UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CAYUGA INDIAN NATION OF NEW YORK,

Plaintiff,

-vs.-

SENECA COUNTY, NEW YORK,

Defendant.

Civil Action No.:
11-CV-6004 (CJS)

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER UNDER THE ALL-WRITS ACT

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PRELIMINARY STATEMENT

Plaintiff Cayuga Indian Nation of New York, a purported successor entity to the historic Cayuga Indians that once resided in Upstate New York, ("CIN"), moves this Court for a preliminary injunction and a temporary restraining order to prevent Defendant Seneca County, New York ("Seneca County") from foreclosing on real property that CIN purchased relatively recently on the open market. CIN cannot legitimately dispute that it owes real property taxes on those properties given the unequivocal decision of the United States Supreme Court in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). *See Cayuga Indian Nation of N.Y. v Gould*, 14 N.Y.3d 614, 642 (2010) ("*City of Sherrill* certainly would preclude the Cayuga Nation from attempting to assert sovereign power over its convenience store properties for the purpose of avoiding real property taxes."). Instead, CIN bases its argument for a preliminary injunction and temporary restraining order on a purported sovereign immunity from suit and the Indian Trade and Intercourse Act ("ITIA"), citing without explanation the Second Circuit's decision in *Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 459 (2010) ("*Madison County*"), which addressed sovereign immunity but not the ITIA. After the Oneida Indian Nation ("OIN") withdrew its claim to sovereign immunity, the United States Supreme Court recently vacated *Madison County v. Oneida Indian Nation of New York,* 131 S. Ct. 704, 562 U.S. __ (2011). Seneca County is mindful of *Madison County* but, for the reasons set forth herein, that decision is no longer controlling and, even if it were, it would not apply to prevent foreclosure of CIN-owned property.

First, *Madison County* has no precedential value whatsoever under well-settled case law because it has been vacated by the United States Supreme Court. To the extent the district court decision in *Madison County* stands, that decision is not binding on this Court because principles of *stare decisis* do not require a district court to give any deference to decisions of another

district judge. Instead, this Court certainly may and should exercise its independent judgment to deny CIN's challenge to the foreclosure proceedings. The district court's decision in *Madison County* has already been rejected by the United States District Court for the Eastern District of New York and by other courts in sister states because it conflicts with, *inter alia*, the Supreme Court's ruling in *Sherrill* that (i) Indian tribes are lawfully subject to real property taxes on recently purchased properties even if those properties lie within the borders of an ancient reservation, and (ii) tax immunity may not be used as a defense to eviction following foreclosure.

Second, this Court should not enjoin or restrain the foreclosure proceedings at issue because binding case law holds that a claim to sovereign immunity bars only lawsuits against the tribe. Seneca County has no intention to file any suit against CIN. Rather, it has filed an *in rem* proceeding against the properties at issue. In *Madison County*, the Second Circuit remained silent on this issue, and the district court's holding relied on a case that barred *in personam* actions to recoup money damages. Lost in all of this is that the United States Supreme Court has already ruled that a county's efforts to impose and collect real property taxes on tribe-owned properties does not infringe on tribal self-government or sovereign immunity because such jurisdiction is *in rem* rather than *in personam*. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 264-65 (1992) (confirming Indian tribe's real property tax obligation after county foreclosed on the tribe's properties). Thus, an *in rem* proceeding against the properties should be allowed, notwithstanding CIN's purported claim to sovereign immunity from suit.

Third, this Court should not enjoin or restrain the foreclosure proceedings at issue because CIN's properties are located outside any sovereign domain. It is well settled that a sovereign entity such as a state or tribe is not entitled to immunity from suit with respect to land or property it owns outside its sovereign territory. *See, e.g., Georgia v. Chattanooga*, 264 U.S.

472, 479-80 (1924). Unlike the Oneidas which at least purportedly have maintained a minimal presence and interest in land in Madison County, the Cayugas completely abandoned their lands in Seneca County centuries ago. CIN has only recently begun to purchase properties in Seneca County on the open market. *Sherrill* undisputedly confirms that these properties are not sovereign Indian County lands. As such, CIN's claim to sovereign immunity with respect to these properties fails as a matter of law.

Fourth, even if *Madison County* somehow remains useful as precedent, it does not bar foreclosure against CIN's fee simple properties because that decision holds that sovereign immunity is inapplicable where the Indian tribe has waived it. Unlike OIN in *Madison County* which, up until the Supreme Court granted *certiorari*, argued that it owed no real property taxes whatsoever, CIN here has made payments on certain properties. Moreover, it has expressly acknowledged its real property tax obligations to the New York Court of Appeals in *Gould*, 14 N.Y.3d at 642, n.11; and has even touted that it is in compliance with those obligations. Indeed, CIN has raised no dispute in its original complaint in this action or in its motion for a preliminary injunction and temporary restraining order that taxes are lawfully due on the properties at issue, and has added only a meek and legally insufficient attempt in its amended complaint to dispute this point. Regardless, CIN's prior representation to the New York Court of Appeals in *Gould* and its acknowledgment of its real property tax obligations waives any immunity with respect to its concurrent failure to meet those obligations. CIN should not be permitted to make representations in court to avoid liability for cigarette sales and excise taxes and later disavow those same representations to avoid liability for real property taxes. Thus, CIN has waived any claim to sovereign immunity or must be estopped from asserting any such claim here.

Finally, CIN's reliance on the ITIA does not support the relief it seeks. The Second Circuit's vacated opinion does not address ITIA arguments, leaving the district court's

misapplication of the ITIA as the only decision which has found that Act applicable to an Indian tribe's recently purchased lands. This Court should reject the district court decision, as other courts have done, because it is contrary to well settled case law. Alternatively, this Court should find that the Act does not apply to the facts of this case. The ITIA was designed to protect Indians from losing aboriginal title to sovereign lands through sales to non-Indians. The Act has no application to non-sovereign properties that an Indian tribe or group purchased on the open market from non-Indians, such as CIN did here. Case law from the United States Supreme Court and the New York Court of Appeals holds that CIN's properties are not sovereign lands, rendering the ITIA inapplicable to the foreclosure proceedings at issue. Further, the historical record is clear that CIN's properties are not even within the borders of any purported ancient federal reservation. Thus, CIN's reliance on the ITIA fails as a matter of law.

BACKGROUND

On February 25, 1789, following the Revolutionary War but before the United States government took effect under the Constitution and before Congress passed any ITIA, New York State exercised it authority and treated with the original Cayuga tribe whereby the Cayugas ceded all of their lands to New York (the "1789 Treaty"). *See Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 268-269 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006) (dismissing CIN's possessory land claim); *see also* 1789 Treaty. The State in return set aside a 64,015-acre state reservation in central New York for their use. *Id.* That historic tract of land sits at the north end of Cayuga Lake and extends down the lake's eastern and western shores into Cayuga County and Seneca County. *Id.* In that same treaty, New York also reserved for itself the exclusive right to purchase back the land use rights it had reserved to the Cayugas. *See* 1789 Treaty. Under the Treaty of Canandaigua in 1794, the United States government sought peace with the Iroquois and, as part of that commitment, acknowledged the existence of that reservation created by New

York. *See Pataki*, 413 F.3d at 268-69. Beyond acknowledging the Treaty of 1789, the Treaty of Canandaigua did not create an independent federal reservation. *See* Treaty of Canandaigua.

