UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 08-2775

UNALACHTIGO BAND OF THE NANTICOKE LENNI LENAPE NATION; HON. JAMES BRENT THOMAS, SR., Tribal Chairman and War Chief Unalachtigo Band of Nanticoke-Lenni Lenape Nation a/k/a KSCHUPPEHELLEN,

v.

JON S. CORZINE, Governor of the State of New Jersey in his individual capacity; STATE OF NEW JERSEY,

POWHATAN INDIANS OF DELAWARE VALLEY d/b/a Powhatan Renape Nation; STOCKBRIDGE-MUNSEE COMMUNITY (Intervenors in D.C.), Stockbridge-Munsee Community,

Defendant-Appellants.

AMENDED
AMICUS BRIEF IN SUPPORT OF AFFIRMANCE ON APPEAL OF THE ORDER OF THE HON. JOSEPH H. RODRIGUEZ SR., DISTRICT JUDGE FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED MAY 20, 2008 IN CIVIL ACTION 05-cv- 5710

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Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. An original and three copies must be filed. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, NEW JERSEY LAND TITLE ASSOCIATION, makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

NONE

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

NONE

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.

The members of the New Jersey Land Title Association are listed below. Under each listed title insurance company, there is listed the name of the publicly held company who has an interest in them.

1. **Old Republic National Title Insurance Company** is a wholly owned subsidiary of Old Republic National Title Holding Company which is a wholly owned subsidiary of Old Republic Title Insurance Group Inc, which is a wholly owned subsidiary of Old Republic International Corporation, a publicly held corporation.

2. **Fidelity National Title Insurance Company**.

3. **Chicago Title Insurance Company**.

4. **Security Union Title Insurance Company**; and

5. **Ticor Title Insurance Company** are wholly owned subsidiaries of Fidelity National Title Group Inc which is a wholly owned subsidiary of Fidelity National Financial Inc, a publicly held company.

6. **United General Title Insurance Company**; and

7. **T.A. Title Insurance Company** are wholly owned subsidiaries of First American Title Insurance Corporation which is a wholly owned subsidiary of The First American Corporation, a publicly held company.

8. **Commonwealth Land Title Insurance Company of New Jersey**; and

9. **Commonwealth Land Title Insurance Company** are wholly owned subsidiaries of LandAmerica Financial Group Inc, a publicly company.

10. **Transnation Title Insurance Company**; and

11. **Lawyers Title Insurance Corporation** are wholly owned subsidiaries of Fidelity National Title Group Inc which is a wholly owned subsidiary of Fidelity National Financial Inc, a publicly held company.

12. **Stewart Title Guaranty Company** is a wholly owned subsidiary of Stewart Information Services Corporation, a publicly held company.

In the event that the Plaintiff (the Intervener, Stockbridge-Munsee or another Indian Tribe) is found to have an interest in the land which is the subject of this Appeal then the then present record title owners of the land once known as the Brotherton Reservation could have their rights to those properties challenged. The title insurance companies which actually insure title to property owned by any of the such individual land owners could be affected. It is unknown which of the present record property owners in what was once the Brotherton Reservation have title insurance policies. It is likely that the said present record property owners have title insurance policies issued by members of the New Jersey Land Title Association.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

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Dated: November 11, 2009

STATEMENT OF IDENTITY OF AMICUS CURIAE

The New Jersey Land Title Association (hereinafter "NJLTA") is a trade association which, pursuant to its by-laws, is "organized to advance the common interest of all those engaged in the field of evidencing title to real property, conveyancing, and insuring interests therein...". The members of the Association include title insurance underwriting companies licensed to do business in the State of New Jersey that underwrite 98% of the title insurance business in the State. In addition, its membership includes over 250 individual title insurance providers doing business selling title insurance in this state. Its other members include title abstract companies, and individuals (including attorneys) involved substantially in the businesses involving the conveyancing, insuring and searching of title to real estate. NJLTA, among other things: provides continuing education on matters involving conveyancing, title searching and other matters involving title to real property; certifies title professionals who have exhibited a proficiency in the knowledge of title insurance and a dedication to the profession, and participates in litigation involving matters related to real property, conveyancing and the title industry. With respect to our involvement in litigation as it affects real property, our involvement in this area has often yielded a profound benefit to the public at large. For instance, in recent years, there has been a significant delay in many counties between the time that deeds and other documents affecting real estate are

