In The

United States Court of Appeals for the Third Circuit

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.

Appeal from the Order dated May 20, 2008, in United States District Court for the District of New Jersey at No.05-cv-05710.

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT STOCKBRIDGE–MUNSEE COMMUNITY
Volume I of II (pages 1a-46a)

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JURISDICTIONAL STATEMENT

In the District Court, Plaintiff Unalachtigo Band asserted claims under a Colonial treaty, federal statutes and the United States Constitution and alleged jurisdiction under 28 U.S.C. § 1331 (2001). App.314a (First Amended Complaint). Defendant-Intervenor Stockbridge-Munsee Community asserted that the district court lacked jurisdiction because Stockbridge is a necessary and indispensable party which enjoys sovereign immunity from suit, cannot be forced to join and, in its absence, the suit cannot proceed and must be dismissed. App.292a (Proposed Answer in Intervention).

This Court has jurisdiction under 28 U.S.C. § 1291 (2001) because the Judgment below is final as against Appellant Stockbridge. The dismissal order was entered on May 20, 2008, App.6a, and Appellant filed its Notice of Appeal on June 17, 2008. App.1a. This appeal is from a final judgment that disposes of all parties' claims.

ISSUE PRESENTED FOR REVIEW

To be federally recognized, an Indian tribe must continuously maintain an organized tribal structure. Likewise, for one Indian tribe to be the successor in interest to another, it must have maintained an organized tribal structure. Is a showing of tribe A's merger into tribe B, a federally recognized tribe, sufficient to

establish B as the successor in interest to A, or must B also prove maintenance of an organized tribal structure by showing that some defining characteristic of A persists in an evolving tribal community? (Issue not raised by parties, addressed only in final opinion, App.37a).

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this court. Plaintiff below filed *pro se* a separate appeal of the same district court decision, No. 08-3716, but its appeal was dismissed because it failed to have an attorney enter an appearance on its behalf. Order of February 20, 2009. It then moved to reopen the appeal. This Court's order of September 16, 2009 stated that the appeal would be reopened and consolidated with this appeal if, within 14 days, appellant paid the docketing fee and an attorney entered an appearance on its behalf. Neither occurred, and the appeal was not reopened. On October 28, 2009, James B. Thomas filed yet another motion on behalf of Plaintiff seeking an extension of time to secure counsel and relief from this Court's order of September 16, 2009.

We are not aware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this court or any other court or agency, state or federal.

STATEMENT OF THE CASE

A. Nature of the Case

Claiming under the Indian Nonintercourse Act, 25 U.S.C. § 177 (2001), Plaintiff Unalachtigo Band of the Nanticoke-Lenni Lenape Nation, an Indian group organized as a New Jersey non-profit corporation that is not recognized by the United States or the State of New Jersey as an Indian tribe, filed this action seeking to recover possession of the Brotherton Indian reservation in central New Jersey. Unalachtigo claimed to be successor in interest to the Indians for whom the Colony established the reservation pursuant to the 1758 Treaty of Easton. It alleged that New Jersey's sale of the reservation in 1802 violated the Nonintercourse Act, which, since 1790, has provided that any sale of Indian lands without Congressional approval is void.

The Stockbridge-Munsee Community, Band of Mohican Indians (Stockbridge), a federally recognized Indian tribe, intervened as a defendant soley to assert its sovereign immunity and seek dismissal for failure to join an indispensable party.[1] Because the Brotherton Indians, the tribe for which the

[1]One of the bedrock principles of Federal Indian law is that Indian tribes are immune from unconsented suit; "[a]s 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." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). *Kiowa* teaches that the doctrine of tribal immunity has

Brotherton reservation was established, had sold its reservation in 1802, moved to Stockbridge's reservation, and merged its government and membership with Stockbridge, Stockbridge claimed it was the successor in interest to the Brotherton reservation.

On Stockbridge's motion to dismiss under Fed. R. Civ. P. 19 , the District Court ruled Stockbridge was not Brotherton's successor and therefore not a necessary party. It denied Stockbridge's Rule 19 motion to dismiss and then *sua sponte* dismissed the action because it found that Unalachtigo had likewise failed to show it was Brotherton's successor and therefore lacked standing to pursue the claim.

Stockbridge and Unalachtigo filed separate appeals, but Unalachtigo's appeal was dismissed because no attorney entered an appearance on its behalf. Consequently, the party that opposed Stockbridge's claims below is not a party here. Appellees here, the State defendants, participated only minimally in the proceedings below and took no position on the issues presented in this appeal.

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its source in the same principles of comity and respect for the dignity of sovereign entities that underlie state sovereign immunity. Indeed, it notes that tribal sovereign immunity may in some respects be broader than that of the states. Because the tribes were not participants in the Constitutional Convention, they did not, like the states, surrender their immunity from suit by sister states. *Id*. at 756. *See* William C. Canby, Jr., *American Indian Law in a Nutshell* 87-95 (3rd ed. 1998).

This appeal presents the question whether the District Court applied the proper legal standard to determine that Stockbridge was not Brotherton's successor in interest. Stockbridge contends that under the correct legal standard, it must be regarded as Brotherton's successor for purposes of determining under Rule 19(a)(1)(B) whether it has claimed a nonfrivolous interest.

Stockbridge asks this Court to reverse the ruling that it is not Brotherton's successor and therefore has not claimed a Rule 19(a) interest in the subject of the action. However, a remand with instructions to complete the Rule 19 analysis appears to be pointless and this Court should therefore affirm dismissal, albeit based on different facts.

B. Course of Proceedings and Disposition Below

When Unalachtigo filed this action, it was represented by James Brent Thomas in a *pro se* capacity. Because Mr. Thomas is not a licensed attorney, the District Court ordered that unless counsel appeared on Plaintiff's behalf, its complaint would be dismissed. Docket Item No. 9. After the Burlington County defendants filed their answer, App. 74a, counsel for Plaintiff entered an appearance. Docket Item No. 12.

Stockbridge then timely moved to intervene as a defendant under Fed. R. Civ. P. 24(a)(2) for the limited purpose of asserting its sovereign immunity and

seeking dismissal for failure to join an indispensable party under Fed. R. Civ. P 19(b) and 12(b)(7). App.87a.

Plaintiff then amended its complaint to name only the State of New Jersey and Governor Corzine as defendants. App.314a. The State defendants then moved to dismiss, asserting the State's Eleventh Amendment immunity from suit. App.336a.

As Stockbridge's motion to intervene and dismiss had been filed and briefed before the State became a party, the District Court first heard arguments on its motion. App.398a (Hearing transcript). After that hearing, Plaintiff sought leave to file another amended complaint, this time to sue Stockbridge's officers in their personal capacities. App.447a. Stockbridge, App.460a, and the State of New Jersey, App.449a, opposed, both arguing that amendment would be futile, sovereign immunity required dismissal and it would be improper for the court to address the claim on its merits.

Shortly thereafter, Unalachtigo's counsel informed the court that Unalachtigo had terminated it as counsel and it would therefore no longer be representing Unalachtigo in this action. App.477a. Mr. Thomas moved to appear *pro se.*

The District Court then granted Stockbridge's motion to intervene, but did

not rule on its Rule 19 motion to dismiss. App.478a.

It then heard arguments on Reed Smith's motion to withdraw as Plaintiff's counsel and Mr. Thomas' motion to appear *pro se*. App.520a (Hearing transcript). It denied both motions. App.497a. At that hearing, the Court voiced its determination to first address whether Unalachtigo or Stockbridge is Brotherton's successor in interest and inquired whether the parties wished to submit additional historical evidence. App.543a. Stockbridge declined, informing the Court that because it had not intervened for the purpose of establishing its title on the merits, but rather had intervened for the purpose of seeking dismissal, it believed that the evidence it had already submitted showed that its claimed interest was not frivolous and thereby satisfied Rule 19(a)(1)(B)'s requirement that a party claim–as opposed to prove–a protectable interest. App.564a.

The State defendants, in light of the Court's determination to address the successor-in-interest question, moved to withdraw their motion to dismiss without prejudice, stating their understanding that, if the case were not dismissed on Stockbridge's motion, they would be permitted to re-file their motion to dismiss. App.559a. The Court granted the State's withdrawal motion, App.562a, and shortly thereafter granted the New Jersey Land Title Association's motion to intervene as an amicus, App.567a, to brief the tribal succession issue. On March

21 and May 22, 2007, the NJLTA filed briefs concluding, among other things, that if any Indian tribe is the successor to the Brotherton Reservation, it is Stockbridge. Docket Items Nos. 73 & 77.

Several months later, Mr. Thomas moved *pro se* for Rule 11 sanctions against Stockbridge's and NJLTA's counsel. App.571a. Stockbridge cross-moved for sanctions against Mr. Thomas. App.593a. In its opinion of December 17, 2007, the Court denied Mr. Thomas' motions as frivolous and vexatious, ordered them stricken from the record, denied Stockbridge's cross motion, and warned Mr. Thomas that if he filed any additional motions, frivolous or otherwise, or in any way attempted to act as Plaintiff's *pro se* counsel, the Court would entertain a renewed motion for sanctions against him by any affected party. App.609a.

In its opinion of May 20, 2008, the District Court ruled Stockbridge had not satisfied the legal standard for demonstrating it is Brotherton's successor and it therefore lacked an interest in the litigation and was neither a necessary nor indispensable party. It denied Stockbridge's Rule 19 motion to dismiss. It then *sua sponte* dismissed the action based on its finding that Plaintiff was not a successor in interest and therefore lacked standing to pursue the claim. App.7a. This appeal followed.