The historical record is clear that at the time of New York's treaty with them in 1789, the Cayugas resided primarily with the Senecas near Buffalo, New York and in Canada and had no interest in retaining the state-created reservation and its corresponding grant of rights to use that land. *See Cayuga Indian Nation v. Pataki*, 165 F. Supp.2d 266, 309-10 (N.D.N.Y. 2001). Between 1794 and 1807, after several illegal attempts to sell their land rights to third parties, the Cayugas sold to New York all of their remaining rights and abandoned the land. *See Pataki*, 413 F.3d at 269; *see also* July 27, 1795 Treaty between the Cayugas and New York State and May 30, 1807 Treaty between the Cayugas and New York State. For the next two centuries, the land was owned and governed by non-Indians and subject to local taxation. *See Pataki*, 413 F.3d at 277 ("[G]enerations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation . . . ."). Indeed, the Second Circuit has found that CIN's claims with respect to land the Cayugas abandoned centuries ago in Cayuga and Seneca Counties present the same problem – *i.e.*, disruption of long-standing local governance – that the OIN's claims presented in *Sherrill*. *See Pataki*, 413 F.3d at 277 ("[W]e conclude that the present case must be dismissed because the same considerations that doomed the Oneidas' claim in *Sherrill* apply with equal force here.").

Recently, CIN, a purported successor entity to the historic Cayuga Indians that once resided in Upstate New York, began purchasing properties on the open market in Seneca and Cayuga Counties. *Gould*, 14 N.Y.3d at 630. After individuals on CIN-owned property began selling tax free cigarettes to the public at large, sheriffs and district attorneys in Seneca and Cayuga Counties seized cigarettes pursuant to a search warrant related to ongoing violations of New York's Tax Law. *Id.* at 630-31. CIN thereafter filed a lawsuit against the sheriffs and

district attorneys challenging their efforts to enforce the Tax Law. *Id.* The lawsuit progressed to the New York Court of Appeals which found that a portion of the Tax Law with respect to cigarette sales was not in effect. *Id.* at 653-54. The Court noted that *Sherrill* precluded CIN from attempting to assert sovereign power over their properties for the purpose of avoiding real property taxes. *Id.* at 642-43. As part of its arguments to the New York Court of Appeals, CIN acknowledged its real property tax obligations with respect to the properties at issue in that case and represented that it was in compliance with those obligations. *Id.* at 643, n.11.

CIN has not complied with its real property tax obligations and is in default with respect to the properties that are at issue in this proceeding. *See* CIN's Amended Complaint, Exhibit A. In accordance with its standard tax foreclosure procedures, Seneca County has advised CIN that it has filed and will move forward with foreclosure proceedings if CIN does not pay the real property taxes it owes to Seneca County. *Id.* Specifically, as Seneca County advised CIN by virtue of a tax enforcement notification, it has commenced "a proceeding to foreclose on real property . . . ." *Id.* The proceeding itself is captioned "In the matter of the Foreclosure of Tax Liens by Proceeding *In Rem* pursuant to Article Eleven of the Real Property Tax Law by the County of Seneca." *Id.* Further, the notification advises the recipient: "Nature of proceeding: Such proceeding is brought against the real property only and is only to foreclose the tax liens described in this petition. No personal judgment will be entered herein for such taxes or other legal charges or any part thereof." *Id.*

CIN has filed the instant lawsuit to enjoin Seneca County from foreclosing on CIN-owned properties. *See* CIN's Amended Complaint, ¶ 1. In the instant motion, CIN claims that a foreclosure action against the properties somehow violates sovereign immunity and the ITIA, citing the Second Circuit's decision in *Madison County* which has recently been vacated by the United States Supreme Court. 131 S. Ct. 704, 562 U.S. __. For the reasons detailed herein, it is

respectfully submitted that CIN's reliance on *Madison County* fails. Sovereign immunity and the ITIA are not available to CIN to challenge the tax foreclosure proceedings.

APPLICABLE STANDARDS

In support of a preliminary injunction or temporary restraining order in a typical case, the moving party must establish a clear showing of: irreparable harm; and either likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation; and a balance of hardships tipping decidedly in favor of the movant. *Barnes v. Alves*, 01-CV-6559-CJS, 2010 U.S. Dist. LEXIS 116677, *4-*6 (W.D.N.Y. Nov. 2, 2010) (Siragusa, J.). If a plaintiff fails to meet its burden, courts deny the relief. *Id.*

To the extent a plaintiff seeks an injunction based on the All-Writs Act, the United States Supreme Court has directed that they are to be issued "sparingly and only in the most critical and exigent circumstances." *Wis. Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1306 (2004). All-Writs Act injunctions are only properly issued where a plaintiff shows it is necessary or appropriate to aid the court's jurisdiction, and the legal rights at issue are "indisputably clear." *Id.*

Under these guidelines, CIN cannot establish that it is entitled to a preliminary injunction or temporary restraining order. Among other factors that prevent such relief, CIN cannot maintain that it has a likelihood of success on the merits.

ARGUMENT

POINT I

SOVEREIGN IMMUNITY DOES NOT BAR THE FORECLOSURE PROCEEDINGS AT ISSUE BECAUSE *MADISON COUNTY* HAS NO PRECEDENTIAL VALUE AND ITS VACATED REASONING HAS BEEN REJECTED BY OTHER COURTS AS CONTRARY TO LOGIC AND LAW.

CIN does not explain in any detail its belief that the doctrine of sovereign immunity or the ITIA bars foreclosure of its fee simple properties, citing only the Second Circuit's decision in

Madison County without any explanation. In *Madison County*, the Second Circuit upheld the district court's decision that sovereign immunity protected OIN from foreclosure, but the court did not address ITIA arguments raised at the district court and briefed on appeal.

Even if *Madison County* were applicable to the facts presented in this case, which it is not, the decision has been vacated by the United States Supreme Court. As such, it has no precedential value whatsoever under well-settled case law. *County of Los Angeles v. Davis*, 440 U.S. 625, 634 (1979) ("Of necessity our decision vacating the judgment of the [United States] Court of Appeals deprives that court's opinion of precedential effect . . . ."); *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975) (same); *Russman v. Bd. of Educ.*, 260 F.3d 114, 122 (2d Cir. 2001) ("When imposed by the Supreme Court, vacatur eliminates an appellate precedent that would otherwise control decision on a contested question throughout the circuit."); *see also Guardians Assoc. of New York City Police Dept., Inc. v. Civil Service Comm'n of the City of New York*, 633 F.2d 232, 265 (2d Cir. 1980) ("In discussing the frequently cited court of appeals opinion in *Davis* we express no view concerning its precedential weight, if any, within the Ninth Circuit, in view of the Supreme Court's subsequent vacatur of that decision on grounds of mootness . . . .").[1]

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[1] Although the Second Circuit's decision in *Madison County* is no longer binding precedent, it should be noted that secondary commentators, even by pro-Indian groups, overwhelming believe that if OIN did not intentionally deprive the Supreme Court of the opportunity to rule, it would have reversed the Second Circuit and found sovereign immunity inapplicable to foreclosure proceedings. *See, e.g., Precision Lawyering. For Tribes and Businesses*, available at http://galandabroadman.wordpress.com/2011/01/11/oneida-why-an-in-rem-exception-would-have-been-wrong/ (last visited February 3, 2011) ("The Oneida Indian Nation seems to have recognized what was at risk, and wisely mooted the dispute before the Roberts Court could rule on it."); *Native American Rights Fund*, available at http://narfnews.blogspot.com/2011_01_01_archive.html (last visited February 3, 2011) ("[T]his case was viewed as a prime opportunity for the Court to . . . carve out a significant exception to the doctrine of tribal sovereign immunity. At least for now, that result has been averted."); *Montana Wyoming Tribal Leaders Council*, available at http://www.mtwytlc.org/component/content/article/113-indian-organizations/763-supreme-court-vacates-and-remands-madison-county-v-oneida-nation.html (last visited February 3, 2011) ("The remand order is a victory for . . . all of Indian Country. From the time when the [Supreme] Court granted review, this case posed a significant risk that they would carve out a significant exception to the doctrine of tribal sovereign immunity. That result has been averted."); *Foreclosureblues*, available at http://foreclosureblues.wordpress.com/2011/01/13/oneidas-dodge-potentially-adverse-supreme-court-ruling-in-re-tax-dodging-case-11th-hour-waiver-of-lawsuit-immunity-moots-

To the extent the district court's decision in *Madison County* stands, that decision is not binding on this Court because principles of *stare decisis* do not require a district court to give any deference to decisions of another district judge. *ATSI Communs., Inc. v. Shaar Fund, Ltd.*, 547 F.3d 109, 112 (2d Cir. 2008) ("The doctrine of *stare decisis* does not compel one district court judge to follow the decision of another . . .Where a second judge believes that a different result may obtain, independent analysis is appropriate."); *see generally* 21 C.J.S. Courts § 212 (2007) ("A single federal district court decision has little precedential effect, and is not binding on . . . other district judges [even] in the same district.") (footnotes omitted).

