UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS,
Plaintiff,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,
v.

STATE OF NEW YORK, et al.,
Defendants.

Civil Action Nos.
82-CV-783
82-CV-1114
(NPM GHL)

THE ST. REGIS MOHAWK TRIBE, by THE ST. REGIS MOHAWK TRIBAL COUNCIL and THE PEOPLE OF THE LONGHOUSE AT AKWESASNE, by THE MOHAWK NATION COUNCIL OF CHIEFS,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,
v.

STATE OF NEW YORK, et al.,
Defendants.

Civil Action No.
89-CV-829
(NPM GHL)

JOINT REPLY MEMORANDUM OF LAW IN SUPPORT OF STATE AND MUNICIPAL DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS

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PRELIMINARY STATEMENT

Defendants in this Indian land claim filed motions for judgment on the pleadings pursuant to Rule 12(c) on November 6, 2006. After several adjournments of the briefing schedule, Plaintiffs filed comprehensive opposition papers, consisting of hundreds of pages of briefing, exhibits, and declarations on July 17, 2007. This reply memorandum is submitted jointly on behalf of the State of New York and the Municipal Defendants, in response to the opposition briefs of the St. Regis Mohawk Tribe and the Mohawk Nation Council of Chiefs ("SRMT/MNCC Opp"), the Mohawk Council of Akwesasne ("MCA Opp"), and the United States ("US Opp").[1] A separate reply brief is submitted by the New York Power Authority; the arguments therein are incorporated in this brief by reference.

The pending Rule 12(c) motions were filed in the aftermath of two controlling decisions that dramatically altered the legal landscape pertaining to ancient Indian land claims, City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) ("Sherrill") and Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266 (2d Cir. 2005), cert. denied, 126 S. Ct. 2021, 2022 (2006) ("Cayuga"). As was argued at length in Defendants' supporting memoranda of law, the possessory land claims asserted in this litigation are inherently

[1] In the State defendants' brief in support of the motion, the tribal plaintiffs were referenced according to nomenclature that had been used when the complaints were originally filed. The plaintiff referenced earlier as the Canadian St. Regis Band of Mohawks is now designated as the Mohawk Council at Akwesasne, and its opposition brief is referenced herein as "MCA Opp." The plaintiff previously referenced as the "American Tribe" will be referenced as St. Regis Mohawk Tribe or "SRMT" The plaintiffs referenced earlier as the People of the Longhouse are now referenced as the Mohawk Nation Council of Chiefs or "MNCC." These plaintiffs have filed a joint opposition brief, hereafter referenced as the "SRMT/MNCC Opp" brief. Collectively the tribal plaintiffs will be referenced herein as the "Mohawks."

disruptive and are subject to dismissal on the pleadings on the basis of laches, acquiescence and impossibility, as elucidated in Sherrill and Cayuga. As is apparent from the face of the pleadings, the complaints and amended complaints filed by each of the Plaintiffs[2] assert a possessory land claim, directly seeking ejectment of the named Defendants and all members of a defendant class who purport to own property in the approximately 15,000 acre claim area (approximately 12,000 acres in the mainland claim, and approximately 3,000 acres in the island claim). As of 1989, according to the SRMT Complaint, the defendant class was estimated to "exceed 2000 persons." (Roberts Aff, Ex C [Cplt. III] ¶ 12). Plaintiffs also ask the Court to declare "null and void" the title asserted by the named defendants and the defendant class, and to confirm that the subject land remains treaty-guaranteed Indian land. In addition, they seek various forms of damages relief from the defendants, for the fair rental value of the subject lands (plus interest) for the entire period of Plaintiffs' dispossession, plus the value of minerals, and waste.

Plaintiffs seek to distinguish their claims from those that were held to be equitably barred in Cayuga, citing alleged factual differences between this case and that one. Plaintiffs have requested that the Rule 12(c) motion be treated as a motion for summary judgment, and that it be denied because there exist disputed factual issues pertaining to the laches defense that can be resolved only after discovery and trial. To the extent that factual distinctions can be

[2] Hereafter, they are collectively referenced as "the Complaints." Copies of the pleadings were previously submitted as exhibits to the affirmation of Assistant Attorney General David B. Roberts dated November 6, 2006, in support of this motion: Exhibit A - Cplt. I (Amended Complaint on behalf of Canadian St. Regis Band of Mohawk Indians, et al, 82-CV-783 [docket no. 13]); Exhibit B - Cplt. II (Amended Complaint on behalf of Canadian St. Regis Band of Mohawk Indians, et al, 82-CV-1114 [docket no. 5]); Exhibit C - Cplt. III (Complaint on behalf of the St. Regis Mohawk Tribe, by the St. Regis Mohawk Tribal Council and the People of the Longhouse at Akwesasne, by the Mohawk Council of Chiefs, 89-CV-829 [docket no. 1]); and Exhibit D - U.S. Amd. Cplt-in-Intvt. (Amended Complaint in Intervention on behalf of the United States, 89-CV-829, 82-CV-114, 82-CV-783 [not listed in electronic docket]).

drawn between this case and Cayuga, Defendants respectfully submit that under the applicable law, they do not amount to genuine issues of *material* fact.

Moreover, during the year that passed since Defendants' Rule 12(c) motions were filed, there have been some further developments in the applicable law. On November 28, 2006, Sherrill and Cayuga were applied by Judge Platt in the Eastern District of New York in Shinnecock Indian Nation v. New York, Index No. 05-2887, 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2006) ("Shinnecock"), to dismiss an ancient Indian land claim on grounds of laches, in the context of a Rule 12(b)(6) motion. On May 21, 2007, Judge Kahn applied the equitable principles of Sherrill and Cayuga to grant partial summary judgment dismissing all possessory land claims that were asserted by plaintiffs in Oneida Indian Nation of New York v. State of New York, 500 F. Supp.2d 128 (N.D.N.Y. 2007) ("Oneida"); after parsing the Oneida plaintiffs' pleadings for any allegations sufficient to state a non-possessory claim, the Court permitted the plaintiffs to press ahead with a contract reformation claim, under which the Oneidas were permitted to seek damages relief from the State of New York (but no other defendant) for any profit that the State may have obtained from the resale of lands that had been purchased from the tribe for unconscionably low consideration. Id. at 139-46.

Judge Kahn *sua sponte* certified the Oneida decision for interlocutory appeal (Id. at 147), and the Second Circuit granted leave for immediate appeals by both sides on July 13, 2007. Reply Affirmation of David B. Roberts dated December 5, 2007, Ex H, I , J [Memoranda of Law submitted on behalf of the State, the Oneida plaintiffs, and the U.S. in support of § 1292(b) motions for leave to appeal]. The State's appeal and Plaintiffs' cross-appeals in Oneida are currently being briefed, and all briefing before the Second Circuit is

scheduled to be completed by March 10, 2008. Roberts Reply Aff, Ex K.

In light of the developments arising in the Oneida land claim, the Defendants herein suggested in a letter dated September 12, 2007 that a stay would be warranted in this case, to await the outcome of that appeal in order to gain guidance in the determination of the pending motions for judgment on the pleadings. Roberts Reply Aff, Ex L. The United States has taken no position regarding such a stay, while it has been opposed by the Mohawks. Roberts Reply Aff, Ex M.