STATEMENT OF FACTS

During the French and Indian War, the Colonies faced formidable enemies on the Western Frontier in the form of France and its Delaware Indian allies, some of whom had migrated from New Jersey decades earlier. App.17a-18a (Opinion). Within New Jersey, small bands of remnant Delawares roamed about, barely subsisting in the Colony's steadily diminishing unsettled areas. *Id*. Fearing an alliance between these remaining Delawares and their cousins to the west, in 1758 the Colony entered into a treaty with those remaining Delawares who still had unresolved claims to certain lands. App.18a-22a (Opinion). In return for giving up their claims, they were settled on a small reservation in central New Jersey; a 3,044-acre farm purchased for that purpose by the Colony. App.21a. All other Indians who desired to remain in the Colony were required to settle on this reservation, called Brotherton. App.22a. Together, these Indians formed a tribal government known as the Brotherton Indians. App.34a-35a.

But after the French and Indian War ended, New Jersey grew increasingly less concerned for the welfare of the Brotherton Indians. State financial assistance was withdrawn, App.23a, and in 1801 the poverty-stricken tribe asked the State to sell its reservation and help it move to central New York, where the Mohican

Indians on the New Stockbridge reservation[2] had invited them to live. *Id*. The State legislature obliged. App.24a. State agents assisted in the move, accompanied the majority of the Brotherton to New York and carried out the legislature's mandate to ensure that the formal merger agreement between the Stockbridge and Brotherton tribes granted full membership rights to the Brotherton Delaware. App.25a-26a. The State then sold the reservation and held the proceeds, which the combined tribe later used to purchase land in Wisconsin after it was forced out of New York in the 1820s and 30s. App.27a.

To ensure that the Brotherton Indians of New Stockbridge would enjoy equal rights in the newly purchased Wisconsin lands and continue to be equal tribal members in the combined tribe after it relocated, in 1823 the Brothertons and

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[2]The Mohican Indians, also referred to as Muhheconnuck or Mahican, *see* App.117a-118a (Wm. C. Sturtevant, "Early Indian Tribes, Culture Areas, and Linguistic Stocks," Smithsonian Institution map, 1967), originally occupied the Hudson River valley in present-day New York State. Their capital was at present-day Albany, and they are the tribe that greeted Henry Hudson in 1609. App.410a (Hearing transcript, lines18-25). Like the Delaware Indians, they are of Algonquin linguistic stock and their territory was adjacent to Delaware aboriginal territory. App.117a (Smithsonian map). In the early 1700s, Dutch settlers drove the Mohicans from the Hudson River valley and they resettled on a small reservation in Western Massachusetts known as Stockbridge. After the Revolutionary War, encroaching white settlement and taxation caused them to accept an invitation from the Oneida Nation in central New York to relocate to Oneida territory on a six-mile-square reservation which they called New Stockbridge. There, in 1802, they were joined by the Brotherton Delawares.

Stockbridge again executed a formal tribal merger agreement. *Id*.

In 1832, the Stockbridge Brothertons appeared before the New Jersey legislature seeking compensation for off-reservation treaty hunting and fishing rights not included in the 1802 cession. The legislature appropriated two-thousand dollars and the Indians signed a transfer agreement, purportedly relinquishing the last of Brotherton's tribal rights in New Jersey. App.28a.

But New Jersey's purchase of the Brotherton reservation did not comply with federal law. Since 1789, federal law has required Congress to approve the sale of any Indian lands. Because the State failed to get Congressional approval, the 1801 sale violated federal law and failed to extinguish Indian property rights in the tract. *See Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

In the 1990s, a tribe of Delaware Indians in Oklahoma sought to pursue this claim. It asked the legal office for the Bureau of Indian Affairs, as its trustee, to develop and prosecute the claim on its behalf. App.262a. The federal lawyers, with the help of a BIA historian, investigated the history of the Brotherton Reservation and concluded that, while there probably was a meritorious claim to be pursued, this tribe of Delawares from Oklahoma was not the one to do it because it was not the successor in interest to the Brotherton Delaware Tribe. *Id*. Instead, it appeared that the Stockbridge-Munsee Tribe in Wisconsin was the likely successor

and, in 2000, the Interior Department's top Indian-affairs lawyer advised Stockbridge of its potential claim. App.259a. Stockbridge then retained counsel and an expert historian to investigate the claim. App.596a-597a.

But in 2005, the Unalachtigo Band, a non-federally recognized group from southern New Jersey, filed this action claiming to be the rightful owners of the Reservation and seeking its possession. App.67a.

Stockbridge concluded that this suit likely would result in a judicial interpretation of the same treaties and statutes which would necessarily form the basis of its own claim, should it decide to pursue it. App.291a (Answer in Intervention). But Stockbridge did not want to litigate these matters in the context of the Unalachtigo suit. Concerned that its interests could be impaired if the action proceeded in its absence, Stockbridge moved to intervene as a defendant for the limited purpose of seeking dismissal for failure to join an indispensable party.

SUMMARY OF ARGUMENT

On Stockbridge's Rule 19 motion to dismiss for failure to join an indispensable party, the District Court undertook a preliminary assessment of the merits of Stockbridge's interest in the case, examining whether Stockbridge is a successor in interest to Brotherton. It considered the history of the Brotherton Tribe and its reservation and correctly determined that the Brotherton and

Stockbridge Tribes had merged to form a single Stockbridge Tribe. Nonetheless, it concluded that Stockbridge is not Brotherton's successor because the requirements of a Ninth Circuit successorship test were not satisfied.

But the District Court misunderstood and misapplied the Ninth Circuit's complex jurisprudence of tribal succession. That body of law has been developing over the course of more than three decades in ongoing litigation about which Pacific Northwest tribes are entitled to exercise off-reservation fishing rights reserved in several treaties negotiated by territorial Governor Isaac Stevens in 1854 and 1855 to open up the present states of Washington, Oregon and Idaho for settlement.

Over the course of that litigation, the Ninth Circuit has developed fundamental principles to guide its successorship analyses. Thus, the successor-in-interest inquiry is a fact-specific, case-by-case analysis aimed at determining whether "a group claiming treaty rights has maintained sufficient political continuity with those who signed the treaty that it may fairly be called the same tribe." *United States v. Oregon*, 43 F.3d 1284, 1284 *amending* 29 F.3d 481 at 485 (9th Cir. 1994). To fairly be called the same tribe and thus qualify as a successor-in-interest, the Ninth Circuit's "single necessary and sufficient condition" is that the group has continuously maintained an organized tribal structure.

Applying these guiding principles to successorship claims by numerous tribes with disparate factual and historical circumstances, the Ninth Circuit fashioned distinct tests for determining whether an organized tribal structure has been maintained–one for non-federally recognized tribes and another for federally recognized tribes. Non-federally recognized tribes can show that they have maintained an organized tribal structure since treaty times by demonstrating that "some defining characteristic of the original tribe persists in an evolving tribal community." *United States v. Washington*, 641 F.2d 1368, 1372-73 (9th Cir. 1981) (*Washington III*).[3]

In the case of recognized tribes, however, federal recognition in and of itself demonstrates maintenance of an organized tribal structure. This is because continuous political existence is a prerequisite for status as a federally recognized tribe. Thus, the Ninth Circuit rejected application of the *Washington III* standard to the successorship claim of a federally recognized tribe and held that "[f]ederal recognition is determinative of the issue of tribal organization." *Washington IV*,

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[3]The most recent Ninth Circuit opinion addressing tribal succession, *United States v. Washington*, 394 F.3d 1152 (9th Cir. 2005), refers to this 1981 decision as "*Washington III*." It refers to the district court's slip opinion in that action as "*Washington II*." In this brief we frequently cite to, and rely heavily upon, the Ninth Circuit's 2005 opinion. Therefore, in the hope of avoiding confusion, this brief uses the 2005 opinion's short-hand designations for the relevant Ninth Circuit rulings. Herein, the 2005 opinion is "*Washington IV*."

394 F.3d at 1161.

The District Court in this case applied the wrong Ninth Circuit successorship test. Despite the fact that Stockbridge has been continuously federally recognized since at least 1792, having entered into numerous treaties and agreements with the United States, the court below applied the *Washington III* test for non-federally recognized tribes. It opined that federal recognition does not impact the tribal successorship analysis and that Stockbridge therefore "must show merger in addition to, not in lieu of, showing the persistence of one or more defining characteristics of the original tribe in an evolving tribal community." App.40a (Opinion). The District Court erred.

In addition to overlooking *Washington IV*'s explicit holding that federal recognition is determinative of tribal organization, the District Court confounded the concepts of assimilation into the dominant culture and the merger of tribal governments. The analysis at App.38a (Opinion) reveals that it mistakenly equated the political merger of a smaller tribe into a larger one–an action taken for the very purpose of survival as a tribal culture and preservation of property rights–with assimilation into non-Indian society, whereby tribal cultural identity and rights are lost. Relying on *Washington III*'s analysis of whether non-federally recognized Indian groups continued to exist as tribes or did not because they had been fully

assimilated into the dominant culture, the District Court apparently concluded that if Brotherton was fully "assimilated" into Stockbridge, succession would not lie.