Indeed, the district court's opinion in *Madison County* has already been rejected by the United States District Court for the Eastern District of New York and by courts in sister states. These decisions correctly find that the district court's decision in *Madison County* has misconstrued the doctrine of sovereign immunity and the ITIA to prevent foreclosure against properties on which an Indian tribe is lawfully required to pay real property taxes. The Eastern District of New York, for example, rejected the district court's decision and held:

> To the extent that the United States District Court for the Northern District of New York [in *Madison County*] has concluded otherwise, in finding that the Oneida Nation is immune from county real property tax enforcement proceedings regarding the lands at issue in Sherrill, *the Court disagrees with that conclusion* . . . .

New York v. Shinnecock Indian Nation, 523 F. Supp. 2d 185, 298 n.73 (E.D.N.Y. 2007) (emphasis added).

The Eastern District of Wisconsin also rejected the district court's decision and held:

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high-courts-role-in-case/ (last visited February 3, 2011) ("Oneidas Dodge Potentially Adverse Supreme Court Ruling In R/E Tax-Dodging Case; 11th Hour Waiver Of Lawsuit Immunity Moots High Court's Role In Case"); *Indianz.Com*, a product of the economic development corporation of the Winnebago Tribe of Nebraska and a Native American-owned media firm, available at http://64.38.12.138/News/2011/000090.asp (last visited February 3, 2011) ("[T]he tribe went out of its way to avoid coming before the justices in a closely watched case.").

> I find the right of a local government to foreclose for nonpayment of taxes implicit in *Sherrill's* holding that the OIN's reacquired property is subject to *ad valorem* property taxes and therefore disagree with the [Northern District of New York in *Madison County*].

Oneida Tribe of Indians v. Vill. of Hobart, 542 F. Supp. 2d 908, 934 (E.D. Wisc. 2008).

Indeed, the district court overlooked that the Supreme Court already decided in *Sherrill* that an Indian tribe may *not* rely on immunity to prevent eviction following foreclosure. The majority in *Sherrill* wrote: "The dissent suggests that, compatibly with today's decision [that an Indian tribe's fee properties are subject to real property taxes], the Tribe may assert tax immunity defensively in the eviction proceeding initiated by Sherrill. *We disagree*." *Sherrill*, 544 U.S. at 214, n.7 (emphasis added). Based on *Sherrill*, and on the decisions which have rejected *Madison County*, and on the additional reasons set forth below, this Court should reject CIN's efforts to prevent foreclosure of its recently purchased fee simple properties when it has failed or refused to pay lawfully due real property taxes.

POINT II

SOVEREIGN IMMUNITY DOES NOT BAR THE FORECLOSURE PROCEEDINGS AT ISSUE BECAUSE SENECA COUNTY HAS NOT COMMENCED AN *IN PERSONAM* ACTION AGAINST CIN BUT RATHER AN *IN REM* PROCEEDING AGAINST THE PROPERTIES THEMSELVES.

The Supreme Court's holding in *Sherrill* that a tribe may not assert immunity as a defense to tax eviction comports with the Court's previous decision in *Yakima* – which involved foreclosure by a county after an Indian tribe failed to pay real property taxes – that real property tax issues do *not* implicate sovereign immunity because they involve *in rem* rather than *in personam* jurisdiction. 502 U.S. at 264-65. In *Yakima*, the Supreme Court held that the county may impose and collect real property taxes, specifically relying on the difference between *in rem* jurisdiction and *in personam* actions. *Id.* ("The Yakima Nation and the United States deplore what they consider the impracticable, *Moe*-condemned 'checkerboard' effect produced by

Yakima County's assertion of jurisdiction over reservation fee-patented land. But because the jurisdiction is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned; and it is not impracticable either."). The Supreme Court held that "[w]hile the *in personam* jurisdiction over reservation Indians at issue in *Moe* [*i.e.*, imposing a sales tax] would have been significantly disruptive of tribal self-government, the mere power to assess and collect a tax on certain real estate is not." *Id.* at 265.

Thus, even if CIN were entitled to sovereign immunity from an *in personam* suit, this would not prohibit an *in rem* proceeding against the properties in question. While recoupment of money may implicate sovereign immunity, *United States v. Nordic Vill. Inc.*, 503 U.S. 30 (1992) (holding that sovereign immunity of the United States was not waived with respect to bankruptcy trustee's claim against the IRS for monetary relief), courts hold that sovereign immunity is not impacted by *in rem* proceedings. *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 371 (2006) (finding that a bankruptcy court's exercise of *in rem* jurisdiction "[d]oes not implicate state sovereign immunity"); *Smale v. Noretep*, 208 P.3d 1180, 1184 (Wash. Ct. App. 2009) (holding that the trial court correctly denied tribe's motion to dismiss action seeking to quiet title claim because "exercising jurisdiction over *in rem* proceedings does not implicate sovereignty immunity."); *Coastland Corp. v. N.C. Wildlife Res.*, 517 S.E.2d 661, 134 N.C. App. 343 (N.C. App. 1999) (holding that because "[s]overeign immunity is a defense to a claim of personal jurisdiction," that principle does not apply to partition suit which is an *in rem* proceeding); *People Ex Rel. Hoagland v. Streeper*, 12 Ill.2d 204, 145 N.E.2d 625 (Ill. 1957) (court rejected State of Missouri's claim of sovereign immunity in an *in rem* action concerning property located within Illinois).

Indeed, *in rem* proceedings are against property and proceed regardless whether the property's current owner is subject to *in personam* jurisdiction. *Shaffer v. Heitner*, 433 U.S. 186,

199 (1977) (emphasis added) ("If jurisdiction is based on the court's power over property within its territory, the action is called "*in rem*" or "*quasi in rem.*" The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, *since he is not before the court.*"); *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land*, 643 N.W. 2d 685, 689 (N.D. 2002) ("A proceeding *in rem* is an action against the property itself, and *in personam* jurisdiction is not required."); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379, 386-87 (Wash. 1996) ("Because our decision is based upon *in rem* jurisdiction, we need not further consider *in personam* jurisdiction, immunity and waiver"); 20 Am. Jur. 2d Courts § 72 (2010) ("[A] decision *in rem* does not impose responsibility or liability on a person directly, but operates directly against the property in question . . . irrespective of whether the owner is subject to the jurisdiction of the court *in personam.*"); 1 Am. Jur. 2d Actions § 29 (2010) (footnotes omitted) ("[An *in rem* proceeding] is against the thing or property itself directly, and has for its object the disposition of the property, without reference to the title of individual claimants.").