sent to county clerks and registers of deeds and the date that these documents have actually been recorded. In some counties, months have passed between the time that a deed is sent in for recording and the date that it is actually recorded. This backlog could be devastating to individuals purchasing homes due to the possibility of intervening upper court liens (for some matter involving the seller) attaching to properties before the deed is actually recorded. NJLTA has been at the forefront of litigation brought to force the implementation of procedures by county clerks and registers to effectuate the prompt recording of instruments affecting title. While such litigation helps protect title insurers against claims, it also helps the public at large by assuring innocent purchasers that the premises that they purchase will be free of liens for which they should not be responsible.

The NJLTA has been admitted as amicus curiae in numerous State Court proceedings involving title issues and title insurance policies. See, *e.g. Walker Rogge, Inc. v. Chelsea Title and Guaranty Co., 116 N.J. 517 (1989); Sonderman v. Remington, 127 N.J. 96 (1992); Sears Mortgage Co. v. Rose, 134 N.J. 326 (1993); In re Opinion 26 of the Committee on the Unauthorized Practice of Law, 139 N.J. 323 (1995); In re Opinion 682 of the Advisory Committee on Professional Ethics, 147 N.J. 360 (1997); New Jersey National Bank v. Azco Realty Co., 148 N.J. Super. 159 (App. Div. 1977), cert. denied, 74 N.J. 280 (1977); Boe v. State, Dept. of Human Services, 183 N.J. 289 (2005); ITT Commercial Finance Corp. v. Pierre*

Development, LLC, 183 N.J. 217 (2005); Coryell, L.L.C. v. Curry, 391 N.J.Super. 72 (App. Div. 2006); Panetta v. Equity One, Inc., 190 N.J. 307 (2007), Township of Middletown v. Simon, 193 N.J. 228, (2008) , Shotmeyer v. New Jersey Realty Title Ins. Co., 195 N.J. 72 (2008) and Burnett v. County of Bergen, 198 N.J. 408 (2009). NJLTA was also admitted as Amicus by the court below in the present matter. *Unalachtigo Band of Nanticoke-Lenni Lenape Nation v. New Jersey, 2008 WL 2165191 (D.N.J.2008).*

STATEMENT OF INTEREST OF AMICUS CURIAE

NJLTA's constituent members insure title to real estate and it, accordingly, has an interest in assuring the stability of legal title to real estate in the State.

If the appeal of the Stockbridge-Munsee is granted, it will cast an unresolved doubt as to the titles to real estate to thousands of acres of presently populated land in the State of New Jersey. The potential of significant claims or losses to both insured and uninsured homeowners, businesses and others is substantial.

SOURCE OF AUTHORITY TO FILE

This application seeks leave of court to appear as amicus under *F.R.A.P. 29 (a).*

SUMMARY OF ARGUMENT

The issue raised in the matter below arose as follows. Plaintiff represented self to be an Indian tribe. It claimed to be the successor in interest to the rights of

an Indian group, for which rights arose when the then Colony of New Jersey had set aside a tract of land for a reservation in Burlington County, New Jersey in 1758. This land came to be known as the Brotherton Reservation. Plaintiff alleged the State of New Jersey unlawfully sold the reservation in 1801. That "unlawfulness" allegedly arose out of the State's failure to seek and receive congressional approval of the sale pursuant to the requirements of the *Indian Nonintercourse Act. 25 U.S.C. § 177.* A previous State court claim had been dismissed on the grounds that this matter was within the jurisdiction of the Federal Courts. *Unalachtigo Band of Nanticoke-Lenni Lenape Nation v. State, 375 N.J.Super. 330, 339-340. (App.Div. 2005).* The State court also dismissed any State-based law contract claim since the lands were never Indian lands at all but rather lands held by the State under contract for the benefit of the Indians. *Unalachtigo Band, supra at 344-345.* And that contract was abrogated by mutual consent of the parties. *Unalachtigo Band, supra.* See also *State of New Jersey v. Wright, 117 U.S. 648, 656 (1886)*(actions of the State of New Jersey in taxing the Brotherton Tract was not a violation of contract rights).

During the litigation below, a second Indian tribe - the Stockbridge-Munsee Community-intervened and filed its motion to dismiss under Rule 19. It also alleged that it was a successor to the Brotherton Indians, and it alleged that it was thus an indispensable party to any determination as to successorship to the land.