For the reasons set forth below, judgment on the pleadings should be granted; the Defendants' motions should not be converted to motions for summary judgment; in the alternative, the Court should issue a stay of further proceedings in this matter, pending the outcome of further appellate proceedings in the Oneida land claim.

ARGUMENT

POINT I

THE EQUITABLE DOCTRINES OF LACHES, ACQUIESCENCE AND IMPOSSIBILITY BAR THE CLAIMS SET FORTH IN THE COMPLAINTS

The United States has previously conceded the lack of any distinction between the claims in Cayuga and those in this case. Indeed, it argued that one of the reasons the Supreme Court should grant *certiorari* in Cayuga was that the Second Circuit's decision in that case sounded the death knell for the Mohawks' claim as well as other Indian land claims in New York. "The decision below deprives the Cayugas and similarly-situated Tribes of *any* remedy for the State's unlawful acquisition of their lands . . .." See Roberts Reply Aff, Ex. N at 12 (emphasis in original). Citing this action, among others, the United States then noted that

"[T]he court of appeals' apparent intent is to terminate all of these pending cases . . . . If left unreviewed, the court's decision will render superfluous the substantial expenditure of time and resources consumed in the lawsuits up to this point; it will leave the United States and the affected Tribes without any remedy for violations of law . . . that rendered the State's purchases invalid under the terms of the Trade and Intercourse Act . . ." Id. at 29 and n. 8 (emphasis added). The United States' current effort to distance itself from its clear (and correct) acknowledgment of the effect of Cayuga on this case is singularly unpersuasive. See US Opp at 35-36.

In an effort to avoid the clear import of Cayuga, all of the Plaintiffs also seek to distance themselves from the pleadings that they filed in this matter. They point out that the Complaints were filed long ago, at a time when relevant case law appeared to support the viability of possessory land claims sounding in ejectment of current occupants of lands that Indian tribes had once possessed. MCA Opp at 30-31; SRMT/MNCC Opp at 11. They have elected not to move for leave to file amended complaints. Rather, Plaintiffs seek refuge under Rule 54(c), suggesting that the Court has power to fashion a damage remedy if they can demonstrate that the State violated the Nonintercourse Act, 25 U.S.C. § 177 ("NIA") when it acquired lands at least 150 years ago from the Indians of the Village of St. Regis. MCA Opp at 29-30; SRMT/MNCC Opp at 12; US Opp at 29 n.16. This contention founders on the teaching of Cayuga, that equitable principles operate to bar disruptive possessory *claims*, and not just particular remedies that might be considered if such a claim were sustained. 413 F.3d at 274-75. In Oneida, the Court applied the laches analysis set forth in Cayuga to grant summary dismissal of all claims that were predicated on an asserted "continuing right to immediate

possession." 500 F.Supp.2d at 133 (quoting Cayuga at 274). "The Second Circuit [in Cayuga] concluded that this type of claim is inherently disruptive because it seeks to overturn years of settled ownership." Id. (citing Cayuga, at 275).

A. Despite Plaintiffs' Retreat From Their Own Pleadings, The Claims Asserted In This Action Remain "Inherently Disruptive" Possessory Claims That Are Barred By Laches.

For the first time, after 25 years of litigation in pursuit of ejectment and other remedies against a defendant class of landowners in the claim area, the Mohawk Council of Akwesasne represent that "the Mohawks are no longer seeking ejectment of anyone, and that the remaining claims are primarily for money damages . . . and for recognition of title . . .." MCA Opp at 27. The St. Regis Mohawk Tribe and the MNCC "acknowledge that under the Sherrill and Cayuga decisions, as well as this Court's earlier decision in Cayuga X,[3] ejectment is not a practical or viable remedy for the Mohawks' land claims and do not seek to have the Court impose this remedy." SRMT/MNCC Opp at 11. Presumably their intent is to press ahead with their claims for trespass damages and declaratory relief arising out of their NIA claim, though they remain studiously vague as to the specifics of the relief they seek. In a dramatic shift from their longstanding claims for possession of the islands on which NYPA operates a major hydroelectric project, the Mohawks now contend that they are entitled only to annual payments by virtue of the Federal Power Act. SRMT/MNCC Opp at 26-29; MCA Opp at 11-18.[4]

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[3] Cayuga Indian Nation of New York v. Cuomo, Nos. 80-930 & 80-960, 1999 U.S. Dist. LEXIS 10579 (N.D.N.Y. July 1, 1999) ("Cayuga X"). Slip opinion attached to Roberts Affirmation dated November 6, 2006 as Exhibit E.

[4] As was noted earlier, the State adopts the arguments advanced in the NYPA Reply Memorandum in response to the so-called islands claim. As to the portion of the islands claim that pertains to Plaintiff's claim for possession of lands within the Robert Moses State Park, a factually indistinguishable claim was asserted in the Cayuga litigation respecting the Cayuga Lake State Park, located within the claim area on the western shore of Cayuga Lake. The District Court in Cayuga X ruled out the ejectment of the State from this tract, and the Second

Finally, The United States seeks to salvage a "fair compensation" claim for damages on behalf of the Mohawks – a remedy that is not embraced in either of the Mohawks' opposition briefs, and which is disavowed in their letter of September 14, 2007 (Ex M)[5] – under which the State would be required to disgorge any profits it gained from centuries-old transactions that allegedly failed to comport with the requirements of the NIA. US Opp at 21-35. For the reasons that follow, all such arguments are meritless.

The Mohawk Council of Akwesasne unfairly chastises Defendants for "imagining 'a parade of horribles'" respecting the disruptive nature of the claims asserted by Plaintiffs. MCA Opp at 27-29. In Cayuga, the Second Circuit looked to the complaints that had been filed on behalf of the Plaintiffs to discern whether the underlying claim was a disruptive possessory claim. 413 F.3d at 270-71; 274. And in similar fashion, Judge Kahn parsed the complaints that had been filed by the Oneidas, to determine whether they asserted a "current possessory interest in the land" that would be subject to the laches defense. 500 F.Supp.2d at 133-34. The Court recited certain allegations and claims for relief that are substantially similar to those set forth in the Complaints herein, and concluded that the Oneidas had asserted a possessory land claim that would be subject to the defense of laches. Id. at 134. Similarly, in this case the initial briefs filed in support of Defendants' Rule 12(c) motions carefully reviewed the allegations and claims for relief set forth in the Complaints to ascertain whether they fell within the ambit of disruptive possessory claims that would be barred by laches. State

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Circuit subsequently ruled out the substituted award of damages as a remedy for such dispossession, because the award of trespass damages (based as it is on a theory of constructive possession) is inherently disruptive. Cayuga, 413 F.3d at 275.

[5] "The Mohawk plaintiffs have not alleged the fair compensation claims although the U.S. has." Ex M at 2.

Brief at 3-5, 10-12; NYPA Brief at 2-3, 4, n.5; Municipal Brief at 2-3, 10-11. Nothing therefore is being "imagined" about the disruptive nature of plaintiffs' claims; these motions are based on Plaintiffs' own pleadings, and properly so.

