial declaration that the challenged treaties were null from the beginning. They also are seeking a declaration that "all interests of any defendant, *including all members of the Landholder Class*, in the subject lands are null and void[.]" *Id.*, exh. F thereto at 26, ¶ 69 (emphasis added).

Despite the possessory nature of their claims, nowhere in the Oneidas' amended complaint does the word "ejectment" or "eviction" appear. Evidently this complaint was carefully crafted to avoid such specific references. Clearly that is import of the allegations highlighted above, however. For example, practically speaking, the effect of a declaration that the Oneidas have the right to possess the subject land, is that they would have the concomitant right to, or at a minimum, the prerogative to, evict current landowners. Thus, if the court allows the Oneidas to amend their complaint to assert such possessory claims, whether they would actually choose to exercise the option to evict, the fact remains that eviction would be an option available to the Oneidas. Consequently, despite the Oneidas' repeated public assurances that they will not evict any current landowner, in considering these motions to amend the court cannot ignore the harsh reality of the possessory nature of the claims which they are seeking to add to their complaint, especially as manifested in their requests for declaratory relief.

During oral argument there were some attempts by the Tribal plaintiffs, especially the Wisconsin, to distance themselves from the plain language of the amended complaint. *See* Tr. at 90 ("[T]here may be a means of implementing [a] judgment as against that class [current landowners] that would avoid involuntary eviction."). In fact, somewhat ironically given the relief which they are seeking on these motions, during oral argument the Wisconsin emphatically stated that they do not intend "to do to others what was done to them, and that is to involuntarily evict people currently in possession of th[e] [subject] land." *Id.* at 89-90. At the same time, however, the Oneidas had no choice but to concede

the possessory nature of their claims. Indeed, the Wisconsin stressed that "the basic thrust of this action[ ]" is a "claim of *possession* for . . . land[.]" *Id.* at 48 (emphasis added). Then, responding to questioning by the court, the Nation admitted that even though "the potential of ejectment is a disastrous thought," it still should be "entitled to *proceed against . . . those persons who are wrongfully in possession* [including the current landowners.]" *Id.* at 54-55 (emphasis added).

Responding to further questioning by the court, the Nation was forced to concede that "the right of possession is inconsistent . . . with the possessory interests of those people who are on the land now." *Id.* at 56. The Wisconsin echoed this view, emphasizing that "[t]he *only claim* that any court has ever acknowledged in these land claim cases is the *current right of possession* that *must be asserted* against those *currently in possession*." *Id.* at 63 (emphasis added). In light of the foregoing, combined with the plain language in their amended complaint, apparently the Oneidas are intent on having the possibility of ejectment hanging over the landowners' heads like the proverbial sword of Damocles.

The Nation's recent actions in the mediation efforts during the 18 or so months of settlement negotiations before Mr. Riccio, and during the pendency of these motions, cause the court to be particularly skeptical of the Oneidas' true motive for seeking to name the private landowners as defendants.[18] In April 2000, almost im-

[18] The court is fully cognizant of the fact that these actions were undertaken by the Nation. Given that neither the Wisconsin nor the Thames have expressly voiced any disagreement with this approach, however, the court deems this silence to mean that they acquiesce in the Nation's tactics. This implied acquiescence is not a stretch given that

mediately after the Settlement Master announced that in his opinion the court should declare an impasse in the mediation efforts, the Nation reverted to what had always been, until quite recently, their position with respect to the individual landowners: it is *not* seeking monetary damages, nor ejectment from any private, individual landowner. For whatever reasons, possibly nothing more than posturing, even with these motions to amend still pending, the Nation indicated that it "wanted to extend an olive branch in [its] long-simmering land-claim dispute with New York State[.]" David W. Chen, *Indian Tribe Offers Landowners a Conditional Deal*, N.Y. TIMES, April 27, 2000, § B, at 6 ("Chen article").[19] This "olive branch" is in the form of a proposed stipulation ("stipulation")[20] wherein the Nation declares that it "will *not* seek damages or rent from or eviction of any private, non-governmental landholder" in this action. Declaration of William W. Taylor, III (Apr. 25, 2000), exh. B thereto (Stipulation) at 1, ¶ 1 (emphasis added).

The Nation's representative, Ray Halbritter, made much of this stipulation admitting that "[t]he landowners . . . have endured . . . uncertainty over their fu-

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either the Wisconsin or the Thames, or both, just as easily could have withdrawn their motions to amend at any time, but they have not.

[19] Pursuant to Fed. R. Evid. 201, the court takes judicial notice of the newspaper articles referenced herein. *See Manufacturers Life Insurance Company v. Donaldson, Lufkin & Jenrette Securities Corporation*, No. 99 Civ. 1944, 2000 WL 709006, at *1 n.1 (S.D.N.Y. June 1, 2000) (taking judicial notice of newspaper article "describing a property-flipping scheme").

[20] This stipulation was submitted as part of a motion, which the Nation filed on April 26, 2000, wherein it seeks to bifurcate this action, allowing plaintiffs to proceed first against the State only.

ture," but that the Oneidas "hope" that the stipulation "will end that uncertainty." Chen article. At a press conference in April 2000, Halbritter stressed that the Oneidas "want to carry on with the statement . . . that we *always* wanted to make sure the landowners who are innocent are protected[.]" Michelle Breidenbach, *No evictions, no rent, Halbritter Promises*, SYRACUSE POST STANDARD, April 27, 2000 (emphasis added). Halbritter continued; in his view, even without the stipulation the landowners "were always protected because the Oneida Nation said they would be and our word is good." *Id.*

The Nation accuses the Counties of engaging in "irresponsible rhetoric," Reply Memorandum in Support of Plaintiffs' Motion for Leave to File an Amended Complaint at 3; but the Nation has it exactly backwards. It is the Nation which has been engaging in "irresponsible rhetoric," especially when it comes to the issue of the private landowners as potential defendants. If the Oneidas are sincere in wanting to "protect" these landowners, the solution is simple: withdraw these motions to amend. Understandably, nothing short of withdrawal (and most certainly *not* the Nation's proposed stipulation) will fully ease the landowners' fears of displacement and personal liability.

Close examination of the stipulation reveals its illusory nature. Without the necessary approval of all of the parties to this action, the stipulation is virtually meaningless. To date, only the Nations's counsel have executed it. In fact, except for the caption, the stipulation does not mention the other two Tribal plaintiffs. Whatever minimal impact this stipulation might have as is is further weakened by the fact that neither the State nor the Counties have executed it, although the stipula-

tion purports to be an agreement between the Nation and those two governmental entities.

Another dubious aspect of this stipulation is its content. The stipulation's sweeping language decidedly favors the Nation, making it highly unlikely that the defendant Counties or the State would agree to execute it. For example, this "agreement" not to seek monetary relief or eviction from the private landowners, "*automatically* becomes null and void and of no further effect[]" if *any* person, at *any* time, in *any* court contends that the stipulation *in any way* "affects or diminishes . . . any reservation Plaintiff may have or the status of land Plaintiff possesses or may hereafter possess or any claim or right of Plaintiff against the State or the Counties[.]" Taylor Decl'n, exh. B thereto, at 2, ¶ 4 (emphasis added).

The Oneidas' motivation is all the more questionable given its unequivocal assertion that it "will *not* seek damages or rent from or eviction of any private, non-governmental landholder in" this action. If the Oneidas genuinely do not intend to seek any relief from the private landowners, then the court seriously questions the need and motivation for this stipulation. Given the heavily one-sided nature of this stipulation, as just described, and the highly doubtful assumption that the Counties and State would agree to the terms of same, the court concludes that, this stipulation is *not* an olive branch. It is simply another ploy by the Oneidas and the Nation in particular.

i. Notice

A lack of prior notice to the current landowners bolsters the court's finding of bad faith on behalf of the

Oneidas. Certainly there was nothing at the outset to preclude the Oneidas from naming the individual landowners as defendants, as has been done in other Indian land claim litigation. *See, e.g., Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 579 (1st Cir. 1979) (tribe brought NIA action "against a defendant class representing landowners in the Town of Mashpee"); *Seneca Nation of Indians v. State of New York*, 26 F. Supp. 2d 555, 559 (W.D.N.Y. 1998) (defendants in NIA action included "numerous" private party lessees), *aff'd on other grounds*, 178 F.3d 95 (2d Cir. 1999), *cert. denied*, 528 U.S. 1073, 120 S. Ct. 785, 145 L. Ed. 2d 662 (2000); *Canadian St. Regis Band of Mohawk Indians v. State of New York*, 97 F.R.D. 453, 455 (N.D.N.Y. 1983) (McCurn, S.J.) (St. Regis descendants brought suit under NIA against, among others, "a defendant class comprised on those with an interest in the subject land[ ]"); *Cayuga I*, 89 F.R.D. at 634 (certifying a defendant class of persons claiming an interest in the *Cayuga* claim area). Notably, there is nothing in the present record indicating that for some reason the Oneidas only recently became aware of the possibility that they could assert claims against the individual landowners.