In his decision in *Madison County*, Judge Hurd briefly discussed this issue, citing dicta in *United States v. Nordic Vill. Inc.*, 503 U.S. 30 (1992). That case, however, involved an attempted *in personam* action against a branch of the United States government under a specific provision of the Bankruptcy Code for money damages, not an *in rem* action involving property. The Supreme Court acknowledged that it could not apply an *in rem* exception in that case because the Bankruptcy Court below never purported to exercise *in rem* jurisdiction. *Id.* at 38 ("[T]he premise for that argument is missing here, since respondent did not invoke, and the Bankruptcy Court did not purport to exercise, *in rem* jurisdiction."). Indeed, because the case involved the attempted recoupment of money, "there was no *res* to which the court's *in rem* jurisdiction could have attached." *Id.* Following *Nordic Village*, Congress enacted legislation to

overrule that decision and abrogated any claim to sovereign immunity under the Bankruptcy Code provision at issue. *See In re Sacred Heart Hosp.*, 133 F.3d 237, 243 (3d Cir. 1998) (holding that an amendment to the Bankruptcy Code "was intended to overrule [*Nordic Village*]" and that "[t]here can be no doubt that Congress unequivocally expressed its intent to abrogate the states' [ ] immunity under the Bankruptcy Code."). Moreover, subsequent to *Nordic Village*, the Supreme Court has held that bankruptcy jurisdiction does not impact state sovereign immunity like *in personam* lawsuits because bankruptcy proceedings are predominantly *in rem*. *Katz*, 546 U.S. at 362 ("Bankruptcy jurisdiction, at its core, is *in rem* . . . [Thus,] it does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction.").

The Second Circuit's decision in *Madison County* does not address the *in rem* issue at all, *i.e.* whether a county may file a purely *in rem* foreclosure proceeding against Indian tribe-owned properties. Instead, it cites *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991), to hold that sovereign immunity bars the most efficient remedy, *i.e.* a lawsuit directly against the tribe. *Potawatomi* of course involved an *in personam* action against a sovereign tribe to enforce sales taxes owed on cigarette sales at a convenience store. It is respectfully submitted that *Potawatomi* offers no support for the proposition that tribal sovereign immunity from personal liability bars *in rem* foreclosure proceedings against real property.

The bar to *in personam* lawsuits against a tribe is surely inapplicable here because foreclosure proceedings are *in rem* proceedings against land, not *in personam* lawsuits against the landowner. *See, e.g.*, *Ontario Land Co. v. Yordy*, 212 U.S. 152, 158 (1909) ("We have repeatedly held that these tax foreclosure proceedings are *in rem*, and not against the person of the owner . . . ."); *Jo Ann Homes at Bellmore, Inc. v. Dworetz*, 25 N.Y.2d 112, 122 (1969) ("[A]n action for foreclosure is in the nature of a proceeding *in rem* to appropriate the land."); *Solomon v. New York*, 567 N.Y.S.2d 295, 296 (2d Dep't 1991) ("On February 28, 1986, the city

commenced an *in rem* tax lien foreclosure action . . . ."). Thus, the courts have explicitly recognized the difference between an *in rem* foreclosure proceeding and an *in personam* lawsuit. *See United States v. Certified Industries, Inc.*, 361 F.2d 857, 861 (2d Cir. 1966) (finding that the filing of a bond "does not fundamentally transform the *in rem* foreclosure action, in which there is a *res* under the control of the state court, into an *in personam* proceeding that can be stayed by another court").

Seneca County has no intention to file an *in personam* action against CIN. Rather, its tax foreclosure proceedings are unquestionably *in rem* proceedings against the properties at issue. As Seneca County advised CIN by virtue of a tax enforcement notification, it has commenced "a proceeding to foreclose on real property . . . ." *See* CIN's Amended Complaint, Exhibit A. The proceeding itself is captioned "In the matter of the Foreclosure of Tax Liens by Proceeding *In Rem* pursuant to Article Eleven of the Real Property Tax Law by the County of Seneca." *See id.* Further, the notification advises the recipient: "Nature of proceeding: Such proceeding is brought against the real property only and is only to foreclose the tax liens described in this petition. No personal judgment will be entered herein for such taxes or other legal charges or any part thereof." *See id.* This *in rem* proceeding against the subject properties does not implicate or offend CIN's purported claim to sovereign immunity from suit. Accordingly, unless and until Seneca County files suit against CIN, CIN's motion for a preliminary injunction and temporary restraining order is not ripe and must be denied.

POINT III

SOVEREIGN IMMUNITY DOES NOT BAR THE FORECLOSURE PROCEEDINGS AT ISSUE BECAUSE CIN HAS NOT RETAINED SOVEREIGNTY OVER ANY LANDS IN SENECA COUNTY.

Case law holds that a sovereign entity does not have immunity from suit with respect to properties it owns outside its sovereign jurisdiction. *See, e.g., Georgia v. Chattanooga*, 264 U.S.

472, 479-80 (1924) (prohibiting Georgia from asserting a defense of sovereign immunity in Tennessee's condemnation action of land that was owned by Georgia but located within Tennessee borders); *People ex rel. Hoagland v. Streeper*, 12 Ill. 2d 204, 212 (1957). As summarized by the Illinois Supreme Court:

> The sovereignty of one State does not extend into the territory of another so as to create immunity from suit or freedom from judicial interference. Land acquired by one State in another is held subject to the laws of the latter and to all the incidents of private ownership . . . As to such property, the [sovereign entity] cannot maintain its sovereign privileges or immunities.

Streeper, 12 Ill. 2d at 212.

The United States District Court for the Eastern District of New York has agreed that under the Supreme Court's decision in *Sherrill*, Indian tribes such as CIN may not assert sovereign immunity with respect to recently purchased fee simple properties because the Indian tribes do not exercise sovereignty over such lands. There, United States District Court Judge Bianco held:

> [I]t is clear from the Supreme Court's decision in *Sherrill* that a tribe can be prevented from invoking a defense of sovereign immunity where equitable doctrines preclude the tribe from asserting sovereignty over a particular parcel of land. In other words, the *Sherrill* Court held that the OIN could not invoke sovereign immunity to defend against local real property tax enforcement proceedings, including eviction proceedings. 544 U.S. at 211. Specifically, as noted *supra*, Justice Stevens argued in his dissent that tribal immunity could be raised "as a defense against a state collection proceeding." *Id.* at 225. However, the majority opinion specifically rejected that reasoning. *See id.* at 214 n.7 ("The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding against Sherrill. We disagree."); *see also id.* at 221 (Souter, J., concurring) (rejecting claim of territorial sovereign status whether affirmative or defensive). Thus, *Sherrill* allows a tribe to be sued by a state or town, such as the instant case, to enforce its laws with respect to a parcel of land if equitable principles prevent the tribe from asserting sovereignty with respect to that land. To hold otherwise would completely undermine the holding of *Sherrill* because, if defendants are immune from suit, plaintiffs here would be left utterly powerless to utilize the courts to avoid the disruptive impact that the Supreme Court clearly stated they have the equitable right to prevent.

New York v. Shinnecock Indian Nation, 523 F. Supp. 2d 185, 298 (E.D.N.Y. 2007).