The basis of the Stockbridge-Munsee Community's claim was that the Brotherton Indians merged with the Stockbridge-Munsee tribe in 1802. The Stockbridge-Munsee Community alleged that – as an Indian Nation – it was immune from suit and could not be joined in the action. Thus it argued the suit had to be dismissed since a determination of the issue of successorship could not be made in its absence.

There was, however, at least a third way in which the matter could be resolved. It could, of course, be determined that neither the Plaintiff nor the Intervenor was a successor to the intended tribal beneficiaries of the Brotherton Reservation. This, in fact, was the conclusion of the District Court. The Plaintiff never perfected an appeal of that determination. The Stockbridge-Munsee's appeal seeks not only to overrule the trial court's decision but to have itself summarily declared to be successor to the rights in Brotherton's by this court.

The Stockbridge-Munsee Community's argument is flawed for several reasons. First, it ignores the fact that there was - in all probability - no longer a tribe in existence when the Brotherton reservation was sold off by the State of New Jersey. Such a fact is fatal to a tribal successorship claim. Second, the cases upon which the Stockbridge-Munsee rely are inapposite. Those cases do not seek to upset title to land. Instead, those cases deal with fishing rights. In the cases cited by the Stockbridge-Munsee, no one was threatened with loss of title to his or her

property. Accordingly, the situations are hardly comparable and the Stockbridge-Munsee's reliance on them misplaced. Third, the cases relied upon by the Stockbridge-Munsee all dealt with treaty rights which have been continuously exercised since the signing of the treaty. They do not deal with the facts presented on this appeal; that is, a stale claim ignored by the supposed successors for over two hundred years. Recent Supreme Court precedent bars the prosecution of stale claims purporting to overturn years of settled land ownership. It will be argued that – under these circumstances - the District Court properly found that the Stockbridge Munsee Community had failed to demonstrate an interest in the litigation which was sufficient enough to support their motion to dismiss.

SUPPLEMENTAL STATEMENT OF FACTS

Intervenor, Stockbridge -Munsee - in both its Statement of Facts and its Appendix - fail to make mention of a critical issue noted in the opinion of the trial court. That issue deals with the possibility that the Brotherton Indians no longer constituted a tribe at the time of the dissolution of the Brotherton Reservation. The issue is important. If a tribe had no longer existed at the time of the dissolution of the Brotherton Reservation then – as a matter of law – no one could have succeeded whatever rights the Brotherton Indians may have had. *Mashpee Tribe v. New Seabury Corp.592 F.2d 575, 585-596 (1st.Cir. 1979)*. The classic statement of law for determining the issue of tribal existence was set forth in *Montoya v. U.S.*

180 U.S. 261, 266 (1901) where the Supreme Court defined a tribe as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory...." But the trial court found it unnecessary to decide that issue since the court decided the case on other grounds. (App.36, n.20.)(Opinion).

However, these facts are obviously relevant to this appeal. They were researched by Amicus and made part of the record below. (Sa1-Sa38)[1] (App.36, n.20.)(Opinion). Those facts outlined herein.

By 1801 – the date of the dissolution of the Brotherton Reservation – there was little evidence of an Indian tribe continuing in existence at Brotherton.

In a letter dated September 17, 1777 to Josiah Foster,[2] Brotherton Resident Jacob Skekitt wrote:

> "Friend
>
> In the first place we think ourselves in the dark or rather lost, for we have no elder or leader as we formerly used to have, we are like Children that are both Fatherless or Motherless, formerly our forefathers used to have their own ways they used to have sachems to govern them, but now we have none..."
>
> Skekitt goes on to say to talk about Native American justice and says:
>
> "Now when we look on back on the former ways of our forefathers we think that they were not right and just but your ways we look upon

[1] "Sa" refers to Supplemental Appendix of Amicus, NJLTA . Motion to allow filing of Supplemental Appendix was filed with the Court November 13, 2009.)

[2] Foster was one of the Commissioners of Brotherton from 1778-1801. Unless indicated otherwise, the following quotes from various correspondences contained in the *Foster-Clement Collections, Collection Number 213, The Philadelphia Historical Society, Philadelphia, Pennsylvania.*

to be right and just."