But contrary to the District Court's flawed logic, where tribes merge for the purpose of surviving as distinct Indian communities, *i.e.*, to avoid assimilation, they need not also continue to exist as identifiable tribal organizations within the combined tribal organization in order to avoid losing their property rights. As long as the combined successor tribe continues to exist as a distinct tribal political community, it necessarily must retain its rights. And that certainly must be the case here, where Brotherton and Stockbridge accomplished their merger through written agreements that expressly sought to ensure that the property of each tribe would be secured for the future benefit of the combined tribes and that, from the merger forward, the Brotherton would share equally in Stockbridge's governance.

The *Washington III* test requiring a showing of the persistence of one or more defining characteristics of the original tribe in an evolving tribal community was devised to evaluate the claims of groups that appeared to have fully assimilated into the dominant culture. To establish continuous existence as separate, tribal political entities, they would have to meet the persistence-of-some-defining-characteristic standard to show they had maintained a continuous tribal organization.

The Ninth Circuit is a court long experienced in grappling with the complexities of Federal Indian law. Its separate maintenance-of-tribal-organization tests for recognized and unrecognized tribes take into account the fundamental distinctions between political merger and assimilation. The *Washington IV* rule that federal recognition is determinative recognizes that federal recognition and assimilation are mutually exclusive: a tribe which enjoys federal recognition *ipso facto* cannot have been fully assimilated. By showing Brotherton's merger into Stockbridge, Stockbridge, as a federally recognized Indian tribe, has shown that it is Brotherton's successor in interest.

This Court should apply the Ninth Circuit's *Washington IV* test here. The facts as preliminarily found by the District Court establish beyond question that Stockbridge is the continuation of Brotherton. Indeed, it is hard to conceive of a clearer case of tribal political succession. This tribal merger was accomplished by written agreement and the exchange of valuable consideration. It was facilitated by the legislative enactments of two states and overseen by New Jersey state officials whose reports document the complete incorporation of the Brotherton Tribe's membership and government into the Stockbridge Tribe in 1802. Twenty years later, when the combined tribe was preparing to move to new lands in Wisconsin, they again executed formal written merger agreements and exchanged valuable

consideration to ensure that Brotherton would have equal status in ownership and governance of the new reservation and that the proceeds from the sale of the New Jersey reservation could be used to purchase the Wisconsin lands.

Stockbridge was a federally recognized tribe during this entire period, already having entered into at least three treaties with the United States in the 1790s. It would enter into several more over the course of the following decades. Stockbridge continues to be a federally recognized tribe and is included on the most recent list of federally recognized tribes published by the Secretary of the Interior. 74 Fed. Reg. 40218, 40221 (2009). There is no question here that a continuous tribal organization has existed from the time the Brotherton Indians organized as a political entity in 1758 to the present. Consequently, this Court must reverse and hold that Stockbridge is Brotherton's successor in interest.

As Brotherton's successor, it follows that Stockbridge has claimed a nonfrivolous interest relating to the subject of this action under Rule 19(a)(1)(B) and the District Court's ruling that Stockbridge lacks an interest in this litigation must also be reversed.

Because it is improper for a court to address the merits of a claim before resolving a Rule 19 motion to dismiss based on sovereign immunity, this Court arguably should then vacate the dismissal of Unalachtigo's suit for lack of standing

and remand for completion of the Rule 19 analysis. But considerations of judicial economy and the interest of avoiding needless litigation counsel that, under the unique circumstances of this case, remanding the case for further proceedings is an unsatisfactory option.

Stockbridge believes that this Court can properly affirm the District Court's dismissal of the action based solely on the facts as determined in the lower court's preliminary investigation into the merits of Stockbridge's claim and leave aside the lower court's analysis of the facts relating to the merits of Unalachtigo's claim. If application of the correct legal standard to the "Stockbridge facts" can foreclose any other tribe, including Unalachtigo, from establishing successorship, then this Court may affirm the dismissal for lack of standing.

Those facts show that only the Brotherton tribe enjoyed rights in the Brotherton reservation and that Stockbridge is Brotherton's political successor in interest. Because the rights at issue are tribal rights, unless the descendants of the individual Brotherton Indians who did not accompany their tribe to New York in 1802 could establish that they are also a tribal successor to Brotherton, Stockbridge must necessarily be the only successor.

But applicable legal principles would preclude the New Jersey descendants from establishing successor status. Even if they could satisfy the *Washington III*

standard for unrecognized tribal successorship, *i.e.*, show descendancy and continuous maintenance of tribal organization, because they deliberately separated from the Brotherton Tribe, they could not satisfy the Ninth Circuit's requirement that "political cohesion with the tribal entity in which the treaty . . . rights are vested" be maintained. *United States v. Oregon*, 29 F.3d 481, 486, *amended by* 43 F.3d 1284 (9th Cir. 1994). Thus, under any conceivable set of facts, Stockbridge's status as Brotherton's successor forecloses any other tribe from establishing successorship to Brotherton.

Consequently, on remand, even if Unalachtigo were to amend its complaint to allege, and could then prove, that its ancestry traces to those Brotherton Indians who stayed behind in New Jersey and that it had maintained a tribal organization, it could not qualify as Brotherton's successor. The Brotherton tribal organization merged with that of the Stockbridge, so whatever tribal organization the Unalachtigo might have, if any, it cannot be a continuation of the tribal organization of the Brotherton. The facts as preliminarily determined on Stockbridge's Rule 19 motion foreclose the required showing by Unalachtigo and this Court may properly affirm the District Court's dismissal of Unalachtigo's suit.

ARGUMENT

A. The District Court Erred in Ruling that Stockbridge Failed to Demonstrate a Nonfrivolous Interest Under Rule 19(a): It Applied the Wrong Legal Test to Decide That Stockbridge Is Not a Successor in Interest to Brotherton.

Standard of Review. Because the court below erred in formulating and applying legal precepts, the scope of review is plenary. *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 404 (3d Cir. 1993) ("To the extent that a district court's Rule 19(a) determination is premised on a conclusion of law, . . . our scope of review is plenary."); *Koppers Co., Inc. v. Aetna Cas. and Sur. Co.*, 158 F.3d 170, 174 (3d Cir. 1998).

1. The Brotherton and Stockbridge Tribes Entered into Formal Written Merger Agreements, Exchanged Valuable Consideration, and Merged Their Governments and Membership Into a Single Tribe, Intending That Stockbridge Succeed to Brotherton's Interests; the States of New Jersey and New York Facilitated the Merger and Recognized and Dealt with Stockbridge as Brotherton's Successor.

The record shows, and the District Court found, that the Brotherton Indians "maintained a governmental structure" and "constituted a political entity." App.34a-35a (Opinion). In 1802 the Brotherton tribe formally merged with Stockbridge. App.20a, 21a & 40a. It migrated to New York and, by express written agreement and the exchange of valuable consideration, merged its

government and membership with Stockbridge. It intentionally gave up its identity as a separate political entity and both parties, as well as the State of New Jersey, intended that Stockbridge succeed to Brotherton's interests.

The events culminating in this merger spanned several decades. In the late 1700s, the withdrawal of State assistance, together with the pressures of warfare, disease, poverty and encroaching white settlement caused the Brotherton Indians to seek legislative permission to lease their lands. App.23a (Opinion). In March, 1796, the legislature appointed commissioners to supervise the leasing of Brotherton lands. App.147a (Edward McM. Larrabee, RECURRENT THEMES AND SEQUENCES IN NORTH AMERICAN INDIAN-EUROPEAN CULTURE CONTACT 15 (Am. Philosophical Soc'y 1976)). *See State of New Jersey v. Wright*, 117 U.S. 648, 651 (1886) ("[o]n [Brotherton's] petition, an act was passed [in]March, 1796, which appointed . . . commissioners to take charge of the lands, and lease out the same . . . .") (internal quotation marks omitted).

During this period, and at least as early as 1793, the Brotherton Indians were being urged by Stockbridge to move, as a tribe, to Stockbridge in central New York.[4] *See* App.128a (Weslager at 274). Stockbridge assured the Brotherton they

[4]On October 20, 1793, Hendrick Aupaumut, Sachem of Muhheconnuk, wrote to the New Jersey Delaware inviting them to move to New Stockbridge and become full members of the Tribe. App.219a-230a (Letter to Jacob Shogett from

would enjoy equal rights and in October, 1796, a delegation from Brotherton visited New Stockbridge and accepted Stockbridge's offer.[5]

In 1797, the New Jersey legislature authorized the Indian commissioners to prepare a bill and arrange for hearings in the Township of Evesham. On December 3, 1801, the legislature passed an act authorizing the sale of the Brotherton Reservation, the preamble to which states:

> Whereas the Commissioners appointed by law to superintend the affairs of the Indian Natives, at Brotherton, have by their memorial, set forth that it is the desire of the said Indians to dispose of their interest in the property held in trust for their use, in the county of Burlington, and remove to the settlement of New-Stockbridge, in the State of New York: and whereas it appears by the petition of the said Indians at Brotherton, and the Indians at New Stockbridge, that it is their desire to be enabled to accomplish an union, which would be agreeable and beneficial: and whereas it is the desire, and the duty of the Legislature, to adopt such measure as would promote the happiness and comfort of the said Indians: –

Hendrick Aupaumut and response, October 20, 1793, Foster-Clement Papers, 1685–1815, Indian land papers and surveys, 1780–1800, Historical Society of Pennsylvania, Philadelphia (*hereinafter* "FCP")). A year later, Aupaumut repeated the invitation and assured the Brotherton that if they moved, "your Nation shall have Equal Privelege [sic] with us which you may be Depend upon." *Id.* (Letter to Brotherton Delaware from Hendrick Aupaumut, November 12, 1794, FCP).