Prior to the Eastern District's rejection of a tribe's claim to sovereign immunity on recently purchased land, the district court in *Madison County* reached a contrary conclusion and drew a questionable distinction between sovereignty over land and immunity from suit. That decision should be rejected because it is contrary to practical realities and well-settled precedent. Further, the facts of *Madison County* differ from those here. Specifically, the Oneidas and OIN have purported to maintain a 32-acre parcel in Madison and Oneida County since time immemorial and also purport to exercise sovereignty over that land. The Cayugas and CIN cannot make that claim. They have not remained in Seneca County, having completely abandoned the area centuries ago, and are *not* entitled to exercise sovereignty over *any* properties in Seneca County. *See Gould*, 14 N.Y.3d at 642 ("*City of Sherrill* certainly would preclude the Cayuga Nation from attempting to assert sovereign power over their convenience store properties for the purpose of avoiding real property taxes."). As such, CIN has acted outside of its sovereign domain by purchasing land in Seneca County on the open market, and it may not maintain its sovereign privileges or immunities with respect to such properties. Instead, just as Georgia (an otherwise immune sovereign) is subject to the laws of another state when it purchases properties outside of Georgia, CIN is subject to the incidents of private ownership in Seneca County, including foreclosure should it fail to pay real property taxes. Thus, CIN's request for a temporary restraining order and preliminary injunction based on sovereign immunity should be denied.

POINT IV

SOVEREIGN IMMUNITY DOES NOT BAR THE FORECLOSURE PROCEEDINGS AT ISSUE BECAUSE CIN HAS WAIVED ANY CLAIM TO SOVEREIGN IMMUNITY OR SHOULD BE ESTOPPED FROM INVOKING ANY SUCH CLAIM.

Madison County confirms the long-standing principle that a sovereign entity may waive its immunity from suit. *Madison County*, 605 F.3d at 159 (holding that foreclosure would be

allowed if the tribe waived immunity). While courts have held that a waiver should be clear, they recognize that there are no magic words or talismanic phrases required in order to find such a waiver. *See C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (finding waiver of tribal immunity based on contract language to which Indian tribe agreed); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006) ("[A]n effective limitation on tribal sovereign immunity need not use magic words."). Indeed, courts hold that a sovereign entity may waive its claim to immunity from suit by virtue of the sovereign's conduct. *See C & L Enterprises, Inc.*, 449 F.3d at 25 ("An Indian tribe's sovereign immunity may be limited by either tribal *conduct* (i.e., waiver or consent) or congressional enactment (i.e., abrogation).") (emphasis added).

Putting an issue in play through litigation constitutes conduct by which a sovereign entity may waive its immunity. *See Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 500 F.Supp.2d 1143, 1150 (E.D. Wisc. 2007) (finding that "the Tribe has expressly waived its immunity from the Village's claim for a determination in its favor on the same issue [raised by the Tribe]. To hold otherwise would be anomalous and contrary to the court's broad equitable powers."); *Wyandotte Nation v. City of Kansas*, 200 F.Supp.2d 1279, 1285 (D. Kan. 2002) (finding waiver where "the tribe's action in filing a quiet title suit necessarily places before the court the issue of whether plaintiff or defendants hold title to the land.").

Here, CIN has waived its claim to sovereign immunity with respect to its real property tax obligations by making real property tax payments to Seneca County on certain properties, by acknowledging its real property tax obligations to the New York Court of Appeals, and by representing to the Court of Appeals that it is in compliance with these obligations. *See Gould*, 14 N.Y.3d at 656, n.11 ("The Cayuga Indian Nation acknowledges its obligation to pay real property taxes and comply with local zoning and land use laws on these parcels and it is

undisputed that [CIN] has, to date, fulfilled those obligations."). Having placed its obligations and compliance squarely in play, CIN may not now disavow those obligations in order to avoid a foreclosure action if it fails to satisfy them. These undisputed facts distinguish CIN's situation here from OIN in *Madison County*. Indeed, up until OIN withdrew its claim to sovereign immunity after the United States Supreme Court granted *certiorari*, OIN vehemently argued to the Northern District of New York and to the Second Circuit that it owes any real property taxes. *See, e.g.*, OIN's Summary Judgment Brief to the Northern District of New York, 2006 U.S. Dist. Ct. Motions LEXIS 9993, at *21 (Jan. 20, 2006) (contending that "the [OIN's] lands are exempt from taxation under the plain language of both RPTL § 454 and Indian Law § 6"); OIN's Appellate Brief to the Second Circuit, 2007 WL 6432641, at *42 (March 30, 2007) (arguing at length that OIN property "is exempt from taxation under state law").

Public policy further supports finding that CIN has waived its immunity under these circumstances. A ruling in CIN's favor would effectively bless CIN's continuous scheme to pick and choose those properties on which it deigns to pay its real property taxes, leaving the county treasurer's office in the confusing and impossible position of receiving some real property tax payments, but not others – and having no recourse with respect to the properties in arrears. Either CIN owes the real property tax or it does not. In light of CIN's history of making certain payments together with its representations to the New York State Court of Appeals, CIN plainly has an obligation to pay real property taxes and has waived any right to dispute foreclosure if it fails to meet those obligations. Thus, this Court should find *Madison County* inapplicable to CIN and deny CIN's motion for a preliminary injunction and temporary restraining order.

POINT V

THE INDIAN TRADE AND INTERCOURSE ACT DOES NOT BAR THE FORECLOSURE PROCEEDINGS AT ISSUE BECAUSE IT DOES NOT APPLY TO FEE LANDS RECENTLY PURCHASED BY A TRIBE ON THE OPEN MARKET.

Without citing any supporting authority or analysis, CIN curiously seeks an injunction and temporary restraining based on the Indian Trade and Intercourse Act of 1834, § 25, 4 Stat. 733 (the "ITIA"). The Second Circuit's decision in *Madison County* is silent on this issue. This Court should reject CIN's reliance on the ITIA because there is no way to reconcile the Supreme Court's decision in *Sherrill* with any barriers to foreclosure based on the ITIA.

A) The ITIA Bars Only Alienation of Indian Country Lands.

The ITIA was meant to regulate conveyances of land originally possessed by Indian tribes and to protect them from overreaching in voluntary but one-sided land sales that would diminish aboriginal holdings. *See Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1358 (9th Cir. 1993) (Congress sought to protect Indian tribes by ensuring that in the transfer of Indian lands, the Indians were treated fairly and protected from "the greed of other races" and "artful scoundrels inclined to make a sharp bargain."). Thus, a violation of the ITIA may be found only when an Indian tribe sells aboriginal title to land. *See Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 136 (2d Cir. 2010) ("The [ITIA] merely codified the principle that a sovereign act was required to extinguish *aboriginal title* and thus that a conveyance without the sovereign's consent was void *ab initio*.") (emphasis added).

The ITIA was never intended to apply to unrestricted fee land that a tribe purchased on the open market from a non-Indian. *See Bates v. Clark*, 95 U.S. 204, 209 (1877) ("It follows from this that all the country described by the [ITIA] as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever

they lose that title . . . ."). In language directly on point to the issue before this Court, the Ninth Circuit held:

> [N]o court has held that a tribe's modern land purchases, held in fee patent status, are inalienable. Such a holding would not further the policy behind the [ITIA] of peacefully settling Indian lands and preventing Indians from disposing of those lands at unscrupulously low prices.

Lummi Indian Tribe, 5 F.3d at 1359; *see also Mashpee Tribe v. Watt*, 542 F. Supp. 797, 803 (D. Mass. 1982), *aff'd*, 707 F.2d 23 (1st Cir. 1983) (the [ITIA] does not restrict "the alienation of property acquired by Indians from non-Indians in settled sections of the country"); *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land*, 643 N.W. 2d 685, 697 (N.D. 2002) ("[L]and does not become inalienable under the [ITIA] merely because it is acquired by an Indian tribe"); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379, 387 (Wash. 1996) ("The Nation argues that when it purchased its interest in the property, that interest became subject to the [ITIA's] restriction against alienation . . . We do not agree."). Indeed, the Michigan Court of Appeals has ruled that "the [ITIA] applies only to voluntary conveyances by the tribes themselves and *not* to involuntary conveyances by the state for nonpayment of taxes." *Bay Mills Indian Cmtv. v. State of Michigan*, 626 N.W. 2d 169, 173 (Mich. Ct. App. 2001).