He concludes by asking for rules to guide them in order to maintain order:

> "We have no rules to go by, neither by our forefathers rules (because we have no such ruler as in former times) nor by the English ... [t]herefore we think that we ought to have some Rules or Laws to go by..." (Sa17-18)

Skekitt is saying that there is no tribal leadership at all. There is certainly no "Indian community" just a "community of Indians" who need Anglicized law to govern them. As will be developed in Point One below, that fact has profound legal consequences.

Moreover, there is also real doubt that even so much as some defining characteristic of the original tribe continued to exist. Sources note that the "Delawares at Brotherton were acculturated Christians" and not a traditional tribe at all. (Sa18). A German named Johan Autenrieth who had visited the reservation in 1795 noted about his visit to Brotherton:

> "Nice winding paths like in an English park led to the individual residences of the Indians. On a tilled, fenced-in field, just like the log house on it, was entirely European-American in manner even having fruit trees...". (SA18-19)

Autenrieth wrote about Jacob Skekitt (whose letter is referenced above), whom Autenrieth believed to be the leader of Brotherton. Skekitt was described as an older man who nonetheless no longer "pulled his beard out in the fashion of Indians" but shaved "in the European fashion." He noted that the residents of

Brotherton leased out their lands, that only nine families remained, of which one was from New England with a language so different they couldn't even communicate with the other residents. (Sa19). Autenrieth noted that there Skekitt was unable to produce traditional Indian artifacts such as tomahawks and knew nothing of their former war chants. (Sa19).

That abandonment of tribal life is evidenced yet again in another letter from the Foster Collection. This letter was to the New Jersey Legislature dated February 2, 1797 signed by 18 Brotherton residents. In that correspondence it was written:

> "That whereas we have been informed that some of our brother Indians of the said State, who call themselves the Chiefs of Jersey Indians, though we know not how they became possest (sic) of such authority, have petitioned your honorable house, to pass a law, impowering (sic) them or some other persons, to sell all our land, lying and being in the County of Burlington, in the State aforesaid, commonly called by the name Edgepelic or Brotherton, and to remove themselves to a back country to dwell amongst Indians who are strangers to us and we to them … "(Sa19-20).

The letter opposes that idea and goes on to request that the Brotherton property be split among its residents:

> "… either by setting off the share of each person or family by metes and bounds (which method would be most agreeable to us Indians, as then each person would know his own part, and might sell or improve and cultivate the same as he thought proper) or otherwise by providing in such manner for the general benefit of all Indians interested in the Lands …"(Sa20).

These Brotherton residents do not claim to be "chiefs" and deny the existence of "chiefs" in the group they are contesting with. The letter seems to

negate the existence of a tribe "united in a community under one leadership or government." *Montoya, supra.* Furthermore, they are clearly making a request for individual ownership in fee simple absolute - by a metes and bounds description, no less. This is a request more in keeping with contemporary rather than tribal culture.

Third, there is more evidence to support the abandonment of tribal organization and life. The Brotherton residents apparently used a saw mill, built at least ten wooden homes and even held jobs working in local iron forges. (Sa20).

Fourth, and most significantly, the changes were apparently in response to the attempts by Rev. John Brainerd (who had been appointed to minister to the occupants of Brotherton) to "civilize" the Native Americans. (Sa21). This was a desire shared by the residents themselves. (Sa21). This is significant since the voluntary abandonment of tribal existence extinguishes a claim under the Non-Intercourse Act. *Mashpee, supra at 597.*

Fifth, what was happening at Brotherton was consistent with what was happening to the few non-reservation Indians still residing in New Jersey who had become "freeholders, craftsmen or farm workers." (Sa21). [2]

Even the act of dissolution of Brotherton seems to cast doubt on the notion of a tribe "under one leadership or government." One writer describes the

[2] The above recitation of the conditions at Brotherton is meant to be only a sketch. There is a more information available in the *Foster-Clement* collection. (Sa21)

dissolution as follows:

> "Without traditional skills, and apparently unable to develop those of whites, the Lenape were in a desperate position. Unable to become white men no matter how hard they tried, the tired band, number less than 100, asked the state for permission to sell their lands and settle with other Indians in New York. Initially not all of the Brotherton wanted to leave. An application by the dominant faction led by the Calvin family was opposed by some residents. In a letter to the General Assembly the Calvin Family faction reported the disagreement over the application to the legislature for permission to sell their lands: 'our application was opposed by some of our transient people who were ignorant of the matters at hand… .' (Sa21-22).