[5]At an October 9 meeting, Aupaumut once again urged the Brotherton to move. App.219a-230a (Aupaumut Speech to Brotherton Delaware at New Stockbridge, New York, October 9, 1796 FCP). On October 18, Brotherton accepted the offer. *Id.* (Speech of Brotherton Delaware at New Stockbridge, New York, October 18, 1796, FCP).

App.24a (Opinion), App.234a (Act of December 3, 1801, *An ACT to constitute and appoint Commissioners to sell and convey certain Lands held in Trust for the Indian Natives at Brotherton, in Evesham Township, in the County of Burlington, and to appropriate the Monies thence arising for the Benefit of the said Indians,* Chap. LXIII, *in* ACTS OF THE TWENTY-SIXTH GENERAL ASSEMBLY 132 (Mann & Wilson, 1801)). *See State of New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164, 165-66 (1812), 1812 WL 1521 (U.S.N.J. Mar. 3, 1812) at *2 (Marshall, Ch. Justice) ("in . . . 1801, when, having become desirous of migrating from the state of New Jersey, and of joining their brethren at Stockbridge, in the state of New York, [Brotherton] applied for, and obtained an act of the legislature of New Jersey, authorizing a sale of their land in that state."). The 1801 Act further authorized the Commissioners "to obtain . . . sufficient evidence of the *admission of the said Indians of Brotherton, into the tribe at Stockbridge*." App.25a (Opinion), App.235a (1801 Act) (emphasis added) .

Thereafter, the Commissioners obtained the consent of a majority of the Tribe and then assisted and accompanied them in the move to New Stockbridge. The Commissioners' final report of November 23, 1802, stated that they had taken more than three-fourths (83) of the Tribe to New Stockbridge and that in full council the Mohicans had delivered speeches and five strings of wampum to the

Commissioners as a pledge of friendship and as a security for the lands and privileges given by Stockbridge to the Brotherton.[6]

Two years later, the merger was confirmed under Indian law and custom in an October, 1804 ceremony witnessed by John Sergeant, Stockbridge's missionary. App.26a (Opinion), App.244a-246a (John Sergeant, Journal of John Sergeant, Missionary to the Stockbridge Indians from the Society in Scotland for Propagating Christian Knowledge, Dartmouth College Library, Rauner Special Collections Library, 1 vol. in manuscript, Vault 4, 805101).

An 1824 New York law recognized the merger and that Brotherton shared in

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[6]The Commissioners' final report states:

> The Commissioners appointed by the Honorable the Legislature of the State of New Jersey for the purpose of disposing of certain Lands in the County of Burlington the property of the Delaware Tribe of Indians and to convey them to New Stockbridge in the State of New York, agreeably to an Act passed . . . Request leave to report to the House that they have taken more than three fourths of the Said Indians (Eighty three in Number) . . . [and] to present a number of speeches together with five Strings of Wampum delivered in full council of the Mohecahunnuk or New Stockbridge Indians to the Said Commissioners as a pledge of Friendship and as a security of the Lands and Privileges given by the Said New Stockbridge Tribe of Indians to the Delaware Tribe which after the Inspection of the Legislature the Commissioners request may be deposited in the Secretary's Office . . . .

App.239a (Minutes of the General Assembly, November 23, 1802, *in* VOTES AND PROCEEDINGS OF THE 27TH GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY 93 (Sherbun & Mershon, 1802)), *see* App.25a (Opinion).

Stockbridge's governance, authorizing "the Stockbridge and Delaware Indians that have been adopted into the Stockbridge tribe, to meet in general council and . . . appoint peace-makers and [a] town clerk . . . ." App.27a (Opinion), App.248a (Act of April 7, 1824, *AN ACT to provide for the appointment of Peace-makers and Town Clerk for the Stockbridge Indians, and for other purposes*, Ch. CLXXVII, *in* LAWS OF THE STATE OF NEW YORK PASSED AT THE FORTY-SEVENTH SESSION OF THE LEGISLATURE 195 (Leake & Croswell 1824)).

In the 1820s, land developers, aided by the State of New York, began aggressively buying reservation land at Oneida and New Stockbridge. This resulted in efforts by some Six Nations Iroquois and Stockbridge to find suitable land farther to the west. Because such land would have to be purchased, Stockbridge, and their Delaware adoptees, took measures to ensure that the funds still held by New Jersey (proceeds from the sale of the Brotherton Reservation) would be available and the Brothertons would have full rights with the Stockbridge in such lands and their governance.

Thus, in 1822, the Stockbridge Delaware requested that New Jersey deposit the funds in a Utica, New York bank. Pursuant to legislative enactment, New Jersey complied. App.27a (Opinion), App.252a (Act of November 28, 1822, *AN ACT respecting the Brotherton Indians, in* ACTS OF THE FORTY-SEVENTH GENERAL

ASSEMBLY OF THE STATE OF NEW JERSEY, 98-99 (Justice 1823)). In 1823, the leaders of the Stockbridge Mohicans and the Brotherton Delaware entered into a formal merger agreement confirming equal rights in the new lands:

> Articles of agreement made and entered into at Vernon in the state of New York [on September 23, 1823] between . . . Chiefs and head men of the Delware [sic] tribes of Indians formerly from the state of New Jersey of the one part & . . . chiefs and head men of the Muhheconnuk Tribe commonly called the Stockbridge Indians of the other part. Witnesseth article first that the Muhheconuck Tribe . . . do hereby cede grant bestow to said Brotherton Indians . . . and their offspring stock & Kindred forever and equal right title interest claim with us the said Muhheconnuck Tribe . . . and are to be considered as a component part of the Muhheconnuck or Stockbridge nation to all lands comprehended within and discribed [sic] in the two treaties made at Green Bay with the six nations & the St Regis Stockbridge Munsee nations of Indians [on August 18, 1821]. . . . Article second In consideration of the aforesaid granted and bargained premises which the said Muhheconnuck tribe . . . hereby promise covenant & agree to warrant & defend to said Brotherton Indians and to their proginey [sic] forever said Brotherton do hereby promise & agree to pay unto the said Stockbridge Indians [$1,000].

App.27a (Opinion), App.255a (*Lands for Stockbridge and Brothertown [sic] Indians, in* XV COLLECTIONS OF THE STATE HISTORICAL SOCIETY OF WISCONSIN 6-8 (Democrat Printing Co. 1900)). By the 1830s, New York had purchased most of the New Stockbridge reservation and the combined Stockbridge Tribe had largely removed to a tract of land near Green Bay, Wisconsin purchased with the proceeds of the sale of the Brotherton reservation in New Jersey. *See* App.27a (Opinion).

In 1832, the Stockbridge Tribe purportedly relinquished the last of the

Brothertons' rights in New Jersey. Although Brotherton had been paid for its reservation lands, it had not relinquished its off-reservation hunting and fishing rights guaranteed by the 1758 Treaty. To effect a final settlement (which no doubt also violated federal restrictions against alienation without congressional approval but was apparently nonetheless concluded in good faith), the New Jersey legislature appropriated two-thousand dollars by the Act of March 12, 1832, and the Indians signed a deed acknowledging the transfer of their rights. App.28a-29a (Opinion), App.129a. Weslager notes that "these signers may have been New Jersey Brothertons of Mahican ancestry," and states that the "composite Stockbridge-Munsee families in Wisconsin" no doubt made good use of the money. App.129a (C.A. Weslager, THE DELAWARE INDIANS: A HISTORY 277 (Rutgers Univ. Press 1972)).

2. Stockbridge's Merger with Brotherton and its Continuous Federal Recognition Satisfy the Ninth Circuit's Successorship Test for Recognized Tribes and Are Determinative Here, But the District Court Erroneously Applied the Ninth Circuit's Test for Determining Non-Federally Recognized Tribes' Successorship.

Noting that this Circuit has not had occasion to formulate a standard regarding the legal principles governing tribal succession, App.37a, the Court below looked to successorship standards developed by the Court of Appeals for the Ninth Circuit in the ongoing Stevens Treaty fishing rights litigation in the Pacific

Northwest. This litigation–spanning almost four decades–deals with the off-reservation treaty fishing rights of present-day tribes under several treaties negotiated by Territorial Governor Isaac Stevens in 1854 and 1855.

Over the course of this litigation, the widely varying historical circumstances of tribes and groups claiming the right to exercise the fishing rights of treaty signatory tribes has resulted in the development of an array of successor-in-interest tests. The Ninth Circuit's initial tests were fashioned to determine whether non-federally recognized groups qualified to exercise the rights. More recently, it developed a successorship standard to test the claim of a federally recognized tribe. The District Court here improperly relied on the Ninth Circuit's test for non-federally recognized tribes rather than its test for federally recognized tribes.

a. Background: The Stevens Treaties and the Ongoing Treaty Fishing Rights Litigation in *United States v Washington*.

In 1854, Governor Stevens was charged with quickly opening the territory in Oregon and Washington for settlement by non-Indians. To accomplish this, he hastily negotiated agreements with scores of tribes whereby they agreed to give up the vast majority of their territories and relocate to reservations. In return, the tribes received payments and the guarantee that they would continue to have the right of taking fish, "in common with" non-Indians, at their "usual and

accustomed" off-reservation places. *See, e.g.*, Treaty of Point Elliott, art. 5, 12 Stat. 928 (1855).