The United States has adopted an argument made in Oneida, positing that the Court can fashion relief for a violation of the NIA based on a supposed "fair compensation" claim, a claim that is not to be found in any of the Complaints but which is based on an expert declaration stating that his "preliminary review . . . indicates" that the State profited from the resale of at least some of the lands that were purchased from the St. Regis. US Opp at 21. Any claim that rests on an asserted violation of the NIA is necessarily possessory. The NIA does not provide a damage remedy for allegedly "unfair" transactions; it contains no civil remedy provision at all. Rather, in the words of the SRMT Complaint, "purported purchases in violation of the Indian Non-Intercourse Act 'are of no validity in law or equity' and are null and void." See Cplt. III (Ex. C) at ¶ 23; see also Cplt I (Ex. A) at ¶¶ 49-52; 57; U.S. Am Cplt-in-Int (Ex D) at ¶ 18. See also Oneida Indian Nation of New York v. County of Oneida, 434 F. Supp 527, 541-42 (N.D.N.Y. 1977) ("The statute makes no reference to overreaching or fraud or inadequate consideration. By prohibiting all unauthorized dealings with Indians, it cuts off any inquiry into the fairness of such dealings insofar as the validity of the resulting transfer is concerned . . . . That statute declares, without any qualification, that no purchase made in violation of the Act 'shall be of any validity in law or equity.'").

Necessarily a claim that rests on a violation of the NIA involves a determination that the transactions at issue are invalid and that the Plaintiff tribes have a continuing right to title to and possession of the subject lands. See Oneida Indian Nation v. County of Oneida, 719

F.2d 525, 531 (2d Cir. 1983) ("This statute . . . voided all land transactions in which Indians were a party that were consummated without federal approval."); Oneida Indian Nation v. County of Oneida, 434 F.Supp. at 548 ("The plaintiffs have established a claim for violation of the [NIA] . . . [P]laintiffs' right of occupancy and possession to the land in question was not alienated . . . [t]he state acquired no right against the plaintiffs; consequently, its successors . . . are in no better position."); US Opp at 30 ("The Act serves to protect Indian lands by declaring void sales of those lands made without the consent of the United States.").

In fact, the implied right of action recognized by the Second Circuit in its 1983 decision was quintessentially a possessory claim. The court found that "the Oneidas are entitled to enforce the Nonintercourse Act's voiding of the 1795 purchase. . . . Their suit closely corresponds to the common law action for ejectment in which a plaintiff need only establish his right to possession . . . . The Oneidas' claim is based on their present right of possession, . . . and the Counties' liability is premised on their continued occupancy of Oneida land in violation of the Act." Oneida Indian Nation v. County of Oneida, 719 F.2d at 540.

B. Under Cayuga Plaintiffs' Claim Is A Disruptive Possessory Claim Subject To Laches

The claims asserted by Plaintiffs are foursquare with those addressed in Cayuga. As in Cayuga, the Plaintiffs herein "have asserted a continuing right to immediate possession as the basis of all of their claims . . . ." 413 F.3d at 274. The Complaints in this action expressly seek ejectment, trespass damages, and a judicial determination that the Mohawks have a continuing right of possession of all land in the claim area which has never been extinguished.

Under Cayuga, NIA claims are inherently disruptive and subject to laches. This "disruptiveness is inherent in the claim itself - which asks this Court to overturn years of

settled land ownership - rather than an element of any particular remedy which would flow from the possessory land claim." Cayuga, 413 F.3d at 275. See also Oneida Indian Nation v. County of Oneida, 434 F. Supp. at 530 ("[G]ood faith [of the current owners] will not render good a title otherwise not valid for failure to comply with the [NIA]"). Consistent with this, Judge Kahn in Oneida dismissed all possessory claims, expressly citing the plaintiffs' "claim that 'under the Nonintercourse Act, 25 U.S.C. § 177, Plaintiff Tribes have a continuing right to title to and possession of the subject lands, absent a transfer of the subject lands in compliance with that Act.'" which, under Cayuga, are "'indisputably disruptive' possessory land claims . . .." Oneida, 500 F.Supp.2d at 133-34. All Oneida claims that were grounded on alleged violations of the NIA or common law trespass were dismissed because "any award of damages that is predicated on possession of the land, however remotely, is too disruptive and must be barred by laches." Id. at 144 n.8 (emphasis added).

Applying the Oneida analysis to the case at bar, the possessory nature of the claim asserted by Plaintiffs in this case is readily apparent. Plaintiffs claim that, in violation of the NIA the State acquired the 15,000 acres in the claim area, and that for at least 150 years, the Mohawks have been out of possession and Defendants have been in wrongful possession of the land. Cplt. I at ¶ 49; Cplt. II at ¶ 1; Cplt. III at ¶ 1; U.S. Amd. Cplt-in-Intvt. at ¶¶ 21, 22. The plaintiffs seek declaratory relief establishing that they have an absolute right to possession, an order of immediate possession, and the ejectment of the defendants from the subject land. Cplt. I, Prayer for Relief at ¶¶ 3-4; Cplt. II, Prayer for Relief at ¶¶ 2-3; Cplt. III, Prayer for Relief at ¶ 4; U.S. Amd. Cplt-in-Intvt., Prayer for Relief at ¶¶ 1, 2. Plaintiffs also seek damages for the fair rental value of the land, calculated from the date of acquisition of the

parcels, and for the value of minerals and other resources removed from the land after those purchases, plus interest. Cplt. I, Prayer for Relief at ¶¶ 5-6; Cplt. II, Prayer for Relief at ¶¶ 4-6; Cplt. III, Prayer for Relief at ¶ 5; U.S. Amd. Cplt-in-Intvt., Prayer for Relief at ¶¶ 3-4.

The Complaints in this case unquestionably assert claims "predicated on [the Mohawks'] continuing right to possess land in the claim area." 500 F.Supp.2d at 133. The Court in Oneida granted summary judgment dismissing the "'indisputably disruptive' possessory land claims" asserted by the Oneidas "that seek or sound in ejectment of the current owners." Id., at 134, 136.[6] The Court held that laches barred all of the claims asserted by the Oneidas that were predicated on the proposition that the challenged land transactions were void, and it barred any claim premised on the Oneidas' claimed assertion of a "current possessory right" to lands in the claim area. Id. Acknowledging Cayuga's mandate that laches barred the possessory claim asserted by the plaintiffs, the Court in Oneida dismissed claims seeking all forms of relief – whether couched in terms of ejectment, injunction, damages or declaratory relief – that "are disruptive to Defendants' rights and might also call into question the rights of tens of thousands of private landowners . . .." Id. at 137. Clearly, a judgment granting the relief sought by Plaintiffs – ejecting Defendants and members of the defendant class from the 15,000 acre claim area; declaring "null and void" the "purported conveyances" and the purported title to lands occupied by a defendant class "exceed[ing] 2000 persons"; declaring that the subject land remains the property of the Mohawks; and awarding

[6] Insofar as Plaintiffs assert that Oneida requires that laches be determined on a detailed factual record in the context of a summary judgment motion or trial, they are mistaken, for the reasons detailed at length in Point II. In Oneida, the parties had engaged in extensive discovery relating to liability issues, and in doing so, they had developed a factual record by 2005, when the decisions in Sherrill and Cayuga were rendered. Given the relatively advanced procedural posture of Oneida, the laches motion there was framed as a motion for summary judgment, rather than a motion for judgment on the pleadings, as in the case at bar.

trespass damages against the named Defendants and the defendant class – is by any measure "inherently disruptive because it seeks to overturn years of settled land ownership." Id. at 133 (citing Cayuga at 275).