"Transient people" in this context does not seem to connote the usual wanderings of traditional Native Americans but something else. The "attempts to become white" seem inconsistent with the maintenance of an "Indian Community." Finally, the correspondences dealing with the discord within the group seems more like a description of a unorganized association of individuals rather than a political entity under "one leadership or government." Thus, it would seem that the issue of the continued existence of a tribe gives rise to a third possible answer to the issue of sucessorship to the rights to the Brotherton Reservation.

LEGAL ARGUMENT

POINT ONE

IN THE ABSENCE OF A TRIBE, NO ONE CAN CLAIM SUCCESSORSHIP TO WHATEVER RIGHTS THE BROTHERTON INDIANS MAY HAVE POSSESSED.

The long standing test for determining the existence of tribal status was laid down in *Montoya v. U.S.* where the Court defined a tribe as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory…". *Montoya v. U.S. 180 U.S. 261, 266 (1901)*. Only a "tribe" may succeed to tribal treaty rights. *Mashpee, supra; United States v. Washington, 641 F.2d 1368, 1372 (9th.Cir. 1981)*. If – under the *Montoya* definition - no tribe existed at the time of the 1801 transaction, then, by definition, there could have been no violation of Treaty rights and no successor to such rights. *Mashpee, supra*. For a tribe to continue in existence, it need not be the same tribe that originally existed. Changes in a tribe's status attributed to the adaptation of a tribe do not destroy tribal existence, since adaptation may be crucial to a tribe's continued existence. *U.S. v. State of Washington, 641 F.2d 1368, 1373 (1981)*. However, some defining characteristic of the original tribe must continue to exist. *U.S. v. State of Washington, supra at 1372-1373*. As the court in *Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 586 (1st. Cir. 1979)* stated:

> "There has to be a community ... an Indian community is something different from a community of Indians. That is to say, it has some boundary that separates it from the surrounding society, which is perceived as Indian and not merely as neighborhood or territory." *Mashpee, supra.*

The court went on to note that if a tribe voluntarily assimilated and gave up tribal status then there would be no such tribe that continued to exist. *Mashpee, supra at 587.* In regards to assimilation, the *Mashpee* court noted that the term "boundary" as used in the quote above meant "boundary" in the anthropological sense. And a "... boundary in this sense is not something tangible or territorial like a fence or a border. Rather, it is an attitude or consciousness of difference from others, a sense of distinction between 'we' and 'they'." *Mashpee, supra at 586, fn.5.*

Here, it would have been difficult for the District Court to have found - by those standards - that a tribe continued to exist at all. And if that, indeed, was the case, then no one succeeded to the rights of the Brotherton Reservation since those rights ceased when the tribe ceased. In such a situation the Stockbridge-Munsee – as the court below found for other reason – simply lacked standing to bring the motion to dismiss below. There is considerable evidence that this was, indeed, so.

There is evidence that the "tribe" possessed no "elders or leaders," possessed no "sachems" or ruling councils and sought the imposition of European style law to guide them. They lived in wooden homes, worked at nearby iron forges and had

become – by their own wish - acculturated Christians. Thus, there was no "boundary" in the anthropological sense mentioned above.

Contrary to the contention of the Stockbridge-Munsee Community, the trial court never found the existence of a continuing tribe; the court specifically found it unnecessary to rule on that issue. (App.36, n.20). But the issue is significant. By virtue of this slender thread of the possible continuation of tribal existence by the Brotherton Indians two hundred years ago, the Intervenor proposes to inflict huge - perhaps irretrievable losses – on the innocent parties who now live on this land. Such a result is not supported by existing precedent. This is addressed in more detail in Point Two below.

POINT TWO

THERE IS NO PRECEDENT REQUIRING THE REVERSAL OF THE DISTRICT COURT'S DECISION

There is no precedent supporting a reversal of the District Court's action. Just the opposite is true.