As justification for not earlier naming the private landowners as defendants, the Oneidas point to the years of supposedly ongoing settlement efforts. Those efforts were on-again, off-again, however and marked, *inter alia*, by inner turmoil among the Tribal plaintiffs. In addition negotiation efforts, both past and more recently those conducted by then Settlement Master Riccio, appear to have been tainted by an appalling lack of sincerity and commitment. The court is cognizant of the fact that the doomed settlement negotiations before Riccio were not entirely the fault of the Oneidas. As the

parties are fully aware, from the court's perspective, all participants in these negotiations have continually put their own self-interests ahead of the broader interest of the entire community, Oneida and non-Oneida alike who currently reside in the claim area.

The court does give some credence to the Oneidas' assertion that initially the negotiating first, litigating later strategy was a carefully orchestrated attempt to cause "minimal disruption[ ]" to the private landowners. *See* Oneida Memo. at 15. As the negotiations unfolded, however, particularly over the past 18 months or so, the fact that in the end, sadly, the court was forced to conclude that the Oneidas, among others, were not firmly committed to settlement, coupled with the timing of these motions, strongly belies the Oneidas' claim that they adopted a strategy of "minimal disruption," especially when it comes to the private landowners.

As an aside, the court cannot help but comment that in reality the Oneidas' strategy has resulted in maximum disruption, because through their repeated public assurances over the years that the private landowners would not lose their homes, nor be personally liable for monetary damages, the landowners were lulled into a false sense of security. Needless to say, this sense of security was shattered by the Oneidas filing of the present motions. The federal government's joinder in these motions exacerbated the landowners' sense of betrayal. Not only have these motions been extraordinarily divisive, but, worst of all, they have incited threats and potentially dangerous consequences including physical assault on proponents and opponents of these land claims.

Under these circumstances, in the court's opinion the Oneidas' motives in bringing these motions were ques-

tionable and it is difficult to attribute anything other than bad faith to the Oneidas, where a grant of their motion would result in a threat of evicting thousands upon thousands of private landowners—a threat with which these landowners could be forced to live under for perhaps another decade as this lawsuit progresses. The court hastens to add, however, that it is not the threat of eviction, in and of itself, which it finds indicative of bad faith. Rather, as set forth above, that threat, in combination with the fact that for more than a quarter of a century the Oneidas have adamantly maintained that they do not intend to evict current landowners—a position which they have continued to espouse as recently as April 2000, well *after* the filing of these motions—convinces the court that these amendments are not sought in good faith.

b. United States

Obviously the U.S. stands in a far different position than do the Tribal plaintiffs in terms of alleged bad faith. First, of all given the fact that the U.S. sought amendment within months of being granted intervenor status, the court cannot impute bad faith to the U.S. based upon a delay in making this motion. Nor, for that same reason, does the notice argument apply to the U.S. Additionally, in contrast to the Oneidas, the U.S. does not have a history of continually disavowing an intent to evict private landowners from the claim area. Nonetheless, the court finds that "is not unreasonable to impute lack of good faith" to the U.S. insofar as it is seeking to include the private landowners as defendants in this action. *See State Trading*, 921 F.2d at 418.

Based upon the trust relationship between the federal government and Indians, such as the Oneidas,[21] the U.S. intervened on behalf of the Oneidas. Like the Oneidas, in its initial complaint in intervention the U.S. did not name any individual landowners as defendants; only the Counties were so named. Then, as Local Rule 7.1(a)(4) mandates, when it filed its motion to amend the U.S. submitted a proposed amended complaint seeking to expand significantly the number of defendants, including the addition of approximately 20,000 individual landowner as defendants. In that complaint the U.S. also sought to expand the scope of the relief which it is seeking on behalf of the Oneidas. In addition to seeking declaratory relief, the U.S. sought monetary damages and "*possibly . . . ejectment*[.]" U.S. Amended Complaint in Intervention (12/8/98) at 20, Wherefore Clause at ¶ (5) ("U.S. Amend. Co.") (emphasis added). Given that there is no indication to the contrary, the court reads this particular complaint of the U.S. as seeking all of the relief enumerated in the wherefore clause against *all* of the defendants including the individual landowners.

Believing that the federal government has turned its back on its own citizens, the private landowners are upset at the prospect, however remote, of losing their homes and at potentially being held for monetary damages. The potential class of landowners is not alone in this sentiment. Since the filing of these motions to amend, New York State Senator Charles Schumer and a New York congressional representative, Sherwood Boehlert, as well as Governor George Pataki, have taken

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[21] *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, Ch. 12, § B2d(1), 650-51. (1982 ed.).

up the landowners' cries, condemning the federal government for seeking to name the landowners as defendants in this action.

In response to this outcry of public opinion, at oral argument the U.S. advised the court that its amended complaint had been "misinterpreted." Tr. at 20. The court is hard-pressed to see how the public has "misinterpreted" this complaint, which is plain on its face. In any event, after pointed questioning by the court,[22] in a frantic attempt to backpedal the U.S. explained that it "*never*, *ever* intended that tens of thousands of private landowners and business owners would be forcefully removed from their property." Tr. at 20 (emphasis added). *See also* O'Connell Letter at 1 (U.S. "not seeking ejectment against any private landholders in the claim area [ ]"). Upholding that representation, at the court's direction, shortly after oral argument the U.S. submitted a second proposed amended complaint wherein it specifically alleges that it "is *not* seeking ejectment of private landholders[,]" although it explicitly reserves the right to seek ejectment of the State and the Counties. *See*, U.S. Amend. Co. at 22, Wherefore Clause at ¶ 5; *see also* United States' Supplemental Memorandum of Law in Support of its Motion for Leave to File Amended Complaint ("U.S. Supp. Memo.") at 2 (emphasis added); O'Connell Letter at 1 (emphasis added) ("[T]he [U.S.] seeks to strike all reference to ejectment from the prayer for relief as applied to *individual* landholders.").

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[22] Given the contradictions between the U.S.' first proposed amended complaint and its position at oral argument, the court bluntly asked the U.S. if it is "seek[ing] possession of these lands and ejectment of the landowners or not?" Tr. at 20.

In this amended complaint, the U.S. alleges that the non-State defendants as well as the individual landowners "have unlawfully possessed the subject lands and acted to exclude the Oneida Indian Nation for its rightful possession of [same]." U.S. Amend. Co. at 20-21, ¶ 33. Similarly, the U.S. alleges that these proposed defendants "who claim title to and the right to possess the subject lands derived from the illegal transactions described [therein], have kept and continue to keep Plaintiff Tribes *out of possession* of the subject lands in violation of the Nonintercourse Act." *Id.* at 21-22, ¶ 37 (emphasis added). Furthermore, as are the Oneidas, the U.S. is seeking a declaration that because the State acquired the subject property in violation of federal law, the Treaties under attack are void *ab initio*. *See id.* at 22, Wherefore Claim at ¶ 2. The U.S. further seeks a declaration that the Oneidas have a continuing *right of possession* to the subject lands claimed or held by *any* defendants and/or *member* of the defendant class[.] *Id.* at 22, Wherefore Clause at ¶ 3 (emphasis added). Pursuant to Fed. R. Civ. P. 23, the U.S. still also seeks certification of a defendant class of "approximately 20,000 or more persons" who "occupy or have or claim an interest in any of the subject lands and their successors and assigns[.]" *Id.* at 5, ¶¶ 9 and 10. Finally, in its amended complaint, the U.S. continues to seek monetary damages from the individual landowners. *See id.* at 22, Wherefore clause at ¶ (4).

As recently as June 14, 2000, the U.S. reaffirmed that it does not actually "seek," nor will [it] support [ ] ejectment of private landowners in the Oneida claim area. Letter from James F. Simon, Deputy Assistant Attorney General, U.S. Department of Justice, Environment and Natural Resources Division, to Court (June

14, 2000) ("Simon Let."). In that letter, the U.S. stresses that it "has made ***absolutely clear*** in open court and in [its] pleadings that it does ***not*** seek, and will ***not*** support, ejectment of private landowners in the Oneida claim area." *Id.* (emphasis added). It proposes making a motion seeking to hold the State "liable for any and all money damages to the Tribes for the *entire claim area* and the *entire period* since the State's violation of the [NIA][.]" *Id.* (emphasis added). In the meantime, the U.S. requests that the court "hold in abeyance any decision on whether to join a defendant landowner class[.]" *Id.* Lastly, if the court grants the U.S.' proposed motion, it would agree "to withdraw its motion concerning . . . the defendant landowner class *without* prejudice[.]" *Id.* (emphasis added).

