UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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, and THE UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. THE STATE OF NEW YORK, et al., Defendants	Civil Action No. 82-CV-783 **LEAD CASE** (Judge McCurn)
THE MOHAWKS OF AKWESASNE, by THE MOHAWK COUNCIL OF AKWESASNE, Plaintiffs, THE UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. THE STATE OF NEW YORK, et al., Defendants	Consolidated with: Civil Action Nos. 82-CV-1114 and 89- CV-829 (Judge McCurn) UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANTS ' MOTIONS FOR JUDGMENT ON THE PLEADINGS

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UNITED STATES' MEMORANDUM IN OPPOSITION TO MOTIONS FOR JUDGMENT ON THE PLEADINGS

The United States, through its attorney, submits this Memorandum in Opposition to the Motions for Judgment on the Pleadings ("Motions") filed by the State of New York ("State"), Dkt. 446, and the New York Power Authority ("NYPA"), Dkt. 449 (hereinafter collectively the "Defendants").

INTRODUCTION

Defendants, relying on Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266 (2d Cir. 2005), move for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), based on laches. The United States recognizes that Cayuga is now the law of the Second Circuit and binding upon this Court. The United States, however, preserves its contention that Cayuga was wrongly decided, and hereby preserves arguments against that decision's application to this case. The United States contends that Cayuga erred in applying the doctrine of laches to the United States when acting in its sovereign capacity and within the statute of limitations established by Congress. Moreover, Cayuga incorrectly applied laches to money damage awards that are premised upon a present-day possessory right to lands acquired in violation of the Nonintercourse Act. 413 F.3d at 278. Further, to the extent Cayuga can be understood either to (1) alter the laches test to make irrelevant the question of whether the Plaintiffs' delay is unreasonable, or (2) hold that laches can be resolved solely on the basis of the pleadings, the United States asserts it was wrongly decided. A defense of laches presents case-specific factual issues requiring analysis of an historical record that in this case spans over two centuries.

Also, 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, as the district

court recently held in Oneida Indian Nation of New York v. New York, No. 74-CV-187, 2007 U.S. Dist. LEXIS 36940, at *25-27 (N.D.N.Y. May 21, 2007)[1/]. Cayuga merely holds that possessory land claims are potentially subject to laches. While some remedies sought by the United States may implicate present possessory interests, the underlying cause of action is a claim that the State has violated the Nonintercourse Act, federal treaties, and federal common law by purchasing and otherwise acquiring Mohawk lands. The Supreme Court has noted that the "Nonintercourse Act . . . does not speak directly to the question of remedies for unlawful conveyances of Indian land." County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 237 (1985) ("Oneida II"). A Nonintercourse Act claim need not necessarily be one for possessory relief; indeed, nonpossessory relief may provide an appropriate remedy for a Nonintercourse Act claim, if equitable considerations bar vindication of a tribe's right of possession. Under such limited circumstances, as may be present should this Court find that possessory claims are barred by laches, this Court - instead of granting relief on the premise that the original transactions continue to be of no validity and that the Mohawk plaintiffs retain the right to actual possession - may nonetheless redress the State's violations of the Nonintercourse Act. It may do so by accepting and giving effect to the transactions by requiring the State to compensate the tribal plaintiffs with any profits it made through its purchase and resale of Mohawk lands. Such relief, which would also confirm existing title, is consistent with the Nonintercourse Act's purpose of ensuring that Indian tribes are not defrauded of their lands. Because relief is available (if the

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[1/]Pursuant to Local Rule 7.1(a)(1), a copy of the Oneida decision is attached as an exhibit to this Memorandum. The United States learned that this day, July 13, 2007, the Second Circuit granted permission to the State, the Oneida tribal plaintiffs, and the United States to seek interlocutory review of the recent Oneida decision.

requisite facts are proven at trial), this Court should deny Defendants' Motions for Judgment on the Pleadings.

BACKGROUND

1. Plaintiffs' Complaints

This action was brought by the St. Regis Mohawk Tribe, the Mohawk Nation Council of Chiefs, the Canadian St. Regis Band of Mohawk Indians (collectively the "Mohawks") and the United States to remedy the State's unlawful purchases of approximately 15,000 acres of land secured to the Mohawks. The adoption of the United States Constitution clarified that Indian affairs were "the exclusive province of federal law." Oneida II, 470 U.S. at 234. Pursuant to this authority, Congress passed the first Nonintercourse Act in 1790, Ch. 33, 1 Stat. 137, which, as amended, remains in effect to this day. See Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 668 & n.4 (1974) ("Oneida I"). The Nonintercourse Act in effect prohibits the lands of Indian tribes from being alienated unless the conveyance at issue is ratified by Congress. See 25 U.S.C. § 177; Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 56 (2d Cir. 1994).