New Jersey is the most densely populated State in the Nation. *Aversano v. Palisades Interstate Parkway Com'n 363 N.J.Super. 266, 290-291 (App.Div. 2003).* The original complaint put into question some 3044 acres of land. (App.70a). That is the equivalent of 4.75 square miles of land. The initial complaint listed over 17 tax blocks on the tax maps of the Shamong Township subject to the claim. (App.70a). The actual number of individual tax lots existing within those 17

blocks can only be guessed at. But undoubtedly, the land in question is that of a town (Shamong Township) of homeowners, businesses and other ordinary people.

The Stockbridge-Munsee Community seeks a ruling that would call into question the ownership of all of those landowners. As the Stockbridge-Munsee brief makes clear in its conclusion, it then proposes to simply walk away from the problem by not resolving the issues of title, reserving same to some indefinite time in the future. This would leave it to those landowners to suffer with the consequences of the uncertainty thus generated. Such a result could turn these lands into the Chernobyl of the Third Circuit – once valuable parcels but now unsaleable, uninsurable and useless, forever blighted with the stigma of uncertainty of ownership. Moreover, since the Stockbridge-Munsee Community has the benefit of sovereign immunity, the affected homeowners could not even sue for declaratory judgment. The land could go into a state of uncertainty lasting another 200 years or more!

Precedent does not support such an action. Just the opposite is true. Any action based upon an ancient claim which threatens to upset long established property rights necessarily implicates concerns of magnitude. *City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 215-220 (2005).* And the Supreme Court has held that persons who purchased said property in reliance on the long acquiescence of Indian tribes are entitled to protection against such stale

claims. *City of Sherrill, supra.* Here, the Stockbridge-Munsee Community threatens titles to such real estate based on events two hundred years past, upon a strained interpretation of Ninth Circuit cases. For three reasons those cited cases simply do not support their position.

First, Ninth Circuit precedent is not binding upon the Third Circuit, but is entitled only to respectful consideration.

Second, the Ninth Circuit decisions referred to are completely distinguishable from the present matter and should not be seen as direct precedent, but rather as simply analogous rulings bearing upon but not dispositive of the issues in controversy.

Third, those decisions fail to take into account the recent pronouncement of the Supreme Court protecting the interests of established property owners as enunciated in *City of Sherrill, supra.*

These issues are discussed below.

A. DECISIONS MADE IN OTHER CIRCUITS ARE NOT BINDING UPON THE THIRD CIRCUIT.

The Stockbridge-Munsee Community's argument relies almost entirely upon decisions of the Ninth Circuit Court of Appeals, most notably upon one decision, *U.S. v. Washington, 394 F.3d 1152 (9th. Cir.2005).* However, the precedent of other Circuits is not binding upon the Third Circuit. *Newmark v. Principi, 283 F.3d 172, 174 (3rd Cir.2002).* While the Third Circuit "should be reluctant to

contradict" the unanimous position of other circuits, *Butler County Memorial Hosp. v. Heckler, 780 F.2d 352, 357 (3rd Cir.1985),* there is no such unanimity here. The Stockbridge rely wholly on cases developed in one Circuit. Generally in such circumstances one Circuit owes its sister Circuit respectful consideration in deciding and issue. *U.S. v. Glaser, 14 F.3d 1213, 1216 (7th Cir.1994).* And one Circuit Court has encouraged a searching inquiry into the law in matters of importance. It noted:

> [i]f a federal court simply accepts the interpretation of another circuit without [independently] addressing the merits, it is not doing its job. *Menowitz v. Brown 991 F.2d 36, 40 (2nd Cir. 1993).*

Here, a respectful consideration of the cases cited by the Stockbridge-Munsee leads to the conclusion that the trial court correctly decided the matter sub judici.

B. THE NINTH CIRCUIT DECISIONS ARE DISTINGUISHABLE FROM THE PRESENT MATTER.

The decisions cited by the Stockbridge-Munsees are clearly distinguishable from the present matter.

In all of the cases relied upon by the Stockbridge-Munsee Community, the continued existence of the basic treaty rights were actually not subject to dispute. See, *U.S. v. State of Wash., 520 F.2d 676, 692-693; U.S. v. State of Wash. 641 F.2d 1368, 1370 (9th.Cir. 1981); U.S. v. Washington, 394 F.3d 1152, 1154 (9th Cir.2005).* Here, there is significant doubt that a tribe even existed at the time that

Brotherton dissolved and thus great doubt that the right in controversy still exists. (see Point One above).