The Oneida court went on to address the following factors:

"*The transactions at issue before the Court are of particularly ancient pedigree; however, Plaintiffs did not seek redress until relatively recently.*" Id. at 134. In analyzing this issue, the Court noted the undisputed fact that the transactions in Oneida were over 150 years old and that the last disputed transaction took place in 1846. Id. at 134-35. It also noted that the Oneidas' land claim action had not been commenced until 1974, "nearly 130 years after the last transaction subject to the suit." Id. at 135. The Court held that these facts were all that were relevant for purposes of analysis of the first Sherrill / Cayuga consideration, as it was "bound by the Supreme Court's findings that, for purposes of applying laches to land claims, there was a significant lapse of time between the complained of land transactions and Plaintiffs' efforts to regain possession of the claimed land." Id.

In a fashion similar to the Plaintiffs, the Oneidas had advanced a factual record suggesting that historically their access to the courts had been hampered by practical and legal impediments, and that they had vainly pursued litigation and non-judicial remedies long before they had filed a lawsuit to regain possession of their former reservation lands by court decree. Judge Kahn held that such contentions did not raise genuine issues of material fact, because the Sherrill decision had focused only on the long lapse of time from the last transaction to the date on which the possessory land claim was first filed. Indeed, the Court found it unnecessary to evaluate whether the Oneidas had "unreasonably delayed" the pursuit of their claims, and in

fact observed that they had "diligently pursued their claims in various fora" and made clear that the Court's laches ruling "does not, in any substantial part, rest on any supposed deficiency in the Oneidas' efforts to vindicate their claims." Id. at 137. [7]

With respect to the first Sherrill / Cayuga laches consideration as construed in Oneida, the undisputed relevant facts in this case are that the last of the contested transactions occurred in1845 and this action was not filed until 1982. This span of 137 years is comparable to the 128 year delay which was before the Court in Oneida.

"*Most of the Oneidas have lived elsewhere since the mid-nineteenth century and the land in the claim area has a distinctly non-Indian character.*" Id. at 135. The Court in Oneida analyzed this element by reference to census data pertinent to the counties in which the claim area was located, Madison and Oneida Counties. Id. In similar fashion, Defendants have asked the Court to take judicial notice of census data relevant to the Counties that encompass the 15,000 acre claim area, St. Lawrence and Franklin, as well as the affected municipalities. See Municipal Def's MOL p. 16; Sayles Aff, Ex 8, 9, 10. These data show that in the year 2000 census, the non-reservation Indian population in St. Lawrence County was .873% of the overall population and in Franklin County it was 6.201%.

Plaintiffs have advanced their own census data, asserting in particular that within the Hogansburg Triangle (approximately 2,000 acres) the percentage of the population claiming Indian ancestry is much higher than the county-wide and town-wide U.S. Census Bureau data that Defendants have cited. SRMT/MNCC Opp at 33-36 & n.19. The methodology used in

[7] Similarly, in Shinnecock, the Court rejected an argument that laches should not apply to tribe's claim because the tribe "had objected to the [alleged taking] . . . and that institutional barriers prevented [it] from having a forum to subsequently vindicate its rights." The Court observed: "similar arguments did not preclude the Second Circuit in Cayuga from denying plaintiffs' request for relief." See Shinnecock at *5.

Plaintiffs' study departs from the census tracts employed by the Census Bureau (Id., n. 19), and includes properties that have been foreclosed for non-payment of taxes, amounting to more than a quarter of the "Indian-owned" land identified in their study of the Triangle. Id. at 36, n. 22. Because the non-Indian population of the Triangle is not an overwhelming majority, it is asserted that the disruptive consequences of the Mohawks' possessory land claim in that particular area would not be as disruptive as the claims that were rejected in Sherrill and Cayuga. This is of little solace to the more than 2000 non-Indian title holders in the defendant class who would have to bear the disruptive impact of the Mohawks' possessory claim. Moreover, in Sherrill, the particular parcels that were the subject of the Oneida claim of sovereignty were 100% owned by the tribe; the Oneida Nation of New York was and is the owner in fee of about 17,000 acres of the overall claim area. Sherrill, 544 U.S. at 211. The disruptiveness of the Oneida claim in both Sherrill and Oneida was not measured by the Courts through selective analysis of subunits of the overall claim area, but by reference to county-wide and town-wide census data, of which the courts took judicial notice.[8] Id.; Oneida, 500 F.Supp.2d at 137. The Sherrill Court analyzed the disruptive impact of the Oneidas' claim through analysis of population data pertaining to "Sherrill and the surrounding area" 544 U.S. at 211, noted that "the City and County are overwhelmingly populated by non-Indians." Id. at 219.

[8] This applies with equal force to the Mohawks' attempt to single out some thinly-populated subunits of the claim area, such as the Ft. Covington area, to assert that their possessory land claim would be less disruptive in those locations. SRMT/MNCC Opp at 51-52. As is developed in the NYPA Reply brief (p 12), the Mohawks misapply the test of Sherrill and Cayuga when they assert that lands that Mohawks have not owned or occupied since at least the mid-1800's somehow retained their Indian character if such lands are vacant today. Vacant or not, lands long been owned outright by State or local government, and lands that for generations have been in private hands, freely alienable, on the public tax rolls, and subject for more than a century of State and local governance are lands of "longstanding, distinctly non-Indian character." Sherrill, 544 U.S. at 202. The rural nature of the claim area in this case is no more remarkable than the rural makeup of the the claim areas at issue in Cayuga and Oneida.

The Mohawks assert that the tribe has provided certain services in parts of the Hogansburg Triangle, such as water and sewer service (since 2001), reconstruction on a half-mile segment of road in the Triangle (in 2006), fire protection (since 1956), and police protection (from 1999-2000). SRMT/MNCC Opp, 39-41. Though the defendants sharply dispute the Mohawks' assertion that recent services tendered in the Hogansburg Triangle can be equated with the exercise of governmental authority, the Court must take judicial notice that all lands in the Triangle (and elsewhere in the overall claim area) have been subject to state and local taxation, governance and jurisdiction continuously since at least 1845.

Like the Plaintiffs in this case, the Shinnecocks attempted to distinguish Cayuga by asserting that the claim area was relatively small and that relatively fewer non-Indian landowners would be impacted by the claim. This attempt to distinguish Cayuga was rejected, "as the test for disruptiveness is not based on strict numeric calculations and is refuted by Sherrill, where the claim involved a very small parcel of land." Shinnecock at *5. Judge Platt took note of the nature of the defendants named in the Shinnecocks' complaint – which included the Long Island Railroad Company, nationally-known golf courses, some realty companies, and Long Island University.[9] Citing this court's decision barring ejectment in Cayuga, Judge Platt took judicial notice of the "devastating consequences to the region's economy and drastic impact on thousands of commuters" that would flow from the Shinnecocks' possessory claim. Id. at *5 n.9.[10]

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[9] Similarly here, the named Defendants include the New York Power Authority, municipal governments, a railroad, an electric and gas utility company, banks, and mortgage companies.