The lands at issue in this suit include (1) lands located on a Reservation created for the benefit of the "Indians of St. Regis" by the United States in the Treaty of 1796 between the United States, the State, and the Seven Nations of Canada, 7 Stat. 55 (1796) ("Reservation lands"), U.S. Am. Compl.-in-Int. ¶ 13; and (2) Barnhart, Baxter, and Long Sault Islands ("Islands"), Id. ¶¶ 27-30, which the Tribes never ceded. As to the Reservation lands, these lands were within the Mohawks' aboriginal territory, and the Mohawks' rights to such lands were recognized by both the United States and the British Crown. Id. at ¶ 15. The State entered into a

series of agreements between 1816 and 1845 with persons claiming to represent the "St. Regis Indians," in which the State purported to purchase interests in specific Reservation lands. Id. ¶ 17. The State also encroached upon and possessed other Reservation lands. Id. ¶¶ 18 &19. The State sold some of these lands to third parties. Id. ¶ 24. None of these transactions, encroachments, or purported acquisitions were ratified by federal legislation or treaty, as required by the Nonintercourse Act. Id. The State knew, or should have known, that its purported acquisitions of the subject Indian lands, as well as its sale of such lands to third parties, were in violation of the Nonintercourse Act. Id. ¶ 23.

As to the Islands, pursuant to the Treaty of Paris between the United States and Great Britain, the Islands were in British North America, rather than the United States; thus, they were not lands within New York State to which title was ceded by the Treaty of 1796. Id. ¶ 27; see generally Canadian St. Regis Band of Mohawk v. New York, 146 F. Supp. 2d 170, 179 (N.D.N.Y. 2001). After the War of 1812, pursuant to the Treaty of Ghent, 8 Stat. 218 (1814), the boundaries of the United States and Canada were resurveyed, and in 1822 a boundary commission declared that the Islands were within the United States. U.S. Am. Compl.-in-Int. ¶ 30. Prior to the resurvey, the British treated the Islands as the property of the Mohawks. Id., ¶ 29. The Treaty of Ghent protected the property rights of those owning the Islands prior to the boundary determination; thus, the Islands continued to be the property of the Mohawks. Id. After 1822, the State issued patents purporting to convey title of the Islands to third parties. Id. ¶ 31. The State made no attempt to have Congress ratify the acquisition of the Islands, as required by the Nonintercourse Act. Id. ¶ 33. Subsequently, the "Islands were acquired by the NYPA," Canadian St. Regis Band, 146 F. Supp. 2d at 179, through condemnation by the State, for use as

part of the St. Lawrence-Franklin D. Roosevelt Power Project. U.S. Am. Compl.-in-Int. ¶¶ 35 & 37. The State knew, or should have known, that its patents of the Islands to third parties was in violation of the Nonintercourse Act. Id. at ¶ 34.

In 1982, the Canadian St. Regis Band of Mohawk Indians ("Band") brought suit against the State, the Counties of Franklin and St. Lawrence, various municipalities and towns, and various private defendants, alleging that the defendants acquired lands on the Mohawk Reservation in violation of the Nonintercourse Act. Compl. ¶¶ 49-59, Canadian St. Regis Band of Mohawk Indians v. New York, No. 82-CV-783 (N.D.N.Y. 1983). The Band filed a second Complaint in 1982 against the State, NYPA, and several other defendants alleging that such defendants acquired the Island lands in violation of the Nonintercourse Act. Compl. ¶¶ 43-45, Canadian St. Regis Band of Mohawk Indians v. New York, No. 82-CV-1114 (N.D.N.Y. 1983). In 1989, the St. Regis Mohawk Tribe and the People of the Longhouse at Akwesasne, by the Mohawk Nation Council of Chiefs, filed a Complaint asserting the same basic allegations. St. Regis Mohawk Tribe v. New York, No. 89-CV-829 (N.D.N.Y. 1989). The 1989 Complaint included allegations as to both the Reservation lands and the Islands. All three Tribal Plaintiffs allege that they are successors-in-interest to the "Indians of St. Regis" referred to in the 1796 Treaty. All three Complaints were subsequently consolidated into one action. In all of the Complaints, the Tribal Plaintiffs sought a declaration of title to the lands at issue, immediate possession of the lands, and monetary relief, as well as any other relief that may be deemed just and proper. Compl. filed in 82-CV-783, at 12, "Prayer for Relief" section, ¶¶ 3-8; Compl. filed in 82-CV-1114, at 9-10, "Prayer for Relief" section, ¶¶ 2-8; Compl. filed in 89-CV-829, at 21-23, "Prayer for Relief" section, ¶¶ 2-7.