The U.S. posits that this recently suggested course of action would "spare the public from unnecessary concern[,]" but the court is at a loss to see how. *Id.* Without critically analyzing each of the U.S.' four suggested proposals, the court does have a few observations. The first is that from a strategic standpoint, holding the present motion in abeyance, especially insofar as the private landowners are concerned, would only unnecessarily further prolong this litigation and increase community tensions in the claim area. Furthermore, it is troubling to the court that in this recent proposal, the U.S. is only willing to "withdraw *without prejudice*" its motion to amend with respect to the private landowners. This leaves open the possibility that at a later date, the U.S. may still pursue relief against those landowners. Simon Let. at 2 (emphasis added). Given that possibility, it is difficult, if not impossible to see how, as the U.S. puts it, "the public will be spare[d] . . . from unnecessary concern." *See id.* at 2. Given the exigencies which

are inherent in land claim litigation such as this, not to mention the fact that in this case the Oneidas are challenging an unprecedented number of treaties, it is not unrealistic to expect that, including the inevitable appeals, this case will linger in the judicial system for years to come. Thus, while the U.S.' suggested course of action *may* temporarily assuage the private landowners' fears, it is just that—a *temporary* cure.

At the end of the day, the court cannot ignore the fact that despite the U.S.' oft-repeated assurances during oral argument and thereafter that it does not intend to evict current individual landowners, it, like the Oneidas, steadfastly declines to voluntarily withdraw its motion with prejudice as to these landowners. Initially, the U.S. claimed that its underlying motive for pursuing relief against the private landowners was its desire to "bring finality to this longstanding claim." Tr. at 19. Indeed, the U.S. continues to pursue this motion to amend, even though it fully recognizes, "that an unusual and unfortunate degree of anxiety among the landowners in the claim area has resulted from the pendency of [its] motion [to amend]." *See* Simon Ltr. at 1. The U.S.' willingness to continue pursuing amendment under these circumstances, coupled with the fact that it has retreated not once, but twice, in terms of its position as to the private landowners, causes the court to seriously question the U.S.' intent with respect to the private landowners' status herein.

This action has been fraught with enough tension and uncertainty without the U.S. vacillating on the critical issue of the private landowners' role, if any, in this litigation. The U.S.' failure to take a firm position on this issue early on and stand by it has, in the court's opinion,

been extremely detrimental not only to the parties to this litigation, but to the entire Central New York community, especially those residing in or near the claim area. Simply put, the U.S. is trying to have its cake and eat it too; it is trying to appease both the Oneidas *and* the private landowners. The court adds that it is cognizant of the difficult position in which the U.S. finds itself here—at once purporting to represent the Oneidas' interests, interests which are, for the most part, directly antithetical to those of the private landowners. The fact that the U.S. is between a rock and a hard place does not, however, excuse its conduct in terms of its equivocal stance as to the private landowners.

4. Futility Doctrine

a. Governing Legal Standards

"'[F]utility of amendment' [is] one factor which might overcome the privilege to amend." *Gursky v. Northwestern Mut. Life Ins. Co.*, 139 F.R.D. 279, 284 (E.D.N.Y. 1991) (quoting *Foman*, 371 U.S. at 182, 83 S. Ct. at 230). Unfortunately for district courts applying *Foman*, futility is "neither explained nor expanded upon anywhere [there]in[.]" *Id.* The test of whether an amendment is futile has been variously stated by courts within this Circuit. *See*, *e.g.*, *Mackensworth v. S.S. American Merchant*, 28 F.3d 246, 251 (2d Cir. 1994) (internal quotation marks and citation omitted) ("That the amendment [ ] would not serve any purpose is a valid ground to deny a motion for leave to amend."); *Saxholm AS v. Dynal, Inc.*, 938 F. Supp. 120, 124 (E.D.N.Y. 1996) (citation omitted) ("[A] proposed claim is futile only if it is clearly frivolous or legally insufficient on its face."). Irrespective of how the test is stated though, there is

agreement that "[i]f the proposed claim sets forth facts and circumstances which may entitle the plaintiff to relief, then futility is not a proper basis on which to deny the amendment." *Saxholm*, 938 F. Supp. at 124 (citations omitted); *see also Rotter*, 93 F. Supp. 2d at 497 (internal quotation marks and citation omitted) ("Dismissal is warranted only when the [pleader] cannot recover . . . on the facts he has alleged.")

"A review of this Circuit's case law concerning . . . 'futility' of amendment indicates that, in the main, a proposed amendment should be reviewed under a standard analogous to the standard of review applicable to a motion brought under Rule 12(b)(6)[.]" *Rotter*, 93 F. Supp. 2d at 496 (citations omitted). "Accordingly, the Court treats the facts alleged by plaintiffs as true and views them in the light most favorable to them." *Id.* (citations omitted). "Thus, if the proposed amended complaint would be subject to 'immediate dismissal' for failure to state a claim *or on some other ground*, the Court will not permit amendment." *Versace*, 87 F. Supp. 2d at 298 (quoting *Jones v. New York State Div. of Military & Naval Affairs*, 166 F.3d 45, 55 (2d Cir. 1999)) (emphasis added).[23] By the same token, however, on more than one

[23] The court recognizes that it need not always assess a proposed amended pleading in accordance with Rule 12(b)(6) standards. "In evaluating the futility of amendment, a number of courts have held that a summary judgment standard may be applied and leave to amend denied outright should the party seeking amendment fail to satisfy that standard." *Republic Nat. Bank v. Hales*, 75 F. Supp. 2d 300, 308 (S.D.N.Y. 1999) (and cases cited therein). "Other courts, . . . , have at times allowed amendment, but simultaneously evaluated the amended pleading under the standards governing motions brought pursuant to Rule 56." *Id.* at 309 (and cases cited therein). However, because no discovery has yet been conducted in the present case, nor were the

occasion the Second Circuit has held that "[l]eave to amend may be denied where it appears that the proposed amendments are 'unlikely to be productive.'" *Versace*, 87 F. Supp. 2d at 298 (quoting *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993)) (other citation omitted).

b. Summary of Arguments

Devoting a scant two paragraphs to the futility issue,[24] initially the plaintiffs posited that it would not be futile to allow amendment in light of two particular decisions in the test case—the Second Circuit's decision in *Oneida Indian Nation of New York v. Oneida County*, 719 F.2d 525 (2d Cir. 1983) ("*Oneida Nation II*"), which the Supreme Court affirmed in relevant part in *Oneida II*. The Supreme Court's decision in *Oneida II* to expressly recognize the right of Indians, such as the Oneidas, to maintain federal common-law claims for wrongful possession of their lands was a watershed in terms of Indian law jurisprudence. In light of that decision, plain-

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parties given "reasonable notice that they w[ould] be called upon to demonstrate the existence of disputed, material fact(s)[,]" the court will not apply Rule 56 summary judgment standards to the present motions. *See id.*

[24] Cursory treatment of all of the *Foman* factors is the hallmark of plaintiffs' supporting memoranda. This is particularly troubling given the serious ramifications of allowing amendment, especially in terms of the private landowners—ramifications of which surely these plaintiffs were aware. In fact the *pro forma* nature of plaintiffs' supporting memoranda, in part, motivated the court to grant Oneida Ltd.'s *amicus* status. As the court anticipated, the comprehensive and thoughtful analysis set forth in Oneida Ltd.'s memorandum, had the desired effect of forcing plaintiffs, in response to those arguments, to hone in on the futility issue in their supplemental memoranda (filed after oral argument).

tiffs maintain that it is beyond cavil that their proposed claims against the private landowners, including ejectment, are not futile and hence the court should allow them to amend their complaints accordingly.

The Counties' argument that amendment would be futile is equally perfunctory. Relying upon their arguments in opposition to the Oneidas' separate motion for class certification, the Counties assert that allowing amendment to add countless private landowners would be futile because a class comprised of those individuals would not satisfy the requirements of Fed. R. Civ. P. 23. The Counties also maintain that such an amendment would be futile because certification of a class of private landowners would be unconstitutional.