A ruling to the contrary would yield the absurd result an Indian tribe could purchase property on the open market from a non-Indian through normal real estate procedures – and subsequently pay no real property taxes without risk of foreclosure – but that a non-Indian would have to confirm a purchase of that same property from an Indian tribe through an Act of Congress or other federal channels.

In sum, when an Indian tribe purchases land on the open market, the ITIA has no bearing on subsequent transfers of title.

B) As Confirmed by Both Sherrill and Gould, CIN's Recently Purchased Properties Are Not Sovereign Lands.

In *Sherrill*, the United States Supreme Court drew a distinction between sovereign "Indians Country" and lands that an Indian tribe purchases on the open market. The Supreme Court flatly rejected OIN's claim to a sovereign, tax exempt reservation on the latter. The Court held that the right to be free from local taxation – *i.e.*, the right to exert sovereign dominion – was reserved only for actual and long-standing Indian reservations. Thus, OIN's parcels were subject to local taxation because under federal law any remnants of sovereignty or power arising from reservation status had long ago dissipated with the abandonment of the land:

> In this action, [OIN] seeks declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations. We now reject the unification theory of OIN and the United States and hold that "standards of federal Indian law and federal equity practice" preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.

The Supreme Court's decision in *Sherrill* was supported by public policy concerns against creating a haphazard "checkerboard" of reservations throughout a state that could otherwise be created at the behest of an Indian tribe though open market purchases of ancient land from non-Indians. The Court held that allowing OIN to purchase ancient lands at will and thereafter claim tax free status on those lands would overburden state and local governments and neighboring landowners:

> The city of Sherrill and Oneida County are today overwhelmingly populated by non-Indians. A checkerboard of alternating state and tribal jurisdiction in New York State – created unilaterally at [OIN's] behest – would seriously burde[n] the administration of state and local governments and would adversely affect landowners neighboring the tribal patches.

544 U.S. at 219-20. Thus, "[t]he relief [Oneida Indian Nation] seeks – recognition of present and future sovereign authority to remove the land from local taxation – is unavailable because of the

long lapse of time, during which New York's governance remained undisturbed, and the present-day and future disruption such relief would engender." *Id.* at 216, n.9.

Sherrill recognized the concerns associated with checkerboard reservations and found that those matters are properly addressed in the land into trust process under 25 U.S.C. § 465. The Court said: "Recognizing these practical concerns, Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being. Title 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land in trust for Indians and provides that the land "shall be exempt from State and local taxation." *Id.* at 200. Only if a tribe successfully completes the land into trust process – which requires the tribe to pay all due real property taxes – may recently purchased properties be exempt from local taxation and other regulations.

Short of completing the land into trust process, *Sherrill* and its progeny made clear that Indian tribes may not revive any sovereignty rights on repurchased lands. Indeed, the New York Court of Appeals found that *Sherrill* bars CIN from claiming any real property tax exemptions on its properties. *See Cayuga Indian Nation of N.Y. v Gould*, 14 N.Y.3d 614, 642 (2010) ("*City of Sherrill* certainly would preclude the Cayuga Nation from attempting to assert sovereign power over their convenience store properties for the purpose of avoiding real property taxes."). Before *Gould*, *Sherrill* was applied to bar CIN's claims of immunity from zoning laws on repurchased parcels. Specifically, prior to *Sherrill*, CIN had argued successfully that its purported reservation lands in Union Springs, Cayuga County, New York were exempt from local zoning laws and that it could therefore operate a gaming establishment on that property. *Cayuga Indian Nation v. Vill. of Union Springs*, 317 F. Supp.2d 128 (N.D.N.Y. 2004) ("*Union Springs I*"). After *Sherrill*, however, the United States District Court for the Northern District of New York reversed its earlier decision and held that the Nation was not accorded any such rights

on repurchased land. *Cayuga Indian Nation v. Vill. of Union Springs*, 390 F. Supp.2d 203 (N.D.N.Y. 2005) ("*Union Springs II*"). The United States Court of Appeals for the Second Circuit likewise held that *Sherrill* compelled reversal of CIN's possessory land claim. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 273 (2d Cir. 2005). The Second Circuit held that "[t]he Supreme Court's recent decision in [*Sherrill*] has dramatically altered the legal landscape against which we consider plaintiffs' claims." *Id.*

Of course, the Supreme Court's holding in *Sherrill* makes any discussion of the ITIA academic. In rejecting OIN's unification-of-fee-and-aboriginal-title theory, *Sherrill*, 544 U.S. at 213-14, the Supreme Court eliminated the legal basis upon which CIN arguably would have standing to invoke the ITIA to protect its recently acquired fee title. With no legal mechanism to revive its ancient sovereignty – except by applying to the federal government to take the land into trust – CIN is left with unrestricted fee title. The restrictions against alienation that apply to a tribe's "original title to the soil," *Dick v. U.S.*, 208 U.S. 340, 359 (1908), do not exist with respect to CIN's recently purchased properties.

Sherrill cannot be read to mean the ITIA prevents the alienation of title through foreclosure where (1) the recently purchased land is fully taxable and (2) CIN exercises no sovereign authority over it. Those two conditions of the land – which inhere in *Sherrill's* holding – are fundamentally at odds with recognizing the land as "Indian country" and therefore within the protection of the ITIA.

In passing the ITIA, Congress never intended to restrict transfers of title through tax foreclosures where taxes are lawfully imposed on fee lands, especially in the specific context here, where the Supreme Court has held the fee lands are not sovereign tribal territory but rather are fee lands held by a tribe no different than any other taxpayer, and expressly authorized foreclosure for non-payment of lawfully imposed real property taxes. To the understanding of

everyone in Congress in the late 18th century and early 19th century, if lands were held in fee and subject to real property taxes, they were neither Indian Country nor subject to restraints on alienation. It is inconceivable that Congress intended to allow tribes to thwart Supreme Court precedent by raising the ITIA as a bar to lawful tax foreclosure sales.

Further, it is inconceivable that *Sherrill* would cite the ITIA four times in analyzing tribal sovereign immunity from state and local taxation, 544 U.S. at 204, 205, 207, and declare the city of Sherrill as the exclusive lawful sovereign, specifically affirming its right to impose and collect taxes as a core incident of its sovereignty, yet *sub silentio* mean the city could not foreclose because of the ITIA.

While the district court in *Madison County* addressed the ITIA and found it applicable, the Second Circuit remained silent on this issue. As previously discussed, this Court is not required to give any deference to the district court's decision. Again, the district court's decision has been rejected by other courts. In *Hobart*, for example, the court held:

> It is true that in the two cases remanded to the United States District Court for the Northern District of New York after the Supreme Court's decision in *Sherrill*, the lower court has now held that recently purchased tribal lands are subject to the [ITIA]. On remand, the district court concluded that the local governments, whose authority to tax the OIN's property was upheld by the Supreme Court, are nevertheless barred by the [ITIA] from foreclosing on the property for nonpayment of taxes. As already noted, *I find the right of a local government to foreclose for nonpayment of taxes implicit in Sherrill's holding that the OIN's reacquired property is subject to* ad valorem *property taxes and therefore disagree with the district court's decision in those cases.*

542 F. Supp. 2d at 933-34 (emphasis added).

Under CIN's apparent reading of the ITIA, CIN could purchase fee land anywhere in the United States, owe real property taxes on such land, but refuse to pay taxes without risk of foreclosure. This has no basis in law or logic. *See Hobart*, 542 F. Supp. 2d at 921 ("The suggestion that only federal protection against property tax assessments was withdrawn, but not protection from other, similar assessments, or from forced alienation by way of condemnation or

foreclosure for nonpayment of taxes, has no basis in logic or law."). Since "there is no canon against using common sense in construing laws as saying what they obviously mean," *Roschen v. Ward*, 279 U.S. 337, 339 (1929), this Court should prevent the absurd result that CIN may purchase land anywhere in the United States on the open market and avoid foreclosure by virtue of the ITIA.