The United States intervened as a Plaintiff in 1998. Dkt. 167. The United States participates in this litigation in its sovereign capacity on its own behalf to enforce federal law, as well as for the benefit of the Mohawks. The United States' Amended Complaint-in-Intervention raises claims against and seeks relief solely from the State, the party that initially acquired the Mohawk lands in violation of federal law and unlawfully and unfairly profited from that violation, and from NYPA. U.S. Am. Compl.-in-Int. ¶ 1 n.1. The United States alleges that the State acquired the lands on the Mohawk Reservation and the Islands in violation of the Nonintercourse Act. Id. ¶¶ 21 & 33. The United States also alleges that NYPA asserts beneficiary title to and is in possession of the Islands and claims interests in the Islands as a result of unlawful condemnations of the Islands by the State at NYPA's request. Id. ¶ 35. Further, since the State never lawfully acquired the Islands by condemnation, the State had no authority to issue patents purporting to transfer title to NYPA. Id. For relief, the Amended Complaint-in-Intervention requests: (1) a declaratory judgment that the Mohawks have the right to occupy the lands currently occupied by Defendants; (2) "monetary and possessory remedies, including ejectment where appropriate" against Defendants for those lands within Defendants' control; (3) monetary relief from Defendants for lands no longer within Defendants' control, on the grounds that the State was the initial trespasser and all injuries to the Mohawks flowed from the State's tortious actions; and (4) "such other relief as this Court may deem just and proper." Id. at 14, "Prayer for Relief" section, ¶¶ 1-6.

2. Prior Proceedings

Litigation of this action has focused for many years on various motions to dismiss, as well as motions to strike certain defenses and claims. The Court has issued several memoranda

decisions on these motions, including a Memorandum Decision and Order in 2001, Dkt. 200, Canadian St. Regis Band of Mohawk Indians v. New York, 146 F. Supp. 2d 170 (N.D.N.Y. 2001), and one in 2003, Dkt. 275, Canadian St. Regis Band of Mohawk Indians v. New York, 278 F. Supp. 2d 313 (N.D.N.Y. 2003). In both decisions, the Court ruled that the equitable defense of laches was not available to the Defendants. See 146 F. Supp. 2d. at 186-87; 278 F. Supp. 2d at 330-33.[2/]

Because the litigation of this action has been dominated by briefing on various motions to dismiss and on other procedural issues, there has been virtually no discovery. Another reason discovery has not developed is that the parties have devoted considerable effort to resolving this action through settlement. This Court, on several occasions, has accordingly stayed litigation in order to foster settlement discussions. See Dkt. 128; Dkt. 146; Dkt. 367; Dkt. 393; Dkt. 430; and Dkt. 437. It was not until 2004 that discovery began in earnest; even so, only limited discovery has occurred. On June 23, 2004, Magistrate Judge Lowe directed the parties to prepare a joint discovery plan. Dkt. 297. Pursuant to a schedule imposed by the Magistrate Judge, see Dkt. 309, the parties exchanged documents pursuant to Rule 26(a)(1), as well as a first set of interrogatories and requests for production in October 2004. No responses to the interrogatories or requests for production have been exchanged, however, as Magistrate Judge Lowe subsequently ordered a stay to allow the parties to focus on settlement efforts. Dkt. 367. The stay was extended by Judge Lowe, Dkt. 367; Dkt. 390; Dkt. 430; Dkt. 441, and remained in place until September 5, 2006. On that date, Magistrate Judge Lowe directed Defendants to file

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[2/]The Court's rejections of the laches defense in its 2001 and 2003 decisions predated City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) and Cayuga.

motions to dismiss or motions for summary judgment on or before November 6, 2006. Dkt. 445. Defendants filed their Motions for Judgment on the Pleadings on that date. Magistrate Juge Lowe's September 5, 2006 Order required the United States to file response to Defendants' Motions on or before January 15, 2007. Magistrate Judge Lowe granted several extensions of time to file responses. Dkt. 451; Dkt. 454; Dkt. 456.