Oneida Ltd. raises several other and in the court's view more significant arguments regarding futility. Oneida Ltd. first argues that there is no need to add the private landowners as defendants given that the State is in a position to pay any monetary damages to which the Oneidas ultimately may be entitled. Then, invoking "federal common law and equitable principles," Oneida Ltd. forcefully argues that any relief which the plaintiffs ultimately may be awarded in this case should not come at the expense (both literally and figuratively) of the private landowners who currently are residing in the claim area. To avoid any detrimental impact upon these landowners, Oneida Ltd. argues that the court should deny plaintiffs' motion to the extent they are seeking to add the same as defendants, a position which the Counties were quick to endorse during oral argument. *See* Tr. at 23-24 (characterizing as "an act of futility" the addition of private landowners because "no court in this land has to date ever evicted" the same, where they have been in

possession for "the last 140 to 200 years[ ]"). In arguing that it would be futile to allow plaintiffs to amend their complaints, Oneida Ltd. raises a number of valid points which the court will address in turn.

c. Test Case Decisions

After the Supreme Court's decision in *Oneida II* and the Second Circuit's decision in *Oneida Nation II* (two test case decisions), plaintiffs contend that the claims which they are seeking to add "cannot seriously be contested[.]" Oneida Pl. Memo. at 19; and U.S. Memo. at 7. In fact, the Oneidas go so far as to declare that in light of those two decisions, "[r]arely is a [c]ourt faced with claims as clearly established as those contained in the Amended Complaint." Oneida Pl. Memo. at 19. Curiously, despite the fact that plaintiffs purport to be discussing futility, originally this argument was confined to these two broad statements.[25]

Oneida Ltd. takes sharp exception to these bald assertions, distinguishing the *Oneida* test case from both a factual and legal standpoint. Factually, Oneida Ltd. stresses that in the test case the only two defendants were public, governmental entities—Oneida and Madison Counties—the same two Counties which at the moment are the only defendants in this action. Thus, as

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[25] At the court's request following oral argument the Wisconsin and the Thames jointly filed a supplemental memorandum, as did the Nation and the Thames (also jointly). In those memoranda, for the first time, the Oneidas meaningfully addressed the futility issue, rather than just paying lip service to that issue.

Following oral argument, the U.S. likewise filed a supplemental memorandum. In contrast to the Tribal plaintiffs' supplemental briefs, however, the U.S.' supplemental brief sheds no light on the futility issue.

Oneida Ltd. reads *Oneida II* and *Oneida Nation II*, because both are silent as to "potential *private* third-party liability[,]" neither is relevant to the issue of whether plaintiffs are entitled to amend their complaints to add the private landowners. *See* Oneida Ltd. Memo. at 8 (emphasis in original).

Oneida Ltd. further reasons that in arguing that the test case governs the outcome of these motions, the Oneidas are blurring the distinction between justiciability of claims and the relief sought. Concededly, after *Oneida II*, wherein the Supreme Court held, *inter alia*, that land claims such as those alleged herein are not barred by the political question doctrine, the justiciability of such claims is beyond dispute. *See* 470 U.S. at 248-50, 105 S. Ct. at 1259-60; *see also Oneida Nation I*, 691 F.2d at 1081 (citation omitted) ("to [the Second Circuit's] knowledge no Indian land claim has ever been dismissed on nonjusticiability grounds[ ]"). Given these readily apparent distinctions between the test case and the present case, Oneida Ltd. strongly disagrees with the Oneidas that the test case is determinative of whether it is permissible for plaintiffs to amend their complaints to name private landowners as defendants.

In response, the Tribal plaintiffs reprise a point which they stressed during oral argument: because they "hold a *federal common law right to current possession* of the subject lands," their claim is "for possession of the land, not . . . for historically adjusted damages." *See* Wis. Supp. Memo. at 7 (emphasis added); *see also* Memorandum of Oneida Indian Nation of New York and Oneida of the Thames in Response to Brief of *Amicus* Oneida Ltd. ("Nat. Resp.") at 2-4. In making this argument, plaintiffs point to the Supreme Court's acknowl-

edgment in *Oneida I* that "the complaint [there]in . . . assert[ed] a *present right to possession* under federal law[,]" *see Oneida I*, 414 U.S. at 675, 94 S. Ct. at 781 (emphasis added); and the Court's later holding in *Oneida II* "that the Oneidas can maintain this action for violation of their *possessory rights* based on federal common law." *See Oneida II*, 470 U.S. at 236, 105 S. Ct. at 1252 (emphasis added). According to the Oneidas this right, which they characterize as a continuing right of possession, exists regardless of the status of the occupant of the land—public entity or private owner. Thus, after the test case, the Oneidas are adamant that they can properly amend their complaints to assert claims against the private landowners for not only declaratory relief but also for ejectment and monetary damages.

There is no need, as the Tribal plaintiffs urge, for this court to decide here today whether to extend the test case rationale to private third-parties. The court need not travel down that untrodden path because there is a sharp distinction between the *existence* of a federal common law right to Indian homelands and how to *vindicate* that right—a distinction which in the court's opinion must be drawn, especially given that the alleged wrong in this case occurred more than 200 years ago. *See Navajo Tribe of Indians v. State of N.M.*, 809 F.2d 1455, 1467 (10th Cir. 1987) (a claim or substantive right and a remedy are "two, distinct concepts"—a distinction which is "fundamental"). The Tribal plaintiffs mistakenly assume that to fully vindicate those rights, it is imperative that the private landowners be added as defendants herein. The court disagrees.

To the extent that the Oneidas in this particular case eventually may be able to establish that they have pos-

sessory rights in the claim area, such rights do not necessarily encompass the concomitant right to obtain relief directly from the current landowners. Similarly, the fact that the Oneidas' proposed claims against the private landowners may well be justiciable does not necessarily mean, *a fortiori*, that they are entitled to seek monetary damages from or to evict current landowners. In other words, this court does not equate justiciability of land claims with the availability of relief against private landowners especially where, as here, plaintiffs' motivation for pursuing such claims is highly debatable. In sum, the court declines to read the various *Oneida* test case decisions as broadly as the Oneidas advocate. The inapplicability of the test case is only one reason, however, for the court's finding that it would be futile to allow plaintiffs to amend their complaint as to the private landowners.

d. Prior Land Claim Rulings

As all of the parties are fully aware, nearly 20 years ago, very early on in the so-called "*Big Oneida*"[26] case this court signaled its "keen[ ] aware[ness] of the serious, if not insurmountable, problems which would arise out of granting the plaintiffs the relief they seek[,]" including return of the subject property. *Oneida Indian Nation of New York v. New York*, 520 F. Supp. 1278, 1295 (N.D.N.Y.) (D.J., McCurn), *aff'd in part and remanded in part*, 691 F.2d 1070 (2d Cir. 1982) ("*Oneida Nation II*"). At that time, this court further recognized "that an award of possession . . . would create utter

[26] This is yet another land claim action by these same Oneida plaintiffs, wherein they challenged the validity of two land transactions which occurred during the Articles of Confederation period.

chaos and disaster to many, socially, economically and politically." *Id.* A few years later in the *Cayuga* land claim litigation the defendants expressed similar concerns regarding the "dramatic potential consequences of an award of possession[.]" *Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297, 1308 (N.D.N.Y. 1983) ("*Cayuga II*"). In the context of analyzing the justiciability of the Cayugas' claims, this court realized that ejectment "may be unavailable or impractical as too disruptive or unfair[.]" *Id.* (citation omitted). In fact, in *Cayuga II* this court carried one step further its prior observations regarding the potentially devastating consequences of ejectment, opining that as an alternative "historically adjusted monetary damages" could be awarded to the Cayugas. *Id.* (citation omitted). Based upon these prior statements, Oneida Ltd. explicitly invites this court to take the "next logical step," which it views as "holding that, pursuant to the standards of federal Indian law and federal equity practice . . . , the plaintiffs do *not* have the right to eject, dispossess, *or* recover damages from the private landowners." *Id.* at 9 (emphasis added). For the reasons set forth below, the court accepts this invitation.

Two basic premises underlie Oneida Ltd.'s assertion that the Tribal plaintiffs should not be allowed to seek relief from the private landowners. First, Oneida Ltd. asserts that even in the absence of the private landowners as defendants, under the case law the Tribal plaintiffs "still [have] a claim for just damages from the guilty sovereigns(s)[.]" *Id.* at 9-10 (citation omitted). Second, relying principally upon *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, 47 S. Ct. 142, 71 L. Ed. 294 (1926), Oneida Ltd. invokes the "impossibility" doctrine, *i.e.*, the Tribal plaintiffs should not be al-

lowed to seek ejectment against the private landowners because, given the drastically changed conditions of the claim area over the past 200 years, it would be "impossible" to eject those landowners. *See id.* at 357, 47 S. Ct. at 144. For these reasons, as well as for reasons of fairness and equity, Oneida Ltd. maintains that plaintiffs are barred from seeking ejectment or monetary damages from the private landowners; and hence it would be futile to allow plaintiffs to amend their complaints accordingly.

At this juncture, the court will confine its analysis to the issue of whether it would be futile for plaintiffs to amend their complaints to seek ejectment. Then it will go on to consider the related issue of whether it would be futile for plaintiffs to amend their complaints to seek monetary damages or declaratory relief, or both, from the private landowners.

e. Nature of Relief Sought

i. Ejectment

As the Oneidas are quick to point out, unlike the present case, for the most part *Yankton Sioux* and the other cases to which Oneida Ltd. cites "involv [ed] Federal takings, cases where the Nonintercourse act for other reasons did not apply and cases where *no possession was sought*." *See* Nation Resp. at 13 (emphasis added). Therefore, the Oneidas deem that line of cases "irrelevant," Nation Resp. at 13; and "beside the point[,]" Wis. Oneida Resp. at 2, in terms of whether ejectment is a viable remedy here.