[10] In a second litigation involving the Shinnecocks, Judge Bianco recently issued a decision that construed Sherrill and Cayuga, holding that laches barred the tribe from pursuing the unregulated construction of a gaming facility on lands that it owned in fee. As in Sherrill, the Shinnecock asserted they retained aboriginal title and

As was posited in Defendants' main briefs, the practical disruptive impact of Plaintiffs' claim is palpable: Even with their eleventh-hour concession that Cayuga bars their preferred remedy of wholesale ejectment of the defendant class, Plaintiffs' requests for damages and declaratory relief call into question title of a defendant class of at least 2000 landowners; cloud title to essential infrastructure of which the Court can take judicial notice (most dramatically the St. Lawrence power project, state and local highways, and Niagara Mohawk power line easements); and disrupt longstanding State and local governance in the 15,000 acre claim area.

"*Non-Indians have greatly developed the area in question and have justified expectations that they will continue to maintain their lives.*" Oneida, 500 F.Supp.2d at 136. The U.S. Complaint-in-Intervention (¶ 22) alleges: "Defendants, or individuals and entities and/or their predecessors in interest have been in possession of the subject land, without lawful authority, variously from 1816 to 1845 until the present." Similarly, the Mohawks allege that they have been out of possession of the 15,000 acre tract since at least 1845. Cplt.I at ¶¶ 50-56; Cplt.II at ¶¶ 42-50; Cplt. III at ¶ 21(A)-(G); 39-44. As was noted in the preceding section, the claim area has been dramatically and irreversibly altered by non-Indians who settled there and built infrastructure, homes, farms, businesses, and towns.

The Court in Oneida relied on an earlier decision in that case, rendered by Judge

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therefore state and local regulation was prohibited by tribal sovereignty. The Court, assuming for purposes of analysis that the tribe still had unextinguished aboriginal title to such lands, held that such exercise of tribal sovereignty would have a disruptive impact on the environment, residents adjacent to the proposed facility, traffic and to State and local governmental administration. New York v. Shinnecock Indian Nation, Nos. 03-CV-3243, 03-CV-3466, 2007 WL 3307089, *85-*86, *88 (E.D.N.Y. October 30, 2007). It is worth noting that the Westwoods tract at issue in that case was only 80 acres in size and (as the plaintiffs have argued with respect to the tract at issue in this case) was proximate to their State-recognized reservation.

McCurn in the context of a motion for leave to amend the complaint, in which the Court had taken judicial notice that "non-Oneida peoples have subjected [the claim area] to 'development of every type imaginable . . . for more than two centuries,'" and observed: "The same self-evident observation can be made in connection with Defendants' lands before the Court in the instant Motion." Oneida at 136 (citation omitted). Equally "self-evident" is the transformation of the claim area in this case, of which Defendants request that the Court take judicial notice.

C. The Complaints In This Action Do Not Set Forth Any Alternative, Non-Possessory Claims

After dismissing the possessory claims asserted by the plaintiffs, the Court in Oneida went on to hold that the plaintiffs' amended complaint raised a non-possessory claim for damages, based on a contract reformation theory. Id. at 137-46. The Court extracted certain factual allegations from the amended complaint which alleged that the State had paid the Oneidas approximately 50 cents per acre for 100,000 acres in 1795, and then resold such lands for seven times that amount to settlers; it took note of a more general allegation that after each of the 26 transactions at issue, the State had made substantial profits on reselling such lands; and it noted a portion of the relief requested by the Oneidas had included a demand for "disgorgement" of such profits. Id. at 139-40. This, the Court held, was sufficient to plead a non-possessory claim "that seeks to reform or revise a contract that is void for unconscionability." Id. at 140. "This type of contract claim is not disruptive. . . . [T]his type of claim only seeks retrospective relief in the form of damages, is not based on Plaintiffs' continuing possessory right to the land, and does not void the agreements. [The grant of such relief] implicitly recognizes and confirms the transfer of property made pursuant to the agreements subject to attack." Id. The Court went on to hold that the plaintiffs had made a

sufficient factual showing in support of the fair compensation claim to preclude the grant of summary judgment dismissing that claim. Id. at 145.

The Court "recognize[d] that other courts have thoughtfully considered some of the issues discussed above and reached different conclusions" (citing Shinnecock), and it certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Id. at 147. The Second Circuit granted cross-applications for leave to appeal Oneida on July 13, 2007.

The Mohawks appear to embrace a theory that their claim can survive Sherrill, Cayuga, and now Oneida, by seeking only declaratory relief and damages, and eschewing the remedy of ejectment. MCA Opp at 27; SRMT/MNCC Opp at 11. As was pointed out in the first round of briefing, the tribal plaintiffs in both Sherrill and Cayuga also had sought declaratory relief substantially the same as that requested by the Mohawks. Sherrill, at 214; Cayuga, at 271; id. at 280 (Hall, D.J., dissenting). Similarly, the plaintiffs in Oneida requested "a declaration that they have possessory rights to the claimed lands and that Defendants' interests in the lands are null and void." Oneida, at 134. Such declaratory relief clearly was an aspect of the possessory claim that failed to survive the motion for summary judgment in Oneida, and it clearly was part of the claim that the Second Circuit deemed "subject to dismissal *ab initio*" pursuant to Rule 12(b)(6) in Cayuga. 413 F.3d at 277-78.

The aspect of Oneida that allowed the plaintiffs to pursue a fair compensation claim against the State (but not against the non-State landowners in the claim area) is of no solace to Plaintiffs in this case. The Complaints in this case make no allegations whatsoever about the adequacy of consideration that was paid in each of the "purported 'treaties'" between the Indians of the Village of St. Regis and the State. Unlike the Oneidas' complaints, the instant

Complaints do not include any request for disgorgement of profits from the resale of the subject lands. Rather, the relief requested in this case directly casts a cloud over the title of every nonmember of the Plaintiff tribes who professes to own real property in the claim area, declaring "null and void" the ancient treaties from which they ultimately derive title, and declaring that the Mohawks still hold unextinguished Indian title to the entire claim area. Cplt. I, Prayer for Relief at ¶¶ 3-6; Cplt. II, Prayer for Relief at ¶¶ 2-6; Cplt. III, Prayer for Relief at ¶¶ 4, 5; U.S. Amd. Cplt-in-Intvt., Prayer for Relief at ¶¶ 1-4.[11]

The United States espouses a so-called fair compensation claim for the St. Regis plaintiffs – a proposed remedy that is nowhere to be found in any of the Complaints, and which is expressly rejected by the Mohawk Council at Akwesasne[12] – which would envision the recovery of damages from the State for the difference between the amount it paid for Mohawk lands in the claim area, and the amount that such lands were later resold by the State. US Opp at 22-23.[13] Founded as it is in a possessory claim arising under the NIA, the putative claim

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[11] Moreover, 28 U.S.C. § 2415(b) establishes a statute of limitations for contract actions brought on behalf of Indian nations. Any attempt by the Plaintiffs at this late date, to claim some type of relief under a quasi-contract "fair compensation" theory would appear to be barred by the statute unless they can argue that the claim would relate back to the date of the initial complaints. While the State disagrees with his conclusion, Judge Kahn found that the pleadings in Oneida gave adequate notice of a colorable "fair compensation" claim. The pleadings in this case contain no allegations sufficient to give notice of a possible contract reformation claim, and any such claim should not relate back to the original complaints.