3. The Cayuga Decision

Cayuga involved transactions from 1795 and 1807 in which the State acquired the Cayuga Indian reservation. This Court held that these acquisitions violated the Nonintercourse Act, Cayuga, 413 F.3d at 268, and that the defense of laches was unavailable at the liability stage. Cayuga Indian Nation of N.Y. v. Cuomo, 771 F. Supp. 19, 23 (N.D.N.Y. 1991). Based on a number of equitable considerations, including laches, this Court also determined that ejectment was not an available remedy. See Cayuga Indian Nation of N.Y. v. Cuomo, No. 80-CV-930, 1999 U.S. Dist. LEXIS 10579 (N.D.N.Y. July 1, 1999).[3/] Subsequently, after weighing numerous equitable considerations, including laches, this Court awarded prejudgment interest. Cayuga Indian Nation of N.Y. v. Pataki, 165 F. Supp. 2d 266, 356-58 (N.D.N.Y. 2001). The Second Circuit reversed, relying on Sherrill, holding that plaintiffs' ejectment claim was for possession and thus subject to the defense of laches, and that plaintiffs' money damages claims

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[3/] This Court emphasized that, nevertheless, the Cayugas "are entitled to relief for the past two centuries during which they have been deprived of their homeland," and, indeed, its invocation of laches was premised upon the availability of other adequate relief. Cayuga, 1999 U.S. Dist. LEXIS 10579, at *98; id. at *78-82 (determining that money damages will adequately compensate the Cayugas). This Court stressed that "[l]aches was only one of several factors which this court considered in deciding whether or not ejectment was a viable remedy in this case; it was not the determinative factor." Cayuga Indian Nation of N.Y. v. Pataki, 188 F. Supp. 2d 223, 257 (N.D.N.Y. 2002).

were predicated upon the ejectment claim or a present right of possession and thus also were subject to laches. Cayuga, 413 F.3d at 278. "Taking into account . . . the findings of the District Court in the remedy stages of [the] case," based on a developed factual record, the Second Circuit then concluded that "plaintiffs' claim is barred by laches." Id. at 268. Further, while recognizing that laches "traditionally" does not apply to the United States, the Second Circuit nonetheless found that the United States' claims were also barred by laches. Id. at 278-79. The Supreme Court denied the United States' petition for certiorari. See United States v. Pataki, 126 S. Ct. 2021 (2006).

SUMMARY OF ARGUMENT

Although Cayuga is now the law of this Circuit, the United States asserts that it was wrongly decided, and herein preserves objections to its application in this case. Cayuga interpreted Sherrill as applying laches to bar historic land claims that are "possessory" in nature. Sherrill, however, did not apply equitable considerations to bar all claims based on violations of the Nonintercourse Act or common law. Rather, Sherrill focused upon the "appropriateness of the relief," specifically finding that the unilateral revival of tribal sovereignty after a two-hundred-year hiatus constituted disruptive relief, thus triggering equitable defenses such as laches and acquiescence. 544 U.S. at 214. Sherrill, therefore, provides no support for a finding that all relief premised upon a possessory land claim is barred by laches. Nor can it justify a determination that a nonpossessory remedy is barred.

In addition to its erroneous reliance upon Sherrill, Cayuga errs on five other grounds as well, and therefore should not apply in this case. First, the United States is not subject to laches when acting in its sovereign capacity, as the Supreme Court has long held the United States acts

when it asserts treaty rights on behalf of tribes. The United States is enforcing a federal statute in this instance and therefore is clearly acting in its sovereign capacity. Second, trespass damages or other monetary relief against the State as the party that violated the Nonintercourse Act – such as the relief sought in Cayuga and this case – is not disruptive and should not be barred by laches pursuant to Sherrill. Third, laches does not apply to claims brought, as was this one, within the applicable statute of limitations. Fourth, Cayuga wrongly alters the typical laches analysis by apparently making irrelevant the question of whether the plaintiffs' delay is excusable. Finally, to the extent Cayuga held laches can be resolved on the basis of pleadings alone, without considering a complete factual record, this too was in error, as laches is a fact-laden inquiry and it is not appropriate to conduct a laches analysis or find it applicable so as to bar relief in the absence of a complete factual record.