The court readily admits that there are differences between the *Yankton Sioux* line of cases, which form the basis for Oneida Ltd.'s "impossibility" doctrine argu-

ment, and the present case. For example in *Yankton Sioux*, in its Petition for Certiorari, the Tribe unequivocally stated that it was "not claim[ing] the present value of [its] right in the . . . Reservation, *nor* d[id] [it] *resort* to the legal remedy of an *action in ejectment to recover* the exclusive *possession* of the property." *Indian Law*, 18 N.M. L. Rev. 403, 413-414 (1988) (footnote omitted) (emphasis added). Thus, in *Yankton Sioux*, the Tribe's unmistakable object was not to establish its rights to the quarry . . . but to obtain compensation for the[ ] taking [of those rights]." *Id.* at 414.

In contrast, as previously discussed, the Oneidas most decidedly *are* seeking to establish their rights to the claim area. Moreover, the present case is based upon a series of alleged Nonintercourse Act violations—not upon a claimed taking under the Fifth Amendment, as was *Yankton Sioux*. Another case upon which Oneida Ltd. relies, *Felix v. Patrick*, 145 U.S. 317, 12 S. Ct. 862, 36 L. Ed. 719 (1892), likewise is distinguishable. In *Felix*, unlike here, the issue was whether the doctrine of laches should bar an action brought by the heirs of an Indian to establish a constructive trust over lands that had been conveyed 28 years earlier in violation of federal law.

Despite these differences, because there is a dearth of authority which is even remotely similar to, let alone directly on point with, the present case, the court finds *Yankton Sioux* and its progeny instructive. In that line of cases the courts articulated what has become known as the "impossibility" doctrine. Thus, stating the obvious, the Supreme Court in *Yankton Sioux* declared that it would be "impossible . . . to rescind the cession and restore the Indians [sic] 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[.]" *See Yankton Sioux*, 272 U.S. at 357, 47 S. Ct. at 144.

In a similar vein, in *Felix* the Court held that laches barred that constructive trust action because during the intervening years, between the time of the conveyance and the commencement of the lawsuit, land "which was wild . . . 30 years ago is now intersected by streets, subdivided into blocks and lots, and largely occupied by persons who have bought upon the strength of Patrick's title and have erected buildings of a permanent character. . . ." *Felix*, 145 U.S. at 334, 12 S. Ct. at 868. The *Felix* Court also found significant the undeniably harsh result which would ensue if it were to order "surrender" of the disputed land to the plaintiffs; it "would result in the unsettlement of large numbers of titles upon which the owners have rested in assured security for nearly a generation." *See id.* at 335, 12 S. Ct. at 868.

These practical concerns as to the impossibility of restoring Indians to lands formerly occupied by them resonate deeply with this court. Such concerns are magnified exponentially here, where development of every type imaginable has been ongoing for more than two centuries—significantly longer than in either *Yankton Sioux* or *Felix*. Even facing such formidable obstacles to ejectment, plaintiffs still insist that it would be "premature and unfair" for the court to invoke the impossibility doctrine as a grounds for denying their motion to amend. *See* Wis. Resp. at 13; *see also* Nat. Resp. at 17. The court fundamentally disagrees; it would be unfair *not* "to limit [the] relief available for [plaintiffs'] claim[s] at this stage of the proceedings." *See id.* at 13.

Ordinarily, the court might be inclined to allow amendment and await further litigation before determining the scope of remedies available to a plaintiff. This case is far from ordinary however. If the court takes a "wait and see" approach, then because this litigation could span another decade, approximately 20,000 innocent landowners would needlessly be kept in a state of legal limbo. The court cannot countenance such a result. The court is acutely aware of the claims of serious and even tragic harms which the State of New York allegedly perpetrated upon the Oneidas. By the same token, however, it is unfathomable to this court that the remedy for such harms, if proven, should be the eviction of numerous private landowners more than 200 years after the challenged conveyances.

The court's decision to rely upon the impossibility doctrine at this juncture stems from its firm conviction, based in part upon experience which it has gained through the years presiding over other similar litigation, that the time has come to transcend the theoretical. The present motions cry out for a pragmatic approach. It is true that for a time in *Cayuga*, this court did entertain the possibility of ejectment as a remedy. Exercising an abundance of caution in this relatively nascent area of federal Indian law, (*i.e.* the appropriate remedies for land claims), the court in *Cayuga* did conduct an evidentiary hearing on the issue of the availability of ejectment as a remedy.

Like a Monday morning quarterback with the advantage of hindsight, however, the court is now convinced that that hearing can fairly be described as an academic exercise. Much of the proof adduced therein fell into the category of commonsense observations as to the relative

pros and cons of ejectment. Many of the reasons which this court gave in *Cayuga Indian Nation of New York v. Cuomo*, 80-CV-930, 80-CV-960, 1999 WL 509442 (N.D.N.Y. July 1, 1999) (McCurn, Sr. J.) for not permitting ejectment, such as the potential for displacement of vast numbers of private landowners; "negative economic impact[;]" "widespread disruption" to everyone residing in the general vicinity of the claim area due, in part, to interference with transportation systems which currently transect the claim area, were self-evident. *See id.* at *22 and *29. The court gained little if any insight—either factually or legally—from that hearing;[27] it only needlessly prolonged the *Cayuga* litigation. And, ultimately the court held that ejectment was not an appropriate remedy in that case. *See id.* What is more, even though in *Cayuga* the private landowners were defendants practically from the outset, their presence was not crucial to that litigation, and indeed only unnecessarily complicated it. In fact, as will be more fully discussed in the next section, eventually this court concluded that the only equitable and practical way to proceed in *Cayuga* was to conduct separate trials, with the State as the sole defendant in the first trial. *See Cayuga XI Indian Nation of New York v. Pataki*, 79 F. Supp. 2d 66 (N.D.N.Y. 1999).

The court will not wait for years to decide that ejectment is *not* a viable remedy here because, as *Cayuga* demonstrates all too well, holding resolution of that issue in abeyance only prolongs what the court perceives as the inevitable here: no private landowners will be

[27] The court ventures to say that the same would be true even for a court whose docket has not included almost 20 years of presiding over land claim litigation.

evicted from property upon which they are currently residing. Furthermore, prolonging resolution of the ejectment issue only unduly heightens tensions and further divides the entire Central New York community. Indian land claim cases raise enough weighty issues without becoming mired down in issues, such as ejectment, which only serve to distract all concerned from the real task at hand—how, in the 21st century, to reconcile the Indians' interest in their homelands with those of current landowners who, understandably, also view the claim area as their "homeland."

Application of the impossibility doctrine to this litigation, which is based upon federal common law and the Nonintercourse Act, is not an entirely novel proposition. In *Oneida Nation I*, the Second Circuit explicitly recognized that the possibility ejectment might be deemed an "'impossible' remedy," and thus an award of monetary relief would be a workable alternative remedy. *See Oneida Nation I*, 691 F.2d at 1083 (quoting *Yankton Sioux*, 272 U.S. at 359, 47 S. Ct. at 144). The Second Circuit further acknowledged that "[c]ourts have not been blind to the disruption caused by the mere filing of [land claim] lawsuits, . . . and may take into account the impossibility . . . of repossession in designing an appropriate remedy." *Id.* (internal quotation marks and citation omitted). Underlying this statement is the tacit assumption that while Indians are entitled to pursue their rights to certain lands which allegedly were taken from them in violation of federal law, given modern-day realities and the passage of more than 200 years, it may well be that ejectment is an impractical remedy in cases such as this.

The impossibility doctrine does factor into its reasoning in terms of whether it would be futile to allow plaintiffs to amend their complaints to seek ejectment of the private landowners. By no means, however, is that doctrine dispositive. The Oneidas' fairly recent actions provide an additional basis for this court's finding of futility here. As detailed in the earlier discussion of bad faith, during the pendency of these motions the Oneidas significantly retreated from the position which they are advancing on these motions—that they should be allowed to seek ejectment of the private landowners. Now, as previously discussed, they are taking the exact opposite position; they have no desire to eject the current, individual landowners. As also previously discussed, the U.S. too has withdrawn from its original position that it should be allowed to seek ejectment of the private landowners. If plaintiffs themselves are no longer seriously pursuing ejectment of private landowners, then there is absolutely no reason for the court to impose, by allowing amendment, the possibility of that drastic remedy with the concomitant state of disruption to the entire community effected thereby.

ii. Monetary damages

The Oneidas are equally adamant that it would *not* be futile to amend their complaints to assert claims for monetary damages against the private landowners because they cannot obtain "complete monetary relief" without the proposed defendant class. *See* Tr. at 91. Further, they argue, "the availability of damages from [the] State in no way forecloses the availability of damages from others." Nation Resp. at 10. As with several other important issues which these motions raise, the U.S. did not address this one either.