[12] According to the MCA, the "fair compensation" contract remedy fashioned by Judge Kahn in Oneida "is not a suitable remedy here . . .. This is not a question of a fair price for land sold, but of damages or recognition of title where land has been unlawfully taken." MCA Opp at 29, n.13).

[13] The U.S. departs from Judge Kahn's contract reformation theory in Oneida,,at 139-44, insofar as it was premised on putative federal common law contract reformation principles to permit recovery on a showing that New York had "unconscionably" profited from its purchases of Indian lands, allegedly selling them for seven-fold more than they had paid the Oneidas. Id. at 139, 145. Making no attempt to shape its so-called "fair compensation" theory in accord with the the legal standards set out by Judge Kahn in Oneida, the U.S. presses this Court to permit Plaintiffs to seek compensation for "*any* difference in the amount of money the State paid the Mohawks for the lands at issue and the amount the State obtained by selling the same lands to third parties" US Opp at 34 (emphasis

identified by the United States is not an "alternative" claim; it merely seeks an alternative form of remedy for what is still in essence a possessory claim. The fact that a court could deny a tribal plaintiff possession and instead substitute an award of money damages does not change the disruptive nature of the underlying claim. That is exactly what had happened in Cayuga. The District Court there refused to grant ejectment against any defendant, and instead limited the tribal plaintiffs to monetary relief. See Cayuga, 413 F.3d at 277-78 ("The fact that . . . the District Court substituted a monetary remedy for plaintiffs' preferred remedy of ejectment cannot salvage the claim, which was subject to dismissal *ab initio*.").

Just as in Cayuga, the monetary relief the United States requests is in lieu of recovery of the land itself. The United States' description of the rationale for awarding such damages – to compensate the Tribe for loss of land when "equitable considerations bar vindication of a tribe's right of possession" (US Opp at 2) - is the same rationale relied on by Judge McCurn in fashioning the monetary relief awarded in Cayuga in lieu of possession. See Oneida Indian Nation v. County of Oneida, 199 F.R.D. 61, 90 (N.D.N.Y. 2000) (having found that ejectment "may be unavailable or impractical as too disruptive or unfair" the court there opined that "as an alternative 'historically adjusted monetary damages' could be awarded"). Both the damages granted by the District Court in Cayuga and the damages suggested by Plaintiffs are premised upon the preclusion of possessory relief. US Opp at 26 ("If their lands cannot be returned as specified by the [NIA] and if Cayuga precludes an award of trespass damages for wrongful possession, general remedial principles permit the Court to award the Mohawks compensatory

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original). In a footnote, the U.S. steps even further from any pretense of following the non-possessory contract reformation model of Oneida by detaching the damage claim from monetary profit altogether, seeking a damages award for "any profit *or advantage* gained by the State due to the violations of the [NIA] . . .." Id. at 34 n. 20 (underlined emphasis original; italicized emphasis added).

damages . . .").

The United States posits that "upon reflection, we have concluded that even if Cayuga is applied, it is possible that the Second Circuit would find that some relief is still available in this case . . .." US Opp at 1. Contrary to the United States' position, in dismissing the Cayugas' trespass claims, the Court of Appeals held that all claims predicated "upon plaintiffs' possessory land claim" were barred. Cayuga, 413 F.3d at 278. Since the relief Plaintiffs seek is predicated on a possessory land claim, it comes within the Cayuga rule. There is no principled difference between an award of the current value for land awarded in substitution of a right of possession and the historic value of land given in lieu of the same right of possession. A damages award based on the value of the land at the time of the challenged transactions is no less disruptive than an award of damages based on current market value because, in both cases, the legal determination that is the basis for liability – the invalidity of the challenged transaction – calls into question current title, which makes the claim disruptive under Cayuga.

Nor does the argument that the court could shape a judgment for monetary damages that does not threaten to have any disruptive or prejudicial effect on the community (MCA Opp at 29-30; SRMT/MNCC Opp at 12; US Opp at 29 n.16) distinguish the proposed remedy advanced by Plaintiffs from the monetary award granted by Judge McCurn in Cayuga. In denying ejectment entirely, and granting the Cayugas a monetary award against the State only, the District Court in Cayuga had held that the Cayugas' possessory rights could "not be effectuated … other than as to damages." Id. at 22. See Cayuga X, 1999 U.S. Dist. LEXIS 10579 at *78-*79 (finding that recovery of possession through ejectment would not be permitted as to any defendant and that "monetary damages" would serve as an adequate

substitute). The Court of Appeals nonetheless held that both possessory and monetary relief were barred.[14]

Notably, in the course of discussion regarding the surviving non-possessory contract reformation claim, the Court in Oneida declined to adopt an alternative theory for the recovery of damages that had been posited by the Oneidas, and which is embraced by the Plaintiffs in this case in support of their arguments that the Court can shape a remedy for violations of the NIA pursuant to Rule 54(c). MCA Opp at 29-30; SRMT/MNCC Opp at 12; US Opp at 29 n.16. The Court held: "[The Oneidas] and the United States also argue that the common law has long recognized that when equity bars restoration of land to a plaintiff after it has been transferred to innocent parties, equity also requires a damage award for the difference between the price the defendant paid the plaintiff for the land and its true value when the defendant obtained it." 500 F.Supp.2d at 144 n. 8. Because that theory "necessitated a finding of constructive possession or Plaintiffs' immediate right of possession" it was deemed disruptive and barred by laches. Id. "The Circuit's reasoning [in Cayuga] suggests that any award of damages that is predicated on possession of the land in question, however remotely, is too disruptive and must be barred by laches. Plaintiffs' and the United States' reliance on the Court's equitable powers [under Rule 54(c)] to compensate them for the land necessarily implicates the Oneidas' historical claim to the land in question." Id. (emphasis added). The Court instead permitted

[14] The application of Cayuga to bar the type of damages claims now proferred by the United States is supported by Judge Platt's decision in Shinnecock. As in this case, the plaintiff in Shinnecock purported to assert a claim for violation of the NIA. The remedies requested included disgorgement by the original purchaser of the land (the Town of Southampton) of "the value of the benefits received" by the town for each purchase, including the benefits received on resale. Id. at *5. The court nonetheless dismissed all of these claims on the basis of Cayuga. See id. at *6 ("Further, because the rest of the plaintiffs' claims are 'predicated entirely upon plaintiffs' possessory land claim,' they are also dismissed" (citing Cayuga, 413 F.3d at 278)).

the Oneidas to pursue only the contract reformation claim because it "does not rely on any present or future claim to the land in question." Id.

It is clear that no part of the claim that is asserted by Plaintiffs meets the criteria that were applied in Oneida, to allow the plaintiffs to seek damages in satisfaction of a non-possessory contract claim. The claim in this case without question is an inherently disruptive possessory land claim, barred under the doctrine of laches as elucidated in Sherrill, Cayuga, and now in Shinnecock and Oneida.