C) While it is Clear that CIN's Properties Are Not Sovereign Lands, They Are Also Outside Any Purported Federal Reservation.

CIN will undoubtedly claim that when it purchases land within an historic 64,015-acre tract, it is purchasing and reviving rights on federal reservation land. As discussed above, CIN's argument misses the mark because *Sherrill* confirms that CIN is not entitled to assert any such rights on repurchased land. While the New York Court of Appeals in *Gould* also confirms that CIN may not assert sovereignty its properties, it noted that CIN's properties were technically located within an ancient federal reservation that had not been disestablished for purposes of New York's cigarette sales and excise tax. *Gould*, 14 N.Y.3d at 640. In *Gould*, however, the New York Court of Appeals impliedly conceded some doubts about this. *Id.* ("To be sure, the Supreme Court has not yet determined whether parcels of aboriginal lands that were later reacquired by the Nation constitute reservation property in accordance with federal law. Its answer to that question would settle the issue."). While the inquiry is academic because the ITIA only applies to sovereign lands that are not at issue here, the issue warrants review because CIN's claim to an ancient reservation of 64,015 acres, which encompasses several municipal governments, compounds the disruption to state and local government and private citizens that concerned the Supreme Court in *Sherrill*. Seneca County respectfully submits that *Gould's* holding on this issue is incorrect inasmuch as CIN has never possessed a federal reservation. Since this is a federal issue, Seneca County seeks a ruling from this Court that CIN's properties are not located within a federal reservation or that any such federal reservation has been

disestablished. Indeed, prior to vacating the Second Circuit's decision in *Madison County*, the United States Supreme Court had agreed to review the similar issue of whether OIN's lands were within the boundaries of a federal reservation or whether it had been disestablished. 131 S. Ct. 459, 562 U.S. __ (granting *certiorari* on the issues of whether OIN was entitled to assert sovereign immunity as a defense to foreclosure and whether OIN technically retained an historic federal reservation that had not been disestablished).

In *Gould*, the New York Court of Appeals begins its analysis of the history relevant to the purported existence of a federal reservation by discussing the 1794 Treaty of Canandaigua, but one cannot properly analyze whether there ever was a federal reservation without going further back in time. On February 25, 1789, the Cayugas and New York State signed a treaty, the first paragraph of which states: "First: the Cayugas do cede and grant all their lands to the people of the State of New York, forever." The only interest the Cayugas held in any portion of the ceded lands after 1789 was a limited land use right granted by the State in the second article of the treaty: "Secondly: the Cayugas shall, of the said ceded lands, hold to themselves, and to their posterity, forever, for their own use and cultivation, but not to be sold, leased, or in any other manner aliened, or disposed of to others, all that tract of land, beginning at . . . ." By the express terms of the treaty, the Cayugas ceded their lands to the State, which then granted to the Cayugas a right of "use and cultivation" in the same. In the 1789 Treaty, New York State reserved for itself the exclusive right to purchase back the reservation it had created.

The United States Constitution took effect and the United States government began functioning as a federal government on March 4, 1789 – after the 1789 Treaty was signed on February 25, 1789. *See e.g.*, *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1079 n.6 (2d Cir. 1982). The Articles of Confederation did not prohibit or require the assent of Congress for the transfer of Indian land. *See Oneida Indian Nation of New York v. New York*, 860 F.2d 1145,

1167 (2d Cir. 1988). As a result, at the time of the 1789 Treaty, New York could – and did – lawfully exercise its right to extinguish whatever interests the Cayugas had in the subject land. *See id.* The United States itself put forth exactly this argument before the American and British Claims Arbitration Tribunal in 1926, and the Tribunal concluded that the 1789 treaty "was made at a time when New York had authority to make it, as successor to the Colony of New York and to the British Crown," and that "[t]he title of New York . . . was independent of and anterior to the Federal Constitution." Cayuga Indian Claims, 20 AM. J. INT'L L. 574, 590, 591 (Am. & Br. Claims Arb. Trib. 1926).

In the 1794 Treaty of Canandaigua, the United States acknowledged that the Cayugas possessed a state reservation. The Treaty of Canandaigua did not establish any new rights, much less a federal reservation. Article II of the Treaty of Canandaigua provides in full:

> The United States *acknowledge* the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

7 Stat. 44, Art. II (emphasis added).

This language confirms that the United States did not purport to reserve any land by virtue of the Treaty of Canandaigua in 1794; it merely "acknowledged" that New York had reserved to the Cayugas certain rights to the land after the Cayugas ceded whatever Indian title they may have held. Similarly, the United States did not purport to create a reservation by virtue of the Treaty of Canandaigua, but merely acknowledged that the lands constituted a state reservation under the 1789 Treaty with New York and promised not to disturb the Cayugas' use of the land pursuant to that treaty.

The Treaty of Canandaigua did not convey an interest in land to the Cayugas and did not divest New York of its rights. *See Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917, 922 n.5 (1965) (explaining that the purpose of the Treaty of Canandaigua was to "reconfirm peace and friendship between the United States and the Six Nations . . . . [T]here was no purpose to divest New York and Massachusetts of their rights, nor was there any purpose to prevent or to supervise sales or transfers of [subject] territory."). A reading of the Treaty of Canandaigua as creating a federal reservation is erroneous because the United States did not have the power to grant or confirm a title to land when the sovereignty and dominion over it had become vested in New York State. *See Goodtitle v. Kibbe*, 50 U.S. 471, 478 (1850) (holding that Congress could not grant an interest in land that belonged to Alabama). After 1789, New York held the land in fee subject only to limited use rights granted to the Cayugas pursuant to state law. The federal government had no property rights in the lands and could not confer "recognized title" without illegally depriving New York of its property rights.

Although the Supreme Court has not held that the treaty making power of the United States extends to the divestment of a state's interest in land, it has observed that if such authority were to exist, it must be shown unmistakably in the treaty. *United States v. Minnesota*, 270 U.S. 181, 209 (1926) ("[N]o treaty should be construed as intended to divest rights of property – such as the state possessed in respect of these lands – unless the purpose so to do be shown in the treaty with such certainty as to put it beyond reasonable question."). The Treaty of Canandaigua makes no mention of an intent to divest New York of its property rights, and there is no historical evidence that the federal government intended the Treaty to divest New York of its interest. On the contrary, the language of the Treaty of Canandaigua only confirms that the United States explicitly acknowledged New York State's treaty with the Cayugas.

If, as CIN alleges, the Treaty of Canandaigua established a federal Cayuga reservation, then in so doing the United States violated the Fifth Amendment to the Constitution. The United States' power of eminent domain extends to the taking of state-owned property without the state's consent, but the United States must pay just compensation to the property owner for the property it takes. U.S. CONST. AMEND. V; *see also Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 291 (1983). A compensable taking occurs "[i]f a government has committed or authorized a permanent physical occupation of [the] property." *Southview Assocs. v. Bongartz*, 980 F.2d 84, 92-93 (2d Cir. 1992). Under this standard, if by the Treaty of Canandaigua the United States took New York's property rights in the subject lands, then New York State would have been entitled to compensation for that taking. No such compensation was ever given. Because compensation was never paid to New York, even if the United States attempted to effect a taking by the Treaty of Canandaigua, it was incomplete and no property interest passed to the Cayugas. *See United States v. Dow*, 357 U.S. 17, 21 (1958) (holding that title does not pass until the owner receives compensation).