Strongly disagreeing with the Oneidas as to the availability of monetary damages against the private landowners, Oneida Ltd. takes the opposition position. According to Oneida Ltd., the U.S.' presence in this case "now *guarantees* that the [Oneidas] can . . . recover the full measure of appropriate damages from the State." *See* Oneida Ltd. Memo at 6 (emphasis in original). Therefore, it is not necessary to include third-party landowners as defendants.

As with ejectment, after careful consideration of all of the factors herein, the court determines not to allow plaintiffs to pursue claims for monetary damages against the private landowners. Again, the court's experience in *Cayuga* firmly convinces it that it would be futile to allow plaintiffs to seek monetary damages against these landowners. As the parties are well aware, approximately six months after oral argument on the present motions, in *Cayuga XI* this court held that the concept of joint and several liability was inapplicable. *See* 79 F. Supp. 2d at 70. Joint and several liability "ha [d] no place" in that land claim litigation reasoned the court because for one thing it would be "manifestly inequitable[.]" *Id.* Elaborating, the court explained the "potential[ly] . . . devastating result[s]" which would flow from applying joint and several liability in the context of that land claim:

> [A]ny one of the approximately 7,000 individual landowners could be held liable for the *entire* amount of damages sustained by the Cayugas for the past 200 years or so. By any calculation that would be an appreciable sum . . . , especially when viewed in terms of individual responsibility for the same. Stated somewhat differently, the possibility exists, . . .

> that if the State is held jointly and severally liable, any one of these defendants, including an individual landowner whose financial resources pale in comparison to the State's, would be financially responsible for an astronomical sum of money. Thus, although there is a strong argument to be made that the State properly could be held liable for all of the damages sustained by the Cayugas, it would be absurd to hold that a single present day landowner could likewise be held liable for all of these damages. Yet, that would be a necessary corollary of a finding of joint and several liability in this case.

Id. at 71-72 (footnote omitted).

Consistent with this finding, this court further held that it would conduct a separate trial against the State only. *Id.* at 76. Then, because the State and the U.S., as well as the Cayugas, assured the court that following a judgment against the State, they would not pursue any further claims against the non-State defendants, in all likelihood the end result in *Cayuga* is that the private landowners, after being dragged through 20 years of litigation, will not be held liable.

Although not raised by either the Counties or the *amicus*, there are several other reasons which factor into the court's decision that plaintiffs should not be allowed to amend their complaints to assert any claims against the private landowners. The plaintiffs vigorously dispute it, but in the court's opinion, the expansive nature of the relief which they are now seeking, particularly *vis-a-vis* the private landowners, "represent[s] a *radical* shift from the recovery sought in the[ir] original complaint[s]." *See Barrows v. Forest Laboratories, Inc.*, 742 F.2d 54, 59 (2d Cir. 1984) (emphasis added). As

should be readily apparent by now, plaintiffs are seeking to greatly expand both the relief sought, as well as the number of potential defendants. Indeed, given nearly a quarter of a century of promises to the contrary, it is difficult to imagine a more "radical shift" in recovery sought than this recent attempt by the Tribal plaintiffs to seek ejectment and/or monetary damages, of the private landowners.

This "radical shift" in the recovery sought, particularly given the circumstances under which it was sought as outlined above, further justifies denying plaintiffs' motion to amend as against the private landowners. Keeping in mind the extremely unique circumstances which precipitated the filing of these motions, as well as what has transpired since, along with the relevant case law, convinces the court that there are absolutely no circumstances under which ejectment of the private landowners will be a viable remedy in this case. Likewise, for the reasons set forth herein, monetary damages also will not be recoverable against those landowners; nor will the court grant declaratory relief against them. Consequently, it would be futile to allow plaintiffs to amend their complaints when it would be unproductive in that under the court's rulings today plaintiffs would not be entitled to recover the very relief which forms the basis for these motions.

To this point, the court, as did the parties, has focused exclusively upon amendment *vis-a-vis* the individual private landowners, with no mention of the three non-State entities. Because there is no discernible reason for distinguishing between the individual, private landowners and the non-State entities, at least for purposes of these motions to amend, the court finds that it

would also be futile to allow plaintiffs to amend their claims to assert any claims for relief against these defendants.

To summarize, after carefully examining each of the *Foman* factors, and taking into account their combined effect, the court hereby:

(1) GRANTS plaintiffs' motion to amend to add the State of New York as a party defendant herein;

(2) GRANTS the plaintiffs' motion to amend to add the Oneida of the Thames as a party plaintiff herein;

(3) DENIES the plaintiffs' motion to amend to add the landowners and the non-state entities as defendants herein;

(4) DENIES the plaintiff Oneidas' motion to certify a defendant class of landowners, as moot; and

(5) directs plaintiffs within 45 days of the date hereof to file and serve revised amended complaints consistent with this court's rulings herein.[28]

IT IS SO ORDERED.

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[28] The proposed motions to intervene by various citizens groups are not before the court for consideration at this time and thus are not treated herein.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action
No. 74-CV-187
(Judge Kahn)

THE ONEIDA INDIAN NATION OF NEW YORK STATE, THE ONEIDA INDIAN NATION OF WISCONSIN, AND THE ONEIDA OF THE THAMES, PLAINTIFFS

AND

UNITED STATES OF AMERICA, PLAINTIFF-INTERVENOR

v.

THE STATE OF NEW YORK, COUNTY OF MADISON, NEW YORK, AND COUNTY OF ONEIDA, NEW YORK, DEFENDANTS

Filed: June 10, 2002

(Federal Common Law Claims;
Nonintercourse Act Claims)

UNITED STATES' SECOND AMENDED COMPLAINT-IN-INTERVENTION (CORRECTED)

Comes now the United States, at the request of the Secretary of the Interior and pursuant to the authority of the Attorney General, complains and alleges as follows:

I. Nature of the Action

1. a. This action involves land guaranteed to the Oneida Nation by the United States pursuant to the Treaty of Canandaigua of 1794 (the "Oneida Reservation"). The Oneida Reservation comprises approximately 250,000 acres of land located in the Counties of Madison, Oneida, and Lewis in New York State. The land specifically subject to this action (the "Subject Lands") is the Oneida Reservation except for a tract six miles square (the "New Stockbridge Tract") within the outer boundaries of the Oneida Reservation that is the subject of *Stockbridge-Munsee Community v. State of New York, et al.*, No. 86-CV-1140 (N.D.N.Y.), and also except for land within the Oneida Reservation currently owned by the United States.

b. 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 Oneida Nation's right to possess the Subject Lands under federal law.

2. 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 the trespasses to the

Subject Lands that originated with the State's illegal transactions. The State of New York initiated these violations of federal law, and has confirmed and ratified them since, and is responsible for damages accruing with respect to the Subject Lands during the time period since the State's initial illegal transactions. The United States also seeks appropriate relief from the State with respect to certain Subject Lands claimed by the State within the Subject Lands. Consistent with the Court's Memorandum-Decision and Order of September 25, 2000, the private landowners are not parties to this action, and the United States does not seek any monetary or other relief from private landowners in the Subject Lands. Moreover, the United States seeks no relief from any of the counties that are presently defendants in this action; the United States only seeks remedies for the State's violations of federal law from the State itself.

II. Jurisdiction and Venue

3. Jurisdiction is conferred by 28 U.S.C. § 1345. Relief may be awarded pursuant to 28 U.S.C. §§ 2201 and 2202. This Court has venue of this action because the subject lands are located in the Counties of Oneida, Madison, and Lewis which fall within the venue of the Northern District of New York under 28 U.S.C. 112(a) and 1391(b)(2).

III. Description of the Subject Lands

4. The Oneida Reservation includes approximately 250,000 acres of land located in the Counties of Madison, Oneida and Lewis in New York State that were reserved to the Oneida Nation by the United States in the Treaty of Canandaigua of 1794, which referenced a description of the lands reserved to the Tribes in the Treaty of Fort Schuyler of 1788 between New York State and the

Oneida Nation. The Subject Lands, which are at issue in this litigation, include the Oneida Reservation, but excluding from the Oneida Reservation: (1) a tract of six miles square (the "New Stockbridge Tract") within the outer boundaries of the land reserved to the Oneida Nation by the Treaty of Canandaigua that is currently the subject of *Stockbridge-Munsee Community v. State of New York, et al.*, No. 86-CV-1140 (N.D.N.Y.); and (2) the lands within the Oneida Reservation that currently are owned by the United States.

5. The Treaty of Canandaigua established a trust relationship between the United States and the Oneida Nation that has existed continuously to the present day.

6. Congress never has ratified the purported conveyances of the Subject Lands from the Oneida to the State, or conveyances from the State to third parties without the Oneida Nation's consent, and these conveyances were conducted in the absence of federal authority.