POINT II

THE RULE 12(c) MOTION SHOULD NOT BE CONVERTED TO A MOTION FOR SUMMARY JUDGMENT

Plaintiffs have submitted comprehensive affidavits and exhibits in opposition to the Defendants' motions for judgment on the pleadings, which seek dismissal of this action based solely on the sufficiency of the allegations set forth in the Complaints. Plaintiffs seek conversion of the Defendants' motions into a motion for summary judgment, and ask that the Court either deny the motion on the ground that there exist genuine issues of material fact that require a trial, or enter an order pursuant to Rule 56(f), postponing determination of such a summary judgment motion until such time as the parties have engaged in discovery relating to the factual issues pertaining to the defenses of laches, acquiescence, and impossibility.

Plaintiffs' summary judgment conversion request is without merit. The Second Circuit's holding in Cayuga – that laches, impossibility, and acquiescence are defenses that can and should be determined in the context of a motion pursuant to Rule 12(b)(6) – makes apparent that there is no basis to convert the defendants' motions. Cayuga, 413 F.3d at 278.

The District Court has broad discretion to determine whether to accept the submission of extra-pleading materials and rely upon it, and thereby convert the motions for judgment on the pleadings into a Rule 56 summary judgment motion. 5C Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1366, at 159 (Civil 3d ed. 2004). "This discretion will be exercised on the basis of the district court's determination of whether or not the proffered material, and resulting conversion from the Rule 12(b)(6) to the Rule 56 procedure, is likely to facilitate the disposition of the action," 5C Wright & Miller, supra, § 1366, at 165.

Given the explicit holding of Cayuga, it is clear that the disposition of ancient possessory land claims is best facilitated by motions to dismiss, not through the much more arduous and time-consuming process of discovery, summary judgment, and trial practice focusing on centuries-old events. This is especially the case where, as here, Defendants have not submitted any factual material outside the pleadings that require conversion. Rather, the motions to dismiss are predicated on the factual allegations in the Complaints, upon undisputed facts of which the Court can take judicial notice pursuant to Rule 201 of the Federal Rules of Evidence, and on legal principles that were established in Sherrill and Cayuga, and now in Shinnecock and Oneida. While the extensive factual materials advanced by Plaintiffs flesh out the more general allegations of the Complaints, these materials are insufficient to defeat the Rule 12(c) motions, which should not be converted into a motion for summary judgment.

In Cayuga, the Second Circuit held that laches is apparent from the face of a complaint, where, as here, a plaintiff tribe asserts a centuries-old claim asserting a possessory interests in land because such a claim is, after the the Supreme Court's decision in Sherrill, impermissibly "disruptive." The Cayuga panel expressly recognized that this determination may be made on

the pleadings, stating that the Cayugas' complaint failed "*ab initio*" and that "if the Cayugas filed this complaint today, exactly as worded, a District Court would be required to find the claim subject to the defense of laches under Sherrill and could dismiss on that basis." See Cayuga, 413 F.3d at 278; see also id. at 280 (finding there was no need to remand [for further factual development] for a determination of the laches question").

The unmistakable import of Cayuga is that Indian land claims such as this one can be dismissed before trial. The Plaintiffs contend that the Court of Appeals really did not mean it when it said that the Cayugas' claim was "subject to dismissal *ab initio*" and that the District Court could properly dismiss the case on the basis of laches if the "the Cayugas filed their complaint today." See SRMT Opp at 56-57 & n.40; US Opp at 17-18; Cayuga, 413 F.3d at 277-78. No amount of deconstruction of the court's language can change the inescapable meaning of the decision. The United States, at least, acknowledged the import of Cayuga in its statements to the Supreme Court: "The necessary implication of the court of appeals' decision . . . is that this and other tribal land suits should have been dismissed at the outset." Roberts Reply Aff. Ex. N [U.S. Petition for Cert. In Cayuga] at 4.

In Shinnecock, the District Court followed the plain language of the Cayuga decision and dismissed an ancient possessory land claim pursuant to Rule 12(b)(6) in a motion predicated on the same grounds that are asserted in this case, holding that one of Cayuga's "principles" was that "equitable defenses can be applied at the pleadings stage to dismiss disruptive possessory land claims." 2006 WL 3501099 at * 4. Similarly, as was pointed out in the State's main brief, this Court in this case issued a decision that summarily determined the issue of laches at the pleadings stage, albeit in the context of a motion to strike the defense.

Canadian St. Regis Band of Mohawk Indians v. New York, 278 F.Supp.2d 313, 332-33 (N.D.N.Y. 2003).[15]

In a related vein, Plaintiffs seek an opportunity to engage in discovery before judgment is rendered respecting the defenses of laches, impossibility, and acquiescence. US Opp at 12-13; 20-21. In Oneida, Judge Kahn rejected the asserted need for discovery and a detailed factual record in determining whether laches bars an ancient possessory Indian land claim. In that case, the parties had engaged in extensive discovery relating to liability issues, and had developed a factual record before 2005, when the decisions in Sherrill and Cayuga were rendered.[16] Based on this record, the laches motion in Oneida was framed as a motion for summary judgment, rather than a motion for judgment on the pleadings.

In opposing the summary judgment motion, the Oneida plaintiffs pointed out that the laches defense had been struck by court order at a procedural stage that had preceded discovery, and (like Plaintiffs here) they claimed a need to pursue additional discovery pertaining to the issue. See Roberts Reply Aff, Exhibit O [Oneida Plaintiffs' Declaration of Michael R. Smith Pursuant to Fed. R. Civ. P. 56(f) (December 13, 2006)]. In addition, the Oneida plaintiffs submitted voluminous factual material (like Plaintiffs here) in an effort to demonstrate that there existed genuine issues of fact that foreclosed a summary determination

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[15] It is well-established that equitable time-based defenses, such as laches, may be determined where it is apparent that they apply "from the face of the complaint." See, e.g., Young v. S. Pacific Co., 34 F.2d 135, 137 (2d Cir. 1929) (laches shown on the face of the complaint warranted dismissal without further factual development); LC Capital Partners, LP v. Frontier Ins. Group, Inc., 318 F.3d 148, 157 (2d Cir. 2003) ("We agree with the District Court that the circumstances here were sufficiently clear on the face of the complaint and related documents as to make the time-bar ruling appropriate on a motion to dismiss.").

[16] The U.S. Opposition Brief erroneously represents that the Court in Oneida "had conducted several evidentiary hearings" at some unidentified earlier point in that litigation. US Opp at 20, n.10. In fact the record before Judge Kahn included no evidentiary hearings that had been conducted in that litigation.

that their claims were barred by laches.[17]

The Oneida decision is instructive in the case at bar, for the manner in which the Court addressed these fact-based contentions. The Court held that Cayuga and Sherrill had developed "a specific set of criteria . . . to determine when laches should bar possessory Indian land claims, such as those before the Court." Oneida, at 134 (citing Cayuga, at 277). Applying those criteria, notwithstanding the voluminous factual record advanced by plaintiffs and their asserted need to pursue further discovery relating to the issue of laches, the Court granted judgment dismissing the Oneidas' possessory claims, based on "generally self-evident [factual] findings." Id., at 134. The Court held that "additional discovery [was] unnecessary" (Id. at 136-37) and even "counterproductive"(Id. at 136, n. 2) because "the facts that would be considered as part of a laches inquiry . . . are generally self-evident ...." Id. In so holding, the Court "[took] special notice of Judge McCurn's wise reasoning, born of long experience with various Indian land litigations [regarding] the efficacy of ordering such an evidentiary hearing" wherein Judge McCurn had found such a hearing would constitute "an academic exercise" that adduced "commonsense observations" concerning factual questions that "were self-evident." Id. (quoting Oneida Indian Nation of New York v. County of Oneida, 199 F.R.D. at 92).