Second, the decisions cited by the Stockbridge-Munsee Community do not relate to the issue at hand. Those decisions related not to title to land, but to the fishing rights; fishing rights of certain Indian tribes in certain "accustomed places" of the Indians so involved. See e.g. *U.S. v. State of Wash. 520 F.2d 676, 685 (9th.Cir. 1975); U.S. v. Washington, 394 F.3d 1152, 1154 (9th. Cir.2005).*

Third, these were fishing grounds which had been continuously used by those tribes since the time of the original treaty. *U.S. v. State of Wash., supra at 520 F.2d 683.* They were certainly not dormant ancient rights suddenly sought to be exercised to the detriment of innocent homeowners. Put simply, rulings in those cases would not have had the effect of destroying established title to real estate of affected homeowners, hundreds of years after the fact. As will be addressed in Point C below, that is a matter of considerable significance.

C. THE NINTH CIRCUIT DECISIONS, WHICH DEALT WITH LONG-ACKNOWLEDGED INDIAN RIGHTS, CANNOT BE APPLIED LITERALLY IN THE CASE OF STALE CLAIMS IN LIGHT OF THE SUPREME COURT DECISION IN *CITY OF SHERRILL.*

In *City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 215-220 (2005)* the Supreme Court observed:

> When a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled

> expectations are prime considerations. There is no dispute that it has been two centuries since the Oneidas last exercised regulatory control over the properties here or held them free from local taxation. Parcel-by-parcel revival of their sovereign status, given the extraordinary passage of time, would dishonor the historic wisdom in the value of repose.

Other Circuits have interpreted *Sherrill* to bar such ancient claims in their entirety. *Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266, 268 (2nd.Cir.2005).* They have noted that " ... disruptiveness is inherent in the claim itself-which asks this Court to overturn years of settled land ownership." *Cayuga, supra at 275.* And as to Brotherton itself, the United State Supreme Court long ago acknowledged that the Indian rights could be lost by long acquiescence in the status quo. *State of New Jersey v. Wright 117 U.S. 648, 655-656 (1886)*

That being the case, Ninth Circuit decisions involving long-established and-exercised rights which do not challenge title to land are not direct precedent regarding the matter under consideration herein. Quite to the contrary, they constitute only analogous rulings and should be seen as such.

For these reasons, the cases cited by the Stockbridge-Munsee Community are neither controlling nor dispositive of the matter in controversy. As will be argued in Point Three below, the formulation of law utilized the trial court this point was a logical and just reconciliation of divers cases and precedents bearing on point, in light of the historical background of the case under consideration.

POINT THREE

THE DISTRICT COURT'S DECISION VIEWED THE STOCKBRIDGE-MUNSEE COMMUNITY'S CLAIMS LIBERALLY, BUT CORRECTLY FOUND THAT THEY LACKED STANDING TO ASSERT ANY RIGHTS OF THE BROTHERTON INDIANS.

In deciding the Stockbridge-Munsee Community's motion to dismiss under *F.R.C.P. 19*, the trial court was obligated to consider whether the party whose joinder is alleged to be indispensable actually "has a legally protected interest in the subject of the action... ." *Three Affiliated Tribes of Fort Berthold Indian Reservation v. U.S, 637 F.Supp.2d 25, 30 (D.D.C.2009).* The moving party bears the burden of persuasion. *Ilan-Gat Engineers, Ltd. v. Antigua Intern. Bank 659 F.2d 234, 242 (C.A.D.C. 1981).* The Stockbridge-Munsee Community clearly failed to meet that burden.

What legitimate interest could the Stockbridge Munsee Community assert? The claims were based upon events occurring more than two hundred years ago. This ran afoul of prohibitions contained in *City of Sherrill* and *Cayuga Indian Nation of N.Y.* Those events involved an Indian tribe whose very existence at the time was doubtful. This ran afoul of the rule in *Mashpee* that the non-existence of a tribe is fatal to a Non-Intercourse Act claim. Finally, the Stockbridge-Munsee Community did not even claim that they were *that* tribe which possessed those rights; rather they claimed that they were the "political successors" to an original