IV. Parties

7. Plaintiffs have claimed to be successors-in-interest to the historic Oneida Nation with which the United States treated at Canandaigua in 1794. They are the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin, and the Oneida of the Thames (together, the "Plaintiff Tribes"). As used herein, the "Oneida Nation" means the historic Oneida Nation and/or any or all of the historic Oneida Nation's present-day successors-in-interest.

8. The United States has intervened in this action as plaintiff to enforce federal law, namely, the restrictions on alienation set forth in the Trade and Inter-

course Act, 25 U.S.C. § 177; to enforce the provisions of the Treaty of Canandaigua of 1794, 7 Stat. 44, to which the United States was a party; and to protect the treaty-recognized rights of the Oneida Nation.

9. The State of New York ("New York," "New York State," or the "State") purported to acquire possession of the Subject Lands from the Oneida Nation pursuant to the illegal transactions described hereinafter. The State then sold the Subject Lands to, private parties, leading to the settlement of and trespasses on the Subject Lands. New York State currently claims title to and occupies portions of the Subject Lands.

V. Facts

10. From time immemorial to the time of the American Revolutionary War, the Oneida Nation occupied some 6,000,000 acres of land in what now is New York State. In the American Revolutionary War, the Oneida Nation fought on the side of the United States.

11. The United States on three occasions formally promised by treaty that the Oneida Nation would be secure in the possession of the lands on which it was settled. See Treaty of Fort Stanwix of 1784, 7 Stat. 15; Treaty of Ft. Harmar of 1789, 7 Stat. 33, 34; and Treaty with the Six Nations of 1794 (the "Treaty of Canandaigua"), 7 Stat. 44.

12. In 1788, by treaty with the Oneida Nation (*i.e.*, the Treaty of Fort Schuyler), the State of New York purchased most of the Oneida Nation's aboriginal homeland. The Oneida Reservation was reserved from this purchase.

13. In the Treaty of Canandaigua of 1794, the United States, acting pursuant to the United States Constitu-

tion, acknowledged that the Oneida Nation had the right to occupy the Subject Lands and guaranteed the Oneida Nation's free and undisturbed use of the land. Specifically, Article II secured to the Oneida Nation "the lands reserved to the Oneida . . . Nation[ ] in [its] treat[y] with the State of New York", the lands reserved to the Oneida in the Treaty of Fort Schuyler of 1788. The Treaty of Canandaigua stated that the Subject Lands would remain the Oneida Nation's "until [it] choose[s] to sell the same to the people of the United States. . . ." The Oneida Nation has never sold or ceded the Subject Lands to the people of the United States. The Treaty of Canandaigua referred to the Oneidas Nation's lands as "their reservation[]. . . ."

14. The Oneida Reservation was still intact in 1790 when the Indian Trade and Intercourse Act (the "Non-intercourse Act"), 1 Stat. 137 (1790), was enacted. That Act expressly forbade and declared invalid any sale of land, or any title or claim thereto, by any Indian Nation or tribe without the approval and ratification of the United States. The Act has been continuously in force since 1790 and was re-enacted in the Acts of March 1, 1793, 1 Stat. 329, 330; Act of May 19, 1796, 1 Stat. 469, 472; Act of March 3, 1799, 1 Stat. 743, 746; Act of March 30, 1802, 2 Stat. 139, 143; Act of June 30, 1834, 4 Stat. 729; Rev. Stat § 2116. The Act in pertinent part provides:

> 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.

25 U.S.C. § 177.

15. From 1795 to 1846, representatives of New York State met with representatives of the Oneida Nation and executed 26 written instruments (the "26 Agreements") whereby the Oneida Nation purportedly deeded to the State most of the lands within the Oneida Reservation. Each of the 26 Agreements violated the Nonintercourse Act, federal common law, and/or the Treaty of Canandaigua. The transactions are as follows.

a. On September 15, 1795, the State of New York purported to execute a treaty with the Oneida Nation to purchase three tracts of the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

b. On March 5, 1802, the State of New York purported to execute a treaty with the Oneida Nation to purchase additional tracts of the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

c. On June 4, 1802, the State of New York purported to execute a treaty with the Oneida Nation to purchase two tracts of the Oneida Reservation. The treaty was neither consented to nor ratified or approved by the United States.

d. On March 13, 1807, the State of New York purported to execute a treaty with the Oneida Nation to purchase two tracts of the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

e. On February 16, 1809, the State of New York purported to execute a treaty with the Oneida Nation to purchase two tracts of the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

f. On February 21, 1809, the State of New York purported to execute a treaty with the Oneida Nation to purchase two tracts of the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

g. On March 3, 1810, the State of New York purported to execute a treaty with the Oneida Nation to purchase two tracts of the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

h. On February 27, 1811, the State of New York purported to execute a treaty with the Oneida Nation to purchase one tract of the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

i. On July 20, 1811, the State of New York purported to execute a treaty with the Oneida Nation to purchase additional tracts of the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

j. On March 3, 1815, the State of New York purported to execute a treaty with the Oneida Nation to pur-

chase four tracts of the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

k. On March 27, 1817, the State of New York purported to execute a treaty with the Oneida Nation to purchase one tract of the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

l. On August 26, 1824, the State of New York purported to execute a treaty with the Oneida Nation to purchase two tracts of the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

m. On February 1, 1826, the State of New York purported to execute a treaty with the Oneida Nation to purchase one tract of the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

n. On February 2, 1827, the State of New York purported to execute a treaty with the Oneida Nation to purchase two tracts of land within the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

o. On February 13, 1829, the State of New York purported to execute a treaty with the Oneida Nation to purchase one tract of land within the Oneida Reservation. No officer of the United States was present at the

execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

p. On October 8, 1829, the State of New York purported to execute a treaty with the Oneida Nation to purchase one tract of land within the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

q. On April 3, 1830, the State of New York purported to execute a treaty with the Oneida Nation to purchase one tract of land within the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

r. On February 26, 1834, the State of New York purported to execute a treaty with the Oneida Nation to purchase one tract of land within the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

s. On February 24, 1837, the State of New York purported to execute a treaty with the Oneida Nation to purchase one tract of land within the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

t. On June 22, 1840, the Governor of the State of New York approved a treaty that purportedly was executed on June 19, 1840, with the Oneida Nation to purchase one tract of land within the Oneida Reservation. No officer of the United States was present at the execu-

tion of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

u. On April 3, 1841, the Governor of the State of New York approved a treaty that purportedly was executed on March 8, 1841, with the Oneida Nation to purchase one tract of land within the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

v. On April 2, 1841, the Governor of the State of New York approved a treaty that purportedly was executed on March 13, 1841, with the Oneida Nation to purchase a tract of land within the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

w. On May 23, 1842, the State of New York purported to execute two treaties with the Oneida Nation to purchase additional lands of land within the Oneida Reservation. On June 8, 1842, the Governor of the State of New York approved and ratified both. No officer of the United States was present at the execution of the treaties, and the treaties were neither consented to nor ratified or approved by the United States.

x. On June 25, 1842, the State of New York purported to execute a treaty with the Oneida Nation to purchase additional tracts of land within the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

y. On February 25, 1846, the State of New York purported to execute a treaty with the Oneida Nation, including those members residing in Wisconsin and Canada, to purchase one tract of land within the Oneida Reservation. No officer of the United States was present at the execution of the treaty, and the treaty was neither consented to nor ratified or approved by the United States.

16. Except as described in this paragraph, none of the above-mentioned agreements was approved by the United States Senate or the President of the United States. There have been no plain and unambiguous actions by the United States to ratify any of the above-mentioned agreements. The June 4, 1802 agreement, see para. 16(c) *infra*, (the "1802 Agreement") was concluded in the presence of a United States commissioner and was approved by the United States Senate. However, there is no evidence that the 1802 Agreement was ever signed by the President, and the 1802 Agreement is not included in either an 1822 compilation of treaties with Indians, *see* H.R. Doc. No. 74, 17th Cong., 1st Sess. 8 (1822), or the official compilation, produced at Congress' direction, of "all Treaties with . . . Indian tribes," J. Res. 10, 5 Stat. 799 (1845), published in 1846 as volume 7 of the United States Statutes at Large. Thus, each of the above-mentioned agreements was illegal and void ab initio under the Nonintercourse Act.

17. In addition, New York purported to acquire certain portions of the Subject Lands without any agreement between New York State and the Oneida Nation or its members. New York State wrongfully took these lands from the Oneida Nation by purporting to transfer them to third parties through letters patent or similar

instruments (the "Letters Patent Transfers"). The Letters Patent Transfers never were agreed to by the Oneida Nation and never were ratified or approved by the United States. The Letters Patent Transfers and the portions of land that they covered are described in (a) the "Act for the better support of the Oneida Indians," Ch. 86, Laws of New York, April 2, 1799, which required the purported grant to third parties of a one mile square tract of the Subject Lands, and (b) the first finding of fact of the Report submitted on March 24, 1874 by Governor Dix to the New York State legislature, which described New York State's illegal transfer of portions of the Subject Lands. The Letter Patent Transfers violated the federal common law, the Nonintercourse Act, and/or the Treaty of Canandaigua.