[17]See Roberts Reply Aff, Exhibit P [Oneida Plaintiffs' Rule 7.1(a)(3) Statement of Material Facts Genuinely in Dispute (December 13, 2006)]; Exhibit Q [Declaration of Michael R. Smith, identifying 332 exhibits (December 13, 2006)]. The exhibits are excluded in the interest of brevity.

POINT III

IN THE ALTERNATIVE, A STAY IN THIS CASE IS WARRANTED, PENDING THE OUTCOME OF APPELLATE PROCEEDINGS IN ONEIDA

Judge Kahn's decision in Oneida is now before the Second Circuit on cross-appeals, where all briefing is scheduled to be completed by March 10, 2008. The United States has made clear that it intends to utilize their appeal to ask that the Circuit revisit the holdings that it rendered in the Cayuga case. Roberts Reply Aff, Ex J [US Oneida §1292 brief] at 2 ("Although this Court denied rehearing *en banc* in *Cayuga* [not to mention the Supreme Court's subsequent denial of *certiorari*], the district court's order here presents the Court an opportunity to reexamine *Cayuga* . . .."). The United States' § 1292(b) brief in Oneida is devoted largely to argument that frankly asks the Circuit to conduct appellate review *not* of Judge Kahn's decision in Oneida, but of its own decision in Cayuga (Id. at 14-18), literally urging that "there is substantial ground for difference of opinion whether *Cayuga* was correctly decided."

Undaunted, in this case as well, the United States devotes fully seven pages of its opposition brief (US Opp at 14-21) to arguments that it concedes are contrary to "the law of this Circuit and binding upon this Court" setting forth its "objections to Cayuga, as it may be applied in this case, with the purpose of preserving them for possible review on appeal." US Opp at 14. The *pro forma* arguments advanced by the United States in this regard are fully adopted by the St. Regis Mohawk Tribe and the Mohawk Nation Council of Chiefs.

SRMT/MNCC Opp at 70.[18]

Prominent among the Plaintiffs' arguments regarding the issue of laches in this case is their contention that the defense requires more than a showing that there has been a long delay from the allegedly illegal transactions to the date on which the Plaintiffs finally filed an action seeking to assert their possessory claims. Rather, they contend, it is necessary for the Court to assess whether the delay was unreasonable (SRMT/MNCC Opp at 59-65), and to assess whether the defendants were prejudiced by such delay. Id. at 65-70. Urging that laches is a fact-intensive inquiry that can be addressed only on a fully-developed record after comprehensive discovery, the plaintiffs ask that this Court deny the Rule 12(c) motion and permit them to press forward with such discovery. US Opp at 17-21; SRMT/MNCC Opp at 6-10. As was discussed earlier in this brief (pp 12-13), the Court in Oneida, applying the principles of Cayuga, expressly rejected these very contentions. This issue is but one among many controlling legal principles that are under review in the Oneida appeal. Roberts Reply Aff, Ex I [Oneida § 1292 brief] at 16-18.

The United States' brief in opposition to the Rule 12(c) motion relies heavily on Judge Kahn's acceptance of a non-possessory contract reformation claim in Oneida, and asks this Court to follow the lead of that decision to deny Defendants' motion. US Opp at 21-25; Id. at 1-2 ("[U]pon reflection, we have concluded that even if Cayuga is applied, it is possible that the Second Circuit would find that some relief is still available in this case, as the district court

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[18] As much as Plaintiffs may not like it, Cayuga (which applied the holding of Sherrill) is the law of this Circuit and is controlling. See Anderson v. Recore, 317 F.3d 194, 201 (2d Cir. 2003) ("We will follow a precedent from this circuit unless a Supreme Court decision or an en banc holding of this court implicitly or explicitly overrules the prior decision"); United States v. Russotti, 780 F. Supp. 128, 131 (S.D.N.Y. 1991) ("[I]t is axiomatic that a district court cannot simply take a position contrary to that of its circuit court. . . .").

recently held in [Oneida]"). This aspect of the Oneida decision is directly at issue in the State's pending appeal before the Second Circuit. Roberts Reply Aff, Ex H [NY Oneida §1292 brief], 12-19.

It is readily apparent that the decision that will be rendered by the Court of Appeals (and ultimately perhaps the Supreme Court) in the pending Oneida appeal will be of significant assistance – more likely, it will be controlling – in determining the difficult issues raised in the motions before this Court.[19] It is likely that the outcome of the Oneida appeal will clarify the "dramatically altered . . . legal landscape against which we consider [Indian land] claims" in the wake of Sherrill. Cayuga, 413 F.3d at 273. This Court is all too familiar with the daunting nature of Indian land claim litigation, where it is the norm rather than the exception for such cases to span decades, often subject to stays pending settlement talks or awaiting the outcome of related litigation. Indeed, this case has been stayed on several occasions since its inception some 25 years ago, most recently to await the outcome of the appellate proceedings relating to Cayuga.

The complexity and difficulty of discovery, motion practice, and trial, pertaining to transactions dating back to the earliest years of the Republic are self-evident – even where the controlling legal principles are clearly charted. Where, as here, the guiding legal principles are sharply disputed by the parties, and there is a pending appeal before the Circuit Court that will likely clarify those very legal principles, the interests of judicial economy and avoidance of

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[19] Indeed, Judge Kahn recognized as much when he *sua sponte* certified the decision for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b), noting that his recognition of a "fair compensation" claim was in conflict with the holding in Shinnecock; that this was a "controlling question of law as to which there is substantial ground for difference of opinion . . . and an immediate appeal would clarify the law and materially advance the termination of the [Oneida] litigation." Oneida at 147.

unnecessary expense to the parties are served by the issuance of a stay pending the outcome of that appeal.[20]

A stay pending the outcome of the Oneida appeal accordingly would be warranted in this case.

[20] In its Oneida § 1292(b) brief, the U.S. posited: "It would not be in any of the parties' interests to proceed with further discovery, motions, and trial on the 'fair compensation' claim only to find that those efforts were in vain if the court of appeals ultimately holds that the 'possessory' claims should not have been dismissed." Ex J at 13. By the same token, it would not serve the interests of any of the parties in this litigation to proceed with discovery, motion practice, and trial in this matter only to find (after Oneida) that this action should have been dismissed on the pleadings.

CONCLUSION

It is clear that under Sherrill and Cayuga, and now Oneida and Shinnecock, the claims asserted by Plaintiffs are inherently disruptive possessory claims, barred under the equitable doctrines of laches, acquiescence and impossibility. The Complaints therefore should be dismissed with prejudice pursuant to Rule 12(c). In the alternative, the Court should issue a stay of further proceedings in this litigation, pending the outcome of appellate review of the Oneida decision of May 21, 2007.

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