Even if the Second Circuit's decision in Cayuga were found to be correctly decided, that decision may be read to preserve a Nonintercourse Act remedy of compensation for the profits gained by the State by the unlawful purchase and subsequent resale of the lands. Such relief is not premised upon a present right of possession of those lands, and thus would not run afoul of Cayuga's holding that relief premised upon a *possessory* right is disruptive and therefore subject to laches. If equitable considerations preclude vindication of the Mohawks' rights to monetary damages for trespass and the value of the lands unlawfully acquired by the State, based on a present right of possession, then the Mohawks should at least receive a fair price for lands lost through the challenged transactions. Such compensation, because of the illegality of the transfers under federal law, would best be measured by the difference between the prices the State demanded and obtained from third-party purchasers for those lands and what it previously paid

the Mohawks, plus interest. Requiring fair compensation furthers one critical purpose of the Nonintercourse Act, namely to assure that tribes are not defrauded in the sale of their lands. Such relief would reform the transactions to make them comport with a goal of the Nonintercourse Act and, in doing so, confirm existing title, thereby avoiding any potentially disruptive consequences to the current possessors of land. Such resolution provides finality – unlike a dismissal on laches grounds, which would leave title concerns unresolved. This Court, therefore, should deny Defendants' Motions.

ARGUMENT

Standard under Fed. R. Civ. P. 12(c)

Defendants seek relief pursuant to Fed. R. Civ. P. 12(c). In deciding a Rule 12(c) motion, courts apply the same standard as that applicable to a motion under Rule 12(b)(6): the allegations contained in the complaint are accepted as true and all reasonable inferences are drawn in favor of the nonmoving party. Burnette v. Carothers, 192 F.3d 52, 56 (2d Cir. 1999). A complaint may be dismissed pursuant to Rule 12(c) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. As discussed more fully below, the United States' Amended Complaint-in-Intervention sets forth a claim which, if the requisite facts are proven at trial, would entitle it to the remedy requested. Thus, dismissal of the United States' Complaint pursuant to Rule 12(c) is not appropriate.

Rule 12(c) provides that "if matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Defendants rely upon several documents that are outside the pleadings. NYPA, for

example, cites to documents issued by the Federal Energy Regulatory Commission ("FERC") in connection with NYPA's license. NYPA Mot. at 9. In addition, Defendants contend that the Court can take "judicial notice" of certain facts (such as, for example, that certain infrastructure has been built on the subject lands by the State or other non-Indian entities) and that it is appropriate for the Court to consider these facts in the context of a Rule 12(c) motion. State Mot. at 18; NYPA Mot. at 11. Because discovery is necessary on the claims for possessory relief, it is premature and inappropriate to take judicial notice of purported "facts" which should be developed during discovery.[4/] In any event, as will be explained, whether this action is resolved pursuant to Rule 12(c) or converted into a motion for summary judgment pursuant to Rule 56, Defendants are not entitled to judgment.

If this Court converts Defendants' Motions to summary judgment motions, the United States asserts that such motions are premature, as discovery has not taken place in this action, there is not a complete record, and it is not appropriate at this stage of the litigation to dispose of the laches issue summarily.[5/] Rule 56(f) allows a party faced with a motion for summary judgment to request additional discovery, and the Supreme Court has held that such a request

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[4/]Further, the "facts" cited by the State to which this Court is requested to take judicial notice are far too general in nature to assist the Court in its laches inquiry. For example, the State contends that this Court can take judicial notice of the fact that public infrastructure (e.g. State highways and bridges) have been built in the claims area. State Mot. at 18. The State does not provide any details, however, as to where, exactly, the infrastructure is located, when such infrastructure was built, or similar matters. More specific information is needed to conduct an adequate analysis, and this Court should reject the State's attempt to circumvent the need to provide the requisite detailed information by seeking judicial notice of such generalized facts.