18. After each of its purported acquisitions pursuant to the 26 Agreements and the Letter Patent Transfers, the State of New York wrongfully asserted control and/or possession of the relevant portions of the Subject Lands. It then purported to sell those portions of the Subject Lands to third parties. Upon information and belief, the State made substantial profits on its purported sales of the Subject Lands.

19. New York State unlawfully retains possession of certain lands within the Subject Lands.

20. Plaintiff Tribes have sought redress of the wrongs herein described from the executive and legislative branches of the Government of New York State. The State of New York has refused to take adequate action to redress these wrongs.

21. Neither the acquisitions by the State nor the Letters Patent Transfers comply with Nonintercourse Act or federal common law. The United States never

has approved or ratified the alienation of the Subject Lands.

CLAIMS AGAINST NEW YORK STATE

Claim I

Federal Common Law Trespass Claim

22. The United States repeats and realleges and incorporates by reference herein the allegations in paragraphs 1 through 21.

23. In the 26 Agreements and the Letters Patent Transfers, New York interfered with Oneida Nation's enjoyment of its rights to the Subject Lands under federal law and caused trespasses to the Subject Lands that originated with the State's illegal transactions. New York State purported to sell or otherwise grant the Subject Lands to third parties. By purporting to sell or otherwise grant the subject lands to third parties, New York State intended to, and did, authorize and cause those third parties, and all direct and indirect assignees of those third parties, permanently to trespass upon the Subject Lands (the "Third Party Trespasses"). As a result of New York's unlawful actions, the Third Party Trespasses violated, and continue to violate, the Oneida Nation's Federal rights to the Subject Lands. Also, New York continues to trespass upon the Oneida Nation's rights by asserting control and/or possession over certain Subject Lands today.

24. By violating the Nonintercourse Act, by conducting the initial trespasses upon the Oneida Nation's rights, and by authorizing, ratifying, and causing the Third Party Trespasses, New York State provided the means by which third parties derived title and possession of a portion of the Subject Lands in derogation of

the Oneida Nation's federal rights to the Subject Lands. As the original and primary tortfeasor, New York State is liable for all damages to the Subject Lands caused by the State wrongfully and unlawfully acquiring and/or transferring Subject Lands from the Oneida Nation, irrespective of later transfers of portions of the subject lands.

CLAIM II

Trade and Intercourse Claim

25. The United States repeats and realleges and incorporates by reference herein the allegations in paragraphs 1 through 21 and 22 through 24.

26. New York State asserted control and assumed possession of the Subject Lands in violation of the Nonintercourse Act, 25 U.S.C. § 177, and continues to assert control and possession of some of the Subject Lands. New York State purported to sell or otherwise grant portions of the Subject Lands to third parties. 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. As a result of New York's unlawful actions, the Third Party Trespasses violated, and continue to violate the Nonintercourse Act and the Oneida Nation's federal rights to the Subject Lands.

PRAYER FOR RELIEF

WHEREFORE, the United States prays as follows:

1. For a declaratory judgment pursuant to 28 U.S.C. § 2201 that the Oneida Nation has the right to occupy the lands described in this complaint that are currently occupied by the State of New York.

2. For a judgment awarding monetary and possessory relief, including ejectment where appropriate, against the State of New York for those lands within the Claim Area for which the State claims title or control;

3. For a judgment against the State of New York awarding mense profits or fair rental value for the entire Claim Area from the time when the State attempted to acquire each separate parcel of the Subject Lands in violation of the Trade and Intercourse Act, 25 U.S.C. 177, until the present, on the grounds 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 the subsequent trespasses by private landowners.

4. For a judgment against the State of New York awarding appropriate monetary relief for those lands within the Claim Area over which the State no longer retains title or control, on the grounds 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 the subsequent trespasses by private landowners.

5. For an award of attorneys fee and costs;

6. For such other relief as this Court may deem just and proper.

Respectfully submitted this 10th day of June, 2002.

/s/ STEVEN MISKINIS
STEVEN MISKINIS (105769)
Trial Attorney
U.S. Department of Justice
Environment and Natural
Resources Division
Indian Resources Section
P.O. Box 44378
Washington, D.C. 20026-4378
202-305-0262
FAX 202-305-0271

Attorney for the United States
of America

APPENDIX F

OPINION, ATTORNEY GENERAL Wm. BRADFORD[] WITH LETTER OF TRANSMITTAL TO SECRETARY OF WAR*

June 16, 1795

The Attorney General has the honour of Stating his opinion upon the question propounded to him by the Secy of War, Viz, whether the State of New York ha[s] a right to purchase from the Six Nations or any of them the lands claimed by those nations and situate within the acknowledged boundaries of that state, without the intervention of the general government.

By the Constitution of the United States, Congress has power to regulate commerce with the Indian Tribes, and by the act of 1 March 1793, it is expressly enacted, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in Law or equity, unless the Same be made by a treaty or convention entered into pursuant to the Constitution, that it shall be a misdemeanor in any person not employed under the authority of the United States in negotiating such Treaty or convention directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held or claimed &c.

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* This document appears at C.A. App. E1581-E1583. It is part of Exhibit 51 to the December 13, 2006, Declaration of Michael R. Smith in Support of Oneida Plaintiffs' Opposition to Defendant's Motion for Summary Judgment.

The language of this act is too express to admit of any doubt upon the question unless there be something in the circumstances of the case under consideration to take it out of the general prohibition of the law.

Nothing of this kind appears on the documents submitted to the attorney General. It is true, that by treaties made by the State of New York with the Oneidas, Onondagas and Cayugas, previous to the present Constitution of the United States, those nations ceded all their land to the people of New York, but reserved to themselves and their posterity forever (for their own use & cultivation, but not to be sold, leased or in any other manner disposed of to others,) certain tracts of their said lands, with the free right of hunting & fishing &c. So far therefore as respects the lands thus reserved the treaties do not operate further than to secure to the State of New York the right of preemption; but subject to this right they are still the lands of those nations, and their claims to them, it is conceived cannot be extinguished buy [*sic*] by a treaty holden under the authority of the United States, and in the manner prescribed by the laws of Congress.

June 16 - 1795

June 16 - 1795

Sir/

I do myself the honor to transmit to you my opinion on the question states [*sic*] in your letter of the 13 instant and am

with great respect & esteem
Your most ob^{t} Sv^{t}
Signd/
The Sec^{y} of War Wm. Bradford

This is a true and complete copy of a document found in the Henry O'Reilly Papers. Mss Collection. New York Historical Society. New York City. Vol. 11.

APPENDIX G

STATUTORY PROVISIONS

1. Since 1790, see ch. 33, § 4, 1 Stat. 138, various forms of the Trade and Intercourse Act, also known as the Nonintercourse Act, have made the approval of the federal government a prerequisite to the lawful sale of land belonging to any Indian Tribe.

Section 8 of An Act to Regulate Trade and Intercourse with the Indian Tribes, 1 Stat. 330-331 (1793), provided:

> That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negociating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands

within such state, which shall be extinguished by the treaty.

2. As currently codified, the Nonintercourse Act provides as follows:

> No purchase, grant, lease, or other conveyance of lands, 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 convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

25 U.S.C. 177.

3. Section 2415 of Title 28, United States Code, provides in pertinent part as follows:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress,

every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed sixty days after the date of publication of the list required by section 4(c) of the Indian Claims Limitation Act of 1982: *Provided*, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the date the Secretary of the Inte-

rior has submitted legislation or legislative report to Congress to resolve such claim or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought on or before sixty days after the date of the publication of the list required by section 4(c) of the Indian Claims Limitation Act of 1982: *Provided*, That, for those

> claims that are on either of the two lists published pursuant to the Indian Claims Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim.
>
> (c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.
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> * * * * *
>
> (g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.
>
> * * * * *

4. Section 5(b) of Public Law No. 97-394 provides that, under specified circumstances, the Secretary of the Interior shall provide a report concerning tribal land claims that the Secretary has "decide[d] to reject for litigation." 96 Stat. 1978. Section 5(c) of the same law then provides:

> The Secretary, as soon as possible after providing the report required by subsection (b) of this section, shall publish a notice in the Federal Register identifying the claims covered in such report. With respect to any claim covered by such report, any right of ac-

tion shall be barred unless the complaint is filed within one year after the date of publication in the Federal Register.

96 Stat. 1978.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 07-2430-cv(L), 07-2548-cv (XAP)
and 07-2550-cv (XAP)

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

[Filed: Dec. 16, 2010]

Appellees-Cross-Appellants United States of America, Oneida Indian Nation of New York, Oneida of the Thames, and Oneida Tribe of Indians of Wisconsin, having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petitions are denied.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, Clerk
CATHERINE O'HAGAN WOLFE