To facilitate the negotiation process for the cession of so large a territory in the short period of several months, Governor Stevens consolidated many small tribes and bands into several larger tribal entities solely for convenience in deal-making. But these newly created tribal entities were arbitrarily constructed and did not group traditional tribal entities. Thus the treaties did not reflect the complexities of Indian social and political structure. Further, as the Indians signing the treaties generally did not speak English, they did not fully understand the meaning of the treaties. *See United States v. Washington*, 520 F.2d 676, 682-83 (9th Cir. 1975) (*Washington I*); *United States v. Oregon*, 29 F.3d at 484.

Despite the Stevens treaties' inadequacies, they were ratified by Congress. But not long after, the states began refusing to honor the tribes' fishing rights and, a century after ratification, the Indians were taking only a small fraction of the fish harvest. In 1970, the United States brought an action against Washington State to protect the tribal share of the anadromous fish runs. The "first round" of the Stevens treaty litigation culminated in a landmark Supreme Court decision affirming a determination that treaty tribes were entitled to harvest up to 50% of the fish runs at their usual and accustomed places. *Washington v. Washington State*

Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979).

The United States, and consequently the courts, had recognized and dealt with the governing entities of the various reservations to which the signatory tribes were supposed to move (the artificial tribes created by Governor Stevens) as the successors in interest to the tribes that actually signed the treaties and in which the treaty rights had initially vested. For these tribes, federal recognition by the executive branch, and the deference paid to that determination by the courts, was determinative of their status as successors to the treaty tribes: if they were federally recognized, *ipso facto* they had maintained an organized tribal structure and no party challenged their status as successors. But there were a number of other tribes that signed the treaties but did not, in fact, move to these reservations. As a result, they were not recognized by the United States. These unrecognized tribes' assertion of fishing rights under the Stevens Treaties triggered the development of the Ninth Circuit's successorship case law. To date, that body of law has, with one exception important here, been focused almost entirely on the unrecognized tribes' claims that they, too, are entitled to exercise treaty rights.

b. The Ninth Circuit's First Successor-in-Interest Test in *United States v. Washington* Was Fashioned to Evaluate the Successor-in-Interest Claims of Non-Recognized Tribes That Had Maintained a Continuous Tribal Organization.

Early in the *United States v. Washington* litigation, when descendants of the Stillaguamish and Upper Skagit tribes intervened to assert treaty fishing rights, the United States and the federally recognized successor tribes argued that treaty fishing rights could be exercised only by the present-day successor tribes that enjoyed federal recognition. This argument was rejected, however, because it is possible for a treaty-signatory tribe to continue to exist in the absence of federal recognition. Once treaty rights have vested, only Congress may divest them. In such cases, the mere fact of federal non-recognition, *i.e.*, action or inaction by government officials, could not work to extinguish treaty rights. Because the "[e]vidence supported the [lower] court's findings that the members of the two tribes are *descendants of treaty signatories and have maintained tribal organizations*," they were entitled to exercise treaty rights as successors to the signatory tribes. *Washington I*, 520 F.2d at 693 (emphasis added). This was the first successor-in-interest test adopted in *United States v. Washington*.

c. The Ninth Circuit's Second Successor-in-Interest Test in *United States v. Washington*, an Expansion of Its First, Was Adopted to Evaluate the Successor-in-Interest Claims of Non-Recognized Tribes That Had *Not* Maintained a Continuous Tribal Organization.

After the decision in *Washington I*, seven more non-recognized Indian groups claiming to be treaty tribes intervened. In *Washington III*, 641 F.2d at 1372-73, the Court of Appeals considered whether these present-day Indian groups comprised of descendants of treaty-signatory tribes were entitled to exercise the treaty rights that had vested in the tribes of their ancestors. These non-recognized groups did not live on reservations, had long lived among non-Indians and, while they currently had tribal organizations, it was not clear that they had maintained tribal political structures continuously since treaty times. Because treaty fishing rights are tribal, rather than individual rights, only the tribes that signed the treaties or their tribal successors could exercise the rights.

To determine the successor-in-interest status of these groups, the Ninth Circuit elaborated on its *Washington I* standard. It held:

> We have defined a single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure. *United States v. Washington*, 520 F.2d at 693.
>
> This single condition reflects our determination that the sole purpose of requiring proof of tribal status is to identify the group asserting treaty rights

> as the group named in the treaty. For this purpose, tribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community.

Washington III, 641 F.2d at 1372-73.

Applying this standard to the non-federally recognized tribes that sought to intervene as plaintiffs, the Ninth Circuit rejected their argument that, "because their ancestors belonged to treaty tribes, the appellants benefitted from a presumption of continuing existence." *Id.* at 1374. It affirmed the district court's denial of relief because these groups "had not functioned since treaty times as continuous separate, distinct and cohesive Indian cultural or political communit(ies)." *Id*. at 1373 (internal quotation marks omitted).

The distinction between the *Washington I* and *Washington III* successorship tests is clarified by the Ninth Circuit's statement in *United States v. Oregon*, 29 F.3d at 485, that "[o]ur law requires that appellants must trace a continuous and defining political *or* cultural characteristic to the entity that was granted the treaty rights." (Emphasis added). The tribes in *Washington I* had demonstrated that they had maintained tribal political organizations, and the standard articulated there was simply decendancy and maintenance of tribal organization.

In *Washington III*, however, some of the treaty signatory tribes had little or no political structure at the time the treaties were signed, 641 F.2d at 1373 & n.6.

Because "a structure that never existed cannot be maintained," *id.* at 1373, the *Washington III* court held that the groups could nonetheless qualify as successors in interest if they could trace a continuous *cultural* characteristic to the entity that signed the treaty, *i.e.*, if they could show that "some defining characteristic of the original tribe persists in an evolving tribal community," *id*. at 1372.

d. The Ninth Circuit's Third, and Most-Recent, Successor-in-Interest Test in *United States v. Washington* Was Adopted to Evaluate the Successor-in-Interest Claim of a Federally Recognized Tribe.

In *Washington IV*, the Samish Tribe, one of the non-federally recognized tribes previously denied relief in *Washington III* because it had failed to prove its status as a successor-in-interest under the standard for showing continuous cultural or political existence since treaty times, sought to reopen the 1981 judgment. Basing its motion on its subsequent (1996) recognition by the United States pursuant to the federal acknowledgment administrative process, it argued that its federal recognition was an extraordinary circumstance that justified reopening the judgment under Rule 60(b).

The District Court denied Samish's motion to reopen. Relying primarily on the Ninth Circuit's pronouncement in *Washington I* that federal recognition is not necessary for the exercise of treaty fishing rights, it held that federal recognition

was not an extraordinary circumstance because "a tribe's recognition, or nonrecognition, has no impact on whether it may exercise treaty rights." *Washington II*, slip op. at 13, *quoted in Washington IV*, 394 F.3d at 1156.

The Ninth Circuit reversed, stating that it had never held that federal recognition, as opposed to nonrecognition, is irrelevant to a tribe's exercise of treaty rights. *Washington IV*, 394 F.3d at 1158. Observing that a mandatory criteria for federal recognition is political existence from historical times until the present, *id*., it held that federal recognition is a sufficient condition for the exercise of treaty rights: "[f]ederal recognition is determinative of the issue of tribal organization, the [single necessary and sufficient condition for the exercise of treaty rights] on which the Samish were denied treaty fishing rights in *Washington II*." *Id*. at 1161.

The Ninth Circuit relied on Senior Judge Canby's observation that "'[o]nce granted, . . . the recognition will bind the courts until it is removed by the Executive or Congress.'" *Id.* at 1158 (*quoting* William C. Canby, Jr., *American Indian Law in a Nutshell* 6 (4th ed. 2004)). In addition, it relied on the position taken by the United States in *Washington III*:

> Indeed, the United States argued in *Washington III* that "[w]hile recent cases have indicated that the federal government's failure to recognize a tribe is not dispositive, *positive* recognition by the United States is accorded great

> deference and may well be controlling." Brief for United States in Opposition to Petition for a Writ of Certiorari [in *Washington III*] (emphasis added). The United States also noted that "[w]here the Congress or executive branch has expressly recognized a group of Indians as a tribe, the courts have repeatedly deferred to this essentially political decision" and that "*where there has been no such recognition,* a district court may make a factual inquiry into 'whether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure.'" Brief for the Federal Appellees, *Washington III*, 641 F.2d 1368 (9th Cir. 1981) (No. 79-4447, 79-4472)

394 F.3d at 1158 n. 8 (emphasis in original).

The Ninth Circuit further noted that in *Washington III*, it had "'defined a single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure.'" *Id.* at 1161 (*quoting Washington III*, 641 F.2d at 1372). Because federal recognition satisfies this single necessary and sufficient condition, it held that a federally recognized tribe is not required to show that it has maintained an organized tribal structure or that its ancestry traces to the predecessor tribe.

e. The Court Below Applied the Wrong Successor-in-Interest Test; It Used the Ninth Circuit's Test for Non-Recognized Tribes Instead of the Test for Recognized Tribes.