Even if the United States created a federal reservation by the Treaty of Canandaigua, that reservation has been disestablished because (i) the ITIAs in place at the time of the Cayugas treaties with New York did not require federal ratification of those treaties and (ii) in any event, the federal government ratified those transfers.

Any purported Cayuga reservation was disestablished when the Cayugas twice sold in 1795 and 1807 to New York State whatever land use rights they had in the subject land. The July 27, 1795 Treaty between the Cayugas and New York State provides:

> [I]t is Covenanted, stipulated and agreed by the said Cayuga Nation that they will sell . . . to the People of the State of New York all and singular the Lands reserved to the use of the said Cayuga Nation . . . to have and to hold the same to the People of the State of New York and to their Successors forever . . . .

The May 30, 1807 Treaty between the Cayugas and New York State, further provides:

> [T]he said Cayuga Nation for and in consideration of the sum of Four thousand eight hundred dollars . . . Do sell and release to the people of the State aforesaid all their right title Interest possession property claim and demand whatsoever of in and to the said. . . Land . . . commonly called the Cayuga Reservations . . . which two reservations contain all the land the said Cayuga Nation claim or have any interest in in this State To have and to hold the said Two tracts of Land as above described unto the People of the State of New York and their Successors forever.

While the New York Court of Appeals held that these conveyances violated the federal restriction on the alienability of Indian lands, it is respectfully submitted that such a holding is wrong. The ITIA applied by the courts whose decisions the Court of Appeals cited was not the law in effect at the time of the alleged violations and did not include a key provision that the relevant statutes included. *See Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 317 F. Supp.2d 128 (N.D.N.Y. 2004) and *Cayuga Indian Nation of N.Y. v. Cuomo*, 730 F. Supp. 485 (N.D.N.Y. 1990) (both holding that the 1795 and 1807 conveyances of land to New York were invalid under the ITIA, 25 U.S.C. § 177). In fact, the ITIAs of 1793 and 1802 are the applicable Acts under which the use rights were purchased by New York in 1795 and 1807, respectively. Each of these ITIAs has a provision indicating that the statute was meant to govern interstate commerce and not intrastate sales:

> That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the [ordinary] jurisdiction of any of the individual states.

See 1793 TIA, sec. 13; 1802 TIA, sec. 19. Thus, under applicable law, the 1795 and 1807 conveyances did not violate any restriction because they were not barred by the ITIA.

Although no federal Cayuga reservation was ever created and there was, therefore, no restriction at all on the alienability of the lands transferred in 1795 and 1807, those two transfers complied even with the then-current version of the ITIA because they were approved by the federal government. The ITIA prohibits the purchase or grant of aboriginal lands from any

Indian Nation "unless the same shall be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. The plain language of the Act indicates that ratification by the federal government through formalities of the Treaty Clause is not the sole source of federal approval for agreements between states and Indian tribes. Indeed, the United States Supreme Court's decision in *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 248 (1985), holds only that federal approval must be "plain and unambiguous." It says nothing about the form such "plain and unambiguous" consent must take. *See Cayuga Indian Nation v. Cuomo*, 667 F. Supp. 938, 944 (N.D.N.Y. 1987) (noting that the U.S. Supreme Court could have, but "did not set down an unequivocal rule that any conveyance of Indian land must be by express federal treaty in order to comply with the [ITIA]").

Under the applicable "plain and unambiguous" standard, the federal government's involvement in the negotiation, consummation and subsequent implementation of the 1795 and 1807 conveyances constituted federal ratification of those treaties. Not only did federal officials actively participate in the treaty process and attend the negotiations and signing of the 1795 and 1807 treaties, but the federal government distributed New York's payments to the Cayugas. *See Cayuga Indian Nation of New York v. Cuomo*, 730 F. Supp. 485, (N.D.N.Y. 1990) (discussing involvement of federal officials Jasper Parrish and Israel Chapin Jr. in the negotiation and signing of the 1795 and 1807 treaties and Parrish's transmittal of consideration paid by New York State to the Cayugas for the acquisition of the Cayuga land); *Cayuga Indian Nation v. United States*, 36 Ind. Cl. Comm. 75, 92, 96 (1975) (noting that Parrish and Chapin signed the 1795 treaty and that Parrish attended the signing of the 1807 treaty as the United States Superintendent of Indian Affairs). The conduct of the federal government throughout the negotiation and implementation of both treaties demonstrates federal acquiescence to the conveyances, and the conveyances, therefore, were valid and did not violate the ITIA. The

failure of the United States to take any action to attack or undo such transfers for over 200 years is telling and prevents it from doing so now. *See Pataki*, 413 F.3d at 279 (denying relief to CIN based on laches despite effort of United States to intervene and assert claims on CIN's behalf because "given the relative youth of this country, a suit based on events that occurred two hundred years ago is about as egregious an instance of laches on the part of the United States as can be imagined").

Further, in 1910, the United States and Great Britain entered into an agreement to establish an arbitral tribunal to resolve certain claims between the two governments. Among these was a claim by Great Britain on behalf of the Cayuga Indians of Canada, related to New York State's refusal to pay to the Canadian Cayugas some part of the annuity provided for by the 1795 Treaty. *See* Cayuga Indian Claims, 20 AM. J. INT'L L. 574, 576 (Am. & Br. Claims Arb. Trib. 1926). The agreement and the list of claims to be resolved were approved by the Senate. By this agreement, the United States recognized that the obligations under the 1795 Treaty were enforceable and could be adjudicated in an international forum. In 1926, the American and British Claims Arbitration Tribunal published its decision requiring the United States to pay $100,000 to Great Britain as trustee for the Canadian Cayugas. *See id.* at 594. Thereafter, President Coolidge, with the approval of both houses of Congress, included in the federal government's budget the funds required to pay the award. *See Cayuga Indian Nation v. Cuomo*, 730 F. Supp. at 492. By payment of the Tribunal's award, the federal government plainly and unambiguously recognized the 1795 Treaty as a valid conveyance and therefore the source of its liability.

In deciding whether the Cayugas or CIN has ever possessed a federal reservation which remains in place, the New York Court of Appeals, citing the Second Circuit's decision in *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 269 n.2 (2d Cir. 2005), noted that that

"the Treaty of Buffalo Creek neither mentions Cayuga land or Cayuga title in New York, nor refers to the 1795 or 1807 treaties between New York and the Cayuga." *Gould*, 14 N.Y.3d at 639. However, the Court of Appeals' conclusion that there is a federal Cayuga reservation that has not been disestablished does not follow. The Treaty of Buffalo Creek confirms the Counties' assertion that the Cayuga reservation was either never established as a federal reservation or had long been disestablished by the time of the Treaty of Buffalo Creek in 1838. Had there been a federal Cayuga reservation in existence at the time of the Treaty of Buffalo Creek, that treaty would have specifically mentioned any such reservation either as land to which rights were being relinquished or land to which Indians reserved rights. Instead, the Treaty of Buffalo Creek provides for compensation of the Cayugas upon their removal from New York State to the west, and refers to the Cayugas as "friends" of the Senecas. With no Cayuga reservation for the Treaty to address specifically, it simply recognizes Cayugas and Onondagas "residing among [the Senecas]". The Treaty of Buffalo Creek is the ultimate evidence that, at least as of 1838, the federal government did not believe a federal Cayuga reservation existed.

CONCLUSION

For the reasons set forth above, Seneca County respectfully requests that the Court deny CIN's motion for a preliminary injunction and a temporary restraining order.

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