tribe which, itself, may not even have existed. (App.9)(Opinion). Under those circumstances, the trial court placed only the most minimal of burdens on the Stockbridge Munsee to justify their interest. The court required only that they show that some "some defining characteristic" of the original Brotherton Indians "tribe persists in an evolving tribal community." (App.40-41)(Opinion). Whether or not this requirement precisely followed Ninth Circuit precedent is irrelevant. The facts underlying those decisions were far different than the facts herein, and, even the Stockbridge-Munsee expressly concede the importance of that point in their brief. They describe any "successor-in-interest" determinations to be "fact driven" and "case specific". (Brief of Appellant, p. 46). And they note that one can reasonably "counsel against" ... relying to heavily on any particular successorship test adopted in one or another of any of the ... Ninth Circuit cases alluded to. (Brief of Appellant, p. 46). Accordingly, even the Stockbridge Munsee can have no objection to the District Court's actions, which were indeed a "respectful consideration" of the Ninth Circuit precedent in light of a very different factual pattern.

The District Court's requirement was minimal. The Court required that the Stockbridge Munsee show the continued existence of some "defining characteristic" of the original tribe. That requirement made sure that treaty rights could only be exercised by those with a concrete, established, and on-going

connection to the original treaty. This comported with the essence of the Ninth Circuit decisions. See e.g. *United States v. Washington, 641 F.2d 1368, 1373-1374.* The clear import of all of the decisions relied upon by the Stockbridge-Munsee Community was to bar claims by those whose connection with the original treaty was distant, attenuated or adventitious. Cf. *United States v. Washington, 641 F.2d 1368, 1373-1374*. Here, all that the Stockbridge-Munsee Community could show was that long ago there had been a joinder of the few remaining families of the original Brothertons with their own tribe – nothing more. Based on that distant, attenuated and adventitious relationship, it would be a clear absurdity to argue that the Stockbridge-Munsee Community has determined standing to disrupt settled expectations reasonably-entertained regarding four square miles of long-developed and-settled real estate. *Cayuga, supra at 275.* The Stockbridge Munsee accordingly failed to any interest sufficient to justify standing and the District Court correctly so ruled.

CONCLUSION

The above appeal is a matter of significance. The ruling of the District Court was an intelligent balance of respect for treaty rights and acknowledgement of recent Supreme Court precedent protection citizen from stale claims. The District Court's ruling should be affirmed.

Respectfully submitted,

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Dated: November 13, 2009

CERTIFICATION OF COMPLIANCE WITH *L.A.R.28.3(D)*

I, MICHAEL J. FASANO, ESQ., certifies as follows:

1. I am a member of good standing of the Bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to *28 U.S.C. Section 1746*, I certify under penalty of perjury that the foregoing is true and correct.

By: s/ MICHAEL J. FASANO
MICHAEL J. FASANO, ESQ.
For the Firm

Dated: November 13, 2009

CERTIFICATION OF COMPLIANCE UNDER *F.R.A.P.32(A)(7)*

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements and Type Style Requirements.

1. This Amended Brief complies with the type-volume limitation of Fed. IL. App. P. 32(a)(7)(B):

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Dated: November 13, 2009

IDENTICAL COMPLIANCE CERTIFICATION

I hereby certify that the text of the electronic amended brief which was submitted to this Court, is identical to the paper copies that were served upon this Court and on appellants and appellees.

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Dated: November 13, 2009

VIRUS CHECK CERTIFICATION

I hereby certify that I have run a virus check on this Amended Brief and no virus was detected. I used McAfee Security Anti-Virus and Anti-Spyware Product version 4.7.0.777.

By: s/ MICHAEL J. FASANO
MICHAEL J. FASANO, ESQ.
For the Firm

Dated: November 13, 2009

CERTIFICATE OF FILING AND SERVICE

I, MICHAEL J. FASANO, ESQ., hereby certifies as follows:

1. On November 13, 2009 I caused the within Amended Brief of the New Jersey Land Title Association to be filed with the Court via e-file, and have forwarded ten (10) hard copies of the Amended Brief to the United States Court of Appeals for the Third Circuit, by UPS Overnight delivery at the following address:

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For the Third Circuit
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601 Market Street
Philadelphia, PA 19106

2. By virtue of this electronic filing, the following counsel of record are hereby served. In addition, on November 13, 2009 I caused two copies of the Amended Brief of the New Jersey Land Title Association to be served upon each of the following listed below, via regular mail delivery:

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4. Pursuant to *28 U.S.C. Section 1746*, I certify under penalty of perjury that the foregoing is true and correct.

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Dated: November 13, 2009