The District Court found that Brotherton merged with Stockbridge. But it held that Stockbridge's "successorship argument fails, not because it lacks

evidentiary support for its merger claim, but because it makes no showing with respect to the remainder of the test identified in *Washington* and *Suquamish*." App.40a. It then set forth what it understood to be the applicable rule, *i.e.*, that federal recognition is irrelevant to the successorship analysis and that a showing of merger without more does not satisfy the applicable successorship test:

> [A] tribe in the Stockbridge-Munsee's position–that is, a tribe attempting to assert the rights of another tribe–must show merger in addition to, not in lieu of, showing the persistence of one or more defining characteristics of the original tribe in an evolving tribal community. *See Suquamish*, 901 F.2d at 776; *Washington*, 641 F.2d at 1372-73. Although [Stockbridge] points to its own federal recognition and states that it has maintained "a continuous tribal political existence," . . . this does not show that any defining characteristic of the Brotherton group, or the Cranbury-Crosswicks band which made up its core, persists in an evolving tribal community. *See Washington*, 641 F.2d at 1371 (indicating that federal recognition does not impact the tribal successorship analysis). As a result, this Court cannot conclude that [Stockbridge] is a successor to the Brotherton Indians.

Id.

In this case, the court below made the same mistake that the district court in *Washington IV* made: it interpreted *Washington III* to say that "federal recognition does not impact the tribal successorship analysis." App.41a (Opinion). Based on this error, it held that the tribes' merger, *i.e.*, Brotherton's transfer of "whatever political attributes it had to . . . Stockbridge," App.40a, together with Stockbridge's federal recognition, "does not show that any defining characteristic of the

Brotherton . . . persists in an evolving tribal community." App.41a.

But *Washington I, III* and *IV* together make it plain that the defining-characteristic-persisting-in-an-evolving-tribal-community standard was adopted to determine whether non-federally recognized groups had maintained an organized tribal structure, the "single necessary and sufficient condition" for establishing successor-in-interest status. *Washington III* 641 F.2d at 1372-73. The only purpose of the inquiry is to make sure that the tribe asserting treaty rights is the same tribe in which the rights vested. *Id; accord United States v. Oregon*, 43 F.3d at 1284. *Washington IV* establishes that federal recognition renders the defining-characteristic-persistence requirement superfluous. It is not possible to be a federally recognized tribe and not have continuously maintained an organized tribal structure.[7]

The District Court's flawed analysis also appears to stem from confusion surrounding the concepts of assimilation and merger. The merger of two tribes into a single tribe in order to survive as a distinct community is the polar opposite of

[7]Below, no party challenged Stockbridge's citation to *Washington IV* as the controlling authority. *See* Docket Item No. 24 (Memorandum of Law in Support of Stockbridge-Munsee Motion to Intervene and Dismiss Complaint (Corrected) at 17). The District Court did not request briefing on the proper legal standard or otherwise indicate that it believed *Washington III* to be controlling until it issued its final opinion.

assimilation into non-Indian society, whereby tribal cultural identity and rights are lost. The very purpose of the former is to avoid the latter. But the court below apparently reasoned that, because *Washington III* would recognize successor status only where non-federally recognized Indian groups had not been fully assimilated into the dominant culture, *see* App.38a (Opinion), it must find that Brotherton had not been fully assimilated into Stockbridge in order find successorship.

But tribal merger, which seeks to avoid assimilation and promote survival as a distinct Indian community, cannot logically result in the loss of property rights if the predecessor tribe does not continue to exist as an identifiable tribal organization within the tribal organization of the successor tribe. And that must be particularly so where, as here, the merging tribal governments entered into written contracts expressly aimed at securing the property of each tribe for the future benefit of the combined tribe and ensuring that Brotherton would share equally in the future governance of Stockbridge. Moreover, if Brotherton retained property rights in its New Jersey reservation after 1802, but did not, as the District Court implicitly concludes, hold on to those rights after it merged with Stockbridge, where did those rights go? By the operation of what legal principle or theory were they extinguished? By complete "assimilation" such that Brotherton no longer "survive[d] as a distinct communit[y]?" App.38a (Opinion).

To ask these questions is to answer them. The *Washington III* test requiring a showing of the persistence of one or more defining characteristics of the original tribe in an evolving tribal community was devised to evaluate the claims of groups that appeared to have fully assimilated into the dominant culture. If they were to establish that they had continued to exist as separate, tribal political entities, they would have to meet the persistence-of-some-defining-characteristic standard to show that they had maintained a continuous tribal organization, *i.e.*, they had not been assimilated. But the same reasoning cannot apply to federally recognized tribes. Assimilation and federal recognition are mutually exclusive. Because a prerequisite for federal recognition is continuous maintenance of tribal organization, there cannot exist the additional requirement that non-assimilation be proven by showing that some defining characteristic of the *original tribe* persists in an evolving tribal community." App.38a (Opinion) (quoting *Washington III*, 641 F.2d at 1372-73 (emphasis in original).

Until its 2005 *Washington IV* ruling, the Ninth Circuit had not specifically addressed how federal recognition–as opposed to non-recognition–affects the maintenance-of-an-organized-tribal-structure analysis. While *United States v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir. 1990), the second case relied on by the court below, did involve the successorship claim of a federally recognized tribe,

it did not turn on the *Washington III* successorship test and the court did not address the significance of Suquamish's federal recognition. Rather, the case turned on an additional test the court imposed because of the particular historical circumstances in that case.

In *Suquamish*, the Ninth Circuit rejected the Suquamish Tribe's claim that it was the modern-day successor in interest to the Duwamish Tribe, one of the 1855 treaty-signatory tribes whose descendants had failed to prove in *Washington III* that they had continuously existed as a tribal political entity. The federally recognized Suquamish Tribe was a signatory to the same 1855 treaty as the Duwamish and thus was seeking to exercise, in addition to its own rights under the treaty, the additional fishing rights of a second tribe under the same treaty.

In such circumstances, the court of appeals held that not only would the Suquamish be required to satisfy the *Washington III* test, but it would also be required to show that the Duwamish Tribe had merged with the Suquamish: "We hold that for a signatory tribe to obtain treaty tribe status from another signatory tribe, it must *first* show that the two tribes . . . consolidated or merged and demonstrate also that together they maintain an organized tribal structure." *Id*. at 776 (emphasis added).

The court found that there was no evidence showing the United States ever

acted to relocate the Duwamish to the Suquamish reservation nor was there evidence showing that the Duwamish actually moved there. In fact, the tribes were hostile to one another and the Duwamish had refused to move to Suquamish. And the United States had continued to deal with the Duwamish as a separate tribe. *Id.* at 777. The two tribes had not merged.

The facts here are clearly distinguishable from *Suquamish*. There, the issue was merger of two tribes signatory to the same treaty; here, Stockbridge was not a signatory to the 1758 Treaty of Easton and is not attempting to "double dip" under its own agreement. In *Suquamish*, the tribes were hostile to one another and there was no evidence of a merger; here, the tribes were friendly and a purposeful, complete merger is established. Finally, in *Suquamish*, the United States continued to deal with the Duwamish as a separate tribe; here, after the tribes merged the United States, as well as the states of New Jersey and New York, dealt only with Stockbridge. Brotherton's independent governmental dealings ceased entirely.

While *Suquamish* supports the principle that a showing of political merger is necessary, it is inapplicable to this case for the proposition relied on by the court below. Its facts are distinguishable and its holding that the *Washington III* standard would have applied to the federally recognized Suquamish Tribe, had the court reached that issue, is no longer good law.

In selecting a successor-in-interest standard fashioned for non-recognized groups and tribes whose historical circumstances have little in common with those present in this case, the District Court failed to heed the Ninth Circuit's admonition that successor-in-interest determinations must be made based on the facts of individual cases. While it acknowledged that *Washington III* stated that whether an Indian group is descended from a treaty signatory and has maintained an organized tribal structure is a factual question, App.37a, it failed to appreciate the significance of that guiding principle in its choice of the applicable legal standard. And it altogether failed to take into account the Ninth Circuit's subsequent teaching that the successor-in-interest inquiry is an "essentially factual" one aimed at determining whether "a group claiming treaty rights has maintained sufficient political continuity with those who signed the treaty that it may fairly be called the same tribe." *United States v. Oregon*, 43 F.3d at 1284.

f. Application of the Correct Legal Standard Shows that Stockbridge is Brotherton's Successor in Interest.

In this case, the record shows, and the District Court found, App.10a (Opinion, n.5), that Stockbridge is a federally-recognized Indian Tribe. *See* App.279a (67 Fed. Reg. 46328 (July 12, 2002)), 74 Fed. Reg. 40218, 40221 (2009). It has entered into numerous Congressionally ratified treaties and

agreements with the United States dating back to 1792.[8]

In 1971, the Indian Claims Commission found that:

> the Stockbridge Munsee Community . . . is a tribe of American Indians having a tribal organization recognized by the Secretary of the Interior as having authority to represent the tribe. The Stockbridge Indians, a tribe of the Mahican Confederacy, and the Munsee Tribe, a division of the Delawares, no longer have separate tribal organizations. The said tribes have been amalgamated for many years and are now known as the Stockbridge Munsee Tribe, or the Stockbridge Munsee Community. The Stockbridge Munsee Community is the successor in interest to the Stockbridge Tribe and the Munsee Tribe.

The Stockbridge Munsee Community v. United States, 25 Ind. Cl. Comm. 281, 293 (April 28, 1971), at http://digital.library.okstate.edu/icc/v25/iccv25p293.pdf.[9]

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[8]*See, e.g.*, Agreement of April 23, 1792, reprinted in 2 Indian Affairs: Laws and Treaties 1027 (Charles J. Kappler ed., 1904); Treaty of November 11, 1794, 7 Stat. 44 (Canandaigua) (unnamed signatory); Treaty of December 2, 1794, 7 Stat. 47; Treaty of October 27, 1832, 7 Stat. 405; Treaty of Sept. 3, 1839, 7 Stat. 580; Treaty of Nov. 24, 1848, 9 Stat.955; Treaty of February 5, 1856, 11 Stat. 663; Act of February 6, 1871, 16 Stat. 404, Ch. 38, Pt. II at 128 ; Act of June 21, 1906, 34 Stat. 382; Act of June 7, 1924, 43 Stat. 644; Executive Order of March 19, 1937, 2 Exec. & Dept'l Orders, Pt. IV at 1402 (1937); Secretarial Proclamation of Dec. 7, 1948, 13 Fed. Reg. 7718 (1948).

[9]It is unlikely that the Indian Claims Commission's reference to "the Munsee Tribe, a division of the Delawares," was intended to refer to the Brotherton Indians who merged with Stockbridge in 1802. The record indicates, and the District Court found, that the Brotherton reservation was established for the Unami Delawares at Cranbury and Crosswicks. App.35a (Opinion). The reference more likely refers to "a group of Munsees which had previously gone to Canada [who] joined the Stockbridge Indians in Wisconsin in 1837." App.22a (Opinion). Nonetheless, it is noteworthy that in the Indian Claims Commission proceedings, Stockbridge-Munsee's status as successor to two predecessor tribes was not

As a federally recognized Indian tribe, Stockbridge's continuous political existence cannot be doubted. Senior Judge William C. Canby of the Ninth Circuit states in his respected treatise on federal Indian law that "[u]nequivocal federal recognition may serve to establish tribal status for every purpose . . . ." William C. Canby, Jr., *American Indian Law in a Nutshell* 4 (3rd ed. 1998). It is unnecessary for Stockbridge to meet the additional requirement of showing that some defining characteristic of the Brotherton Tribe persisted in an evolving tribal community. That test was fashioned to determine the successorship status of unrecognized tribes that had not maintained–and perhaps had never had–an organized tribal structure. *See Washington IV*, 394 F.3d at 1158 & n.8.

In formulating a successorship standard for this case, this Circuit should be mindful of the Ninth Circuit's teaching that the successor-in-interest determination is a fact-driven, case-specific inquiry, *see* discussion *supra* at 44. That principle counsels against relying too heavily, as the District Court here did, on any particular successorship test adopted in one or another of the Stevens Treaty cases where the factual and historical circumstances have little in common with those at

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challenged by the United States and was accepted by the Commission, presumably because, like the original plaintiff tribes in *United States v. Washington*, Stockbridge-Munsee has been a continuously federally recognized Indian tribe.

issue here.

Instead, what must inform the inquiry here are those broader, underlying principles of tribal succession developed by the Ninth Circuit that have universal application in federal Indian law, *i.e.*, that "a group claiming treaty rights [must have] maintained sufficient political continuity with those who signed the treaty that it may fairly be called the same tribe," *United States v. Oregon*, 43 F.3d at 1284, and that federal recognition is determinative of maintaining an organized tribal structure, *Washington IV* 394 F.3d at 1161.[10]

That Stockbridge has maintained such political continuity with Brotherton that it may fairly be called the same tribe is buttressed both by the contractual nature of the merger and its formality. The tribes' merger is unusually well

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[10]The facts in *Washington IV*, like those of the other Stevens Treaty cases, have little in common with the facts in this case. Indeed, the facts here make a more compelling argument for application of the *Washington IV* rule than that case's own facts do. Here, Stockbridge has been continuously federally recognized since at least 1792; there, the Samish became a federal tribe as a result of the federal acknowledgment administrative process in 1996, and had earlier been ruled ineligible to exercise treaty rights in *Washington III* because it had not maintained a tribal organization.

Moreover, it is likely that the Ninth Circuit again will have occasion to rule on whether the Samish may exercise treaty rights. On remand, the District Court held, in apparent defiance of the Court of Appeal's 2005 ruling, that the extraordinary circumstance of the Samish's 1996 recognition could not overcome the other Rule 60(b) factors of timeliness and equitable considerations and respect for the finality of judgments. *United States v. Washington*, __ F.Supp.2d __, 2008 WL 6742751 at *23 (W.D.Wash. Sept. 2, 2008) (appeal pending).

documented in the written accounts of individuals, the official reports of state agents and legislative committees and the legislative enactments of two states. *See* discussion *supra* at 21-28. The merger was even referenced in a contemporaneous Supreme Court opinion authored by Chief Justice John Marshall. These sources document with certainty that it was the intent of the parties to the merger agreement that the two tribes become one. The parties bargained for and exchanged valuable consideration to ensure that result, agreeing to a complete merger of their memberships and governments by which the Brotherton Tribe purposely relinquished its independent political existence and became an integral part of Stockbridge. While the court below recounted almost all these facts and circumstances in accurate detail, App.23a-30a, it failed to appreciate their significance and accorded them no weight in its selection of a legal standard.

Finally, that Stockbridge is the successor to Brotherton is fully consistent with the general principles of the law of state succession. In international law, which traces many of its fundamental precepts to the doctrines developed by Spain and other European powers as they developed rules for the acquisition of wealth and territory from the original inhabitants of the New World in the Fifteenth and Sixteenth Centuries, *see generally* FELIX S.COHEN, HANDBOOK OF FEDERAL INDIAN LAW §§ 1.01, 1.02[1], [2] (Nell Jessup Newton ed., 2005), it is elemental

that succession exists where one state entity completely merges with another. *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States § 208 cmt.b (1987) (defining a successor state as, *inter alia*, a state "that wholly absorbs another state . . . ."); Lassa Oppenheim, 1 International Law 157 (H. Lauderpacht ed., 8th ed. 1955) (succession exists when "one (i)nternational (p)erson is completely absorbed by another, either through subjugation or through voluntary merger"), *quoted in* Mark Thompson, *Finders Weepers Losers Keepers: United States of America v. Steinmetz, The Doctrine of State Succession, Maritime Finds, and the Bell of the C.S.S. Alabama*, 28 Conn. L. Rev. 479, 483 & n.8 (1996); *see also United States v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992) (following end of Civil War, United States succeeded to property rights of the Confederacy, specifically the ship's bell of the raider C.S.S. Alabama).

By any rational standard, Stockbridge is the continuation of Brotherton. The District Court ignored the facts it so meticulously addressed and applied the wrong legal test. It erroneously held that merger, together with Stockbridge's federal recognition, was insufficient to establish Stockbridge's successor-in-interest status. This Court should give weight to the facts as found by the District Court, adopt the *Washington IV* standard as the legal standard applicable here and rule that Stockbridge is Brotherton's successor in interest.

3. As Brotherton's Successor in Interest, Stockbridge Has Claimed a Nonfrivolous Interest in the Subject Matter of the Litigation and the District Court's Holding that Stockbridge Lacks an Interest in this Litigation Is in Error.

Rule 19 of the Federal Rules of Civil Procedure in relevant part currently provides:[11]

> **Required Joinder of Parties**
> **(a) Persons Required to Be Joined if Feasible.**
> **(1)** ***Required Party***. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
> **(A)** in that person's absence, the court cannot accord complete relief among existing parties; or
> **(B)** that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> **(i)** as a practical matter impair or impede the person's ability to protect the interest; or
> **(ii)** leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.
> . . . .
>
> **(b) When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
> **(1)** the extent to which a judgment rendered in the person's absence

[11]The language of Rule 19 has been amended since the District Court dismissed this action. The changes were stylistic only. *Republic of the Philippines v. Pimentel*, __ U.S. __, 128 S.Ct. 2180, 2184 (2008). The two changes relevant here are that the word "required" replaced the word "necessary" in subparagraph (a) and the word "indispensable" is deleted from subsection (b).

might prejudice that person or the existing parties;

> **(2)** the extent to which any prejudice could be lessened or avoided by:
>
> > **(A)** protective provisions in the judgment;
> >
> > **(B)** shaping the relief; or
> >
> > **(C)** other measures;
>
> **(3)** whether a judgment rendered in the person's absence would be adequate; and
>
> **(4)** whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19.

The court below addressed only the requirement of Rule 19(a)(1)(B) that a person "claim[ ] an interest relating to the subject of the action."[12] Generally, except for allegations frivolous on their face, status as a required party under Rule 19(a) cannot be resolved by reference to the ultimate merits of the interest which the absent party claims. "Rule 19, by its plain language, does not require the absent party to actually *possess* an interest; it only requires the movant to show that the absent party '*claims an interest* relating to the subject of the action.' " *Citizen*

[12]Although it ruled that Stockbridge "lacks an interest in this litigation and is neither a necessary nor an indispensable party," App.46a, the District Court did not conduct a Rule 19(b) analysis whether to proceed with the litigation when a required party cannot be joined. Because a court does not reach Rule 19(b) unless it finds that the requirements of Rule 19(a) have been satisfied, *see Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir. 2001) (describing the three-step process under Rule 19), the District Court's holding must be understood to mean that because it found that Stockbridge is not a required ("necessary") party under Rule 19(a), it could not possibly be "indispensable" under Rule 19(b).

Potawatomi Nation, 248 F.3d at 998 (*quoting Davis v. United States*, 192 F.3d 951, 957 (10th Cir.1999)) (emphasis in original); *see Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992); *Keeweenaw Bay Indian Community v. State*, 11 F3d 1341, 1347 (6th Cir. 1993); *Turley v. Eddy*, 70 Fed.Appx. 934, 936 2003 WL 21675511 at *1 (9th Cir. July 16, 2003) (App.96a, Ex. A to Declaration).

So while it is generally improper for a court to address the merits in order to decide a Rule 19 motion,[13] in this case the elements of a *prima facie* Nonintercourse Act case are inextricably tied to whether the claim of an interest

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[13]In this case, a determination of the successor-in-interest issue also addresses the merits of a claim under the Nonintercourse Act, 25 U.S.C. § 177. Two of the four elements of a *prima facie* Nonintercourse Act claim are showing that the land claimed is the tribal land of the claimant tribe and that the trust relationship between that tribe and the United States that is established by the Act's coverage has never been terminated.

> To establish a *prima facie* case for a violation of the Nonintercourse Act, the Tribe must prove four elements: (1) that it is or represents an Indian tribe within the meaning of the Nonintercourse Act; (2) that the land in issue is covered by the Nonintercourse Act as tribal land; (3) that the United States has never approved or consented to the alienation of the tribal land; and (4) that the trust relationship between the United States and the tribe, established by coverage of the Nonintercourse Act, has never been terminated or abandoned.

Catawba Indian Tribe v. South Carolina, 718 F.2d 1291, 1295 (4th Cir.1983), *aff'd*, 740 F.2d 305 (4th Cir.1984) (en banc), *rev'd on other grounds*, 476 U.S. 498 (1986); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994).

relating to the subject of the action is frivolous. If a tribe cannot establish a *prima facie* claim under the Indian Nonintercourse Act, then it does not claim an interest under rule 19(a)(1)(B) because its claim is frivolous. It therefore was proper for the District Court to first address the successor-in-interest question. *See Republic of Philippines v. Pimentel*, 128 S.Ct. at 2191(where absent party asserts frivolous claim, "a court may have leeway under . . . Rule 19(a)(1) . . . to disregard the frivolous claim" and, because "Rule 19 cannot be applied in a vacuum, . . . it may require some preliminary assessment of the merits of certain claims."). Although the District Court did not couch its approach in terms of a Rule 19(a)(1)(B) analysis, it necessarily conducted its Stockbridge successor-in-interest analysis in order to determine whether Stockbridge claimed a nonfrivolous interest in the subject of the action.

Because the holding that Stockbridge was not Brotherton's successor must be reversed, it follows that Stockbridge has claimed a nonfrivolous interest in the action under Rule 19(a). Consequently, the District Court's holding that Stockbridge "lacks an interest in this litigation and is neither a necessary nor an indispensable party" must also be reversed.

B. After Reversing On Stockbridge's Successorship and Its Failure to Claim an Interest Under Rule 19(a)(1)(B), This Court Should Affirm the Dismissal of Unalachtigo's Claims, Albeit Based On Different Facts.

Upon granting Stockbridge's above-requested relief, it might be argued that this Court should: first, vacate the ruling on the merits of Unalachtigo's claims because the District Court would not have reached them had it adopted the correct legal standard to resolve Stockbridge's motion; and, second, remand for analysis of the other Rule 19 factors to resolve Stockbridge's motion to dismiss. But under the present circumstances, it is clear that remanding the case for further proceedings would result in a pointless expenditure of both scarce judicial resources and the parties' time and money.

Stockbridge believes that this Court can affirm the District Court's dismissal of Unalachtigo's claim without running afoul of the rule that Rule 19 motions, especially where sovereign immunity is asserted, must be addressed first. *See Republic of Philippines v. Pimentel*, 128 S.Ct. at 2191 ("A case may not proceed when a required-entity sovereign is not amenable to suit."). Because the District Court erred in ruling that Stockbridge lacked an interest in the case, it was improper for it to engage in fact finding on the merits of Unalachtigo's claim. But it was not improper, as we have shown, to preliminarily address the facts underlying Stockbridge's claimed successor's interest to assess whether it is

frivolous. Thus, if those facts and Stockbridge's status as Brotherton's political successor alone foreclose any possible claim by any other tribe, including Unalachtigo, that it is also a successor in interest to Brotherton, this Court may properly conclude as a matter of law that Unalachtigo lacks standing and affirm the District Court's dismissal of its claim.

The record shows, and the District Court found, that the 1758 Brotherton reservation was established for particular bands of New Jersey Indians together with other New Jersey Indians who may have joined them there and that they became the Brotherton Tribe. App.32a-35a. The record also shows that, until it merged with Stockbridge, Brotherton was the only tribe with rights in the reservation. *Id.* The Brotherton Tribe later moved to New York, merged its government with Stockbridge, and thereby ceased to exist as an independent political entity. App.23a-26a.

Because a Nonintercourse Act claim must be asserted by a tribe, and it must be the tribe whose right to the land is protected by the Act, *see* note 13 *supra*, *see also* App.42a-43a (Opinion), Stockbridge's status as Brotherton's political successor would seem to foreclose any claim by another tribe that it is also a successor to Brotherton. However, some individual Brotherton Indians–less than one-fourth of the Tribe–remained in New Jersey. App. 25a, 29a (Opinion). Might

Unalachtigo establish that it, too, is a successor to Brotherton if, on remand, it amended its complaint and could show that it satisfied the *Washington III* standard for unrecognized tribal successorship, *i.e*., that it had maintained a tribal organization and that its ancestors were those Brotherton Indians who remained behind in New Jersey?

The answer is no. In *United States v. Oregon*, 29 F.3d at 483, the Ninth Circuit considered whether six tribes that traced their lineage to tribes signatory to two Stevens treaties could exercise the treaty rights of those ancestral tribes. The treaties envisioned the creation of successor tribes composed of all the people represented by the signatories to the treaties. These particular treaty tribes did not move to the designated reservations of the successor tribes, but carried out a nomadic existence for twenty-five years and then signed separate treaties with the United States. The tribal governments of the successor tribes on the designated reservations had exercised the treaty rights of all the signatory tribes and were the entities in which the treaty rights were vested, regardless of whether the tribe that signed the treaty had moved to that reservation.

The Court of Appeals held that the signatory tribes could not exercise the treaty rights of their ancestral tribes because, "by deliberately separating from the [successor tribes], these tribes failed to maintain political cohesion with the tribal

entity in which the treaty rights are vested." *Id.* at 486.

The same principle applies here. On remand, even if Unalachtigo could demonstrate maintenance of an organized tribal structure and could trace its ancestry to those individual Brotherton Indians who remained in New Jersey after their Tribe merged with Stockbridge, application of the correct legal standard shows that the facts as found on Stockbridge's Rule 19 motion preclude a showing that Unalachtigo maintained political cohesion with Brotherton.

Thus, Stockbridge's status as Brotherton's political successor in interest forecloses any possibility that, on remand, Unalachtigo could establish that it is also a Brotherton successor.

The District Court's ultimate finding that Unalachtigo is not a successor in interest to the Brotherton Tribe is correct, albeit for different reasons. This Court should therefore uphold the judgment below that Unalachtigo lacks standing to assert Brotherton's rights and affirm the action's dismissal. Alternatively, if this Court determines that it may not properly address the merits of Unalachtigo's claim based solely on the "Stockbridge facts," it should vacate the judgment insofar as it relates to Unalachtigo and remand for resolution of Stockbridge's Rule 19 motion.

CONCLUSION

It is difficult to imagine a stronger case for political successorship than the one documented here. Brotherton's merger of its membership and government with Stockbridge, confirmed twice by formal written agreement and the exchange of valuable consideration in 1802 and again in 1823, was authorized and facilitated by the legislative enactments of two states and documented in the contemporaneous writings of state officials, missionaries and the Indians themselves. Chief Justice John Marshall even referenced it in an 1812 Supreme Court opinion, one of the first dealing with the nature of recognized Indian title.

The District Court agreed that the Tribes had merged, but applied an erroneous legal standard to conclude that Stockbridge is not Brotherton's successor in interest. Instead of applying the Ninth Circuit's test applicable to federally recognized tribes' successorship claims, it applied that Court's test for determining the successorship status of non-federally recognized tribes.

This Court should apply the Ninth Circuit's successorship test for federally recognized tribes and reverse the District Court's ruling that Stockbridge is not a successor to Brotherton and it therefore has not claimed an interest in this action under Rule 19(a). This Court should then, based on Stockbridge's status as Brotherton's sole successor in interest, affirm the District Court's dismissal of the

action based on Unalachtigo's lack of standing or, in the alternative, vacate the judgment as it relates to Unalachtigo and remand for resolution of Stockbridge's Rule 19 motion.

Respectfully submitted

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CERTIFICATE OF BAR ADMISSION

In accordance with 3rd Circuit LAR 46.1(e), Don B. Miller, Esq., certifies that he is a member of the bar of this Court, admitted in July 2008.

By: /s/ Don B. Miller_____
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CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that the within Defendant-Appellant's Brief contains 13,678 words, as calculated by Microsoft Word 2000 in 14 pt Times New Roman font.

/s/ Don B. Miller_____
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AFFIDAVIT OF SERVICE

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

I, Frederick W. Wright, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Don B. Miller, Esq., Attorney for Defendant-Appellant Stockbridge-Munsee Community, that on this 3rd day of November 2009, I deposited two copies of the Brief and Appendix Volumes I and II, with the United States Post Office priority mail to the following:

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