[5/]Rule 12(c) provides that if a court converts a motion for judgment on the pleadings to a motion for summary judgment, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." If this Court converts Defendants' Motions into motions for summary judgment, the United States will comply with Local Rule 7.1(a)(3) .

should usually be granted when the nonmoving party has not had an opportunity to make full discovery. B.F. Goodrich v. Betkoski, 99 F.3d 505, 523 (2d Cir. 1996) (quotation omitted). "The nonmoving party must have had the opportunity to discover information that is essential to his opposition to the motion for summary judgment." Hellstrom v. U.S. Dep't of Veterans Affairs, 201 F.3d 94, 97 (2d Cir. 2000) (quotation omitted). In George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix, 554 F.2d 551, 555 (2d Cir. 1977), the Second Circuit emphasized that when there has been virtually no discovery in an action, like the case at bar, a court should rarely grant summary judgment:

> Unlike a Rule 12 motion, in which a party's allegations in the pleadings must be accepted, a court in considering summary judgment may look behind the pleadings to facts developed during discovery. See 10 C. Wright & A. Miller, supra, s 2713 (1973). Here, however, the court had virtually nothing to look to other than the pleadings, since appellants had had little opportunity for discovery.
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> We hold that consideration of a summary judgment motion at this point in the proceedings was premature. In a series of recent cases, this court has repeatedly emphasized that on a motion for summary judgment the court cannot try issues of fact; . . . it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, . . . with the burden on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. . . . This is particularly so when, as here, one party has yet to exercise its opportunities for pretrial discovery.

Id. at 555 (quotations omitted) (emphasis added).

As discussed below, discovery is needed in this case to determine the extent and duration of tribal land ownership in the Hogansburg Triangle, so that this Court can determine whether Cayuga is applicable based on the specific circumstances of this case.[6/]

[6/] See page 20 below.

I. Preservation of Claims

Defendants' Motion is premised entirely upon Cayuga, which interpreted Sherrill as mandating application of laches to bar historic land claims that are "possessory" in nature. See Cayuga, 413 F.3d at 277. The United States was not a party to Sherrill; therefore, the Court did not depart from its longstanding precedent that laches does not apply to the United States. Moreover, nothing in Sherrill suggests that equitable considerations could be applied to bar entire *claims or all forms of relief for violation of the Nonintercourse Act or the common law*. Sherrill focused on the "appropriateness of the relief" sought, rather than on the nature of the claim, and concluded that equitable considerations barred the unique declaratory and injunctive relief specifically sought by the Tribe because of the "disruptive practical consequences" of the relief in the "present and future." Sherrill, 544 U.S. at 214, 219. The Supreme Court specifically found that the unilateral revival of tribal sovereignty after a two-hundred-year hiatus constituted uniquely disruptive relief. See id. at 202-03. Sherrill made explicit that "the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in Oneida II." Id. at 221. Accordingly, Sherrill provides no support for a finding that any relief premised upon a possessory land claim – even relief generally regarded as nonpossessory such as a money judgment – is barred by laches.

The United States asserts that Cayuga was wrongly decided. However, the United States' petition for certiorari was denied, see United States v. Pataki, 126 S. Ct. 2021 (2006), and accordingly, Cayuga is now the law of this Circuit and binding upon this Court. The United States accordingly asserts the following objections to Cayuga, as it may be applied to this case, with the purpose of preserving them for possible review on appeal:

(1) *Laches does not apply to the United States.* The United States is not subject to laches when acting in its sovereign capacity. The United States participates in this suit in its sovereign capacity in two respects: to enforce the Nonintercourse Act and the Treaty that secured these lands to the Mohawks, and to effectuate the protections those measures were intended to afford to the Mohawks. See Heckman v. United States, 224 U.S. 413, 437 (1912); United States v. Minnesota, 270 U.S. 181, 194 (1926). The Second Circuit's ruling to the contrary conflicts with clear Supreme Court precedent.

(2) *Laches is applied to remedies, not claims.* Laches and other equitable considerations are properly applied to remedies, not to the underlying claim itself. See Sherrill, 544 U.S. at 213 ("The distinction between a claim or substantive right and a remedy is fundamental.") (internal quotation omitted). This Court should focus, as did the Supreme Court in Sherrill, on the "appropriateness of the relief," not on the nature of the underlying claim, in determining whether and what relief is available for the claims before this Court. Id. at 214.

(3) *Laches does not apply to claims, such as this one, that were brought within the applicable statute of limitations.* Laches is not a defense against a claim brought within the period of the applicable statute of limitations. United States v. Mack, 295 U.S. 480, 489 (1935); see also United States v. Milstein, 401 F.3d 53, 63 (2d Cir. 2005) ("[I]t is well established that, as a general rule, laches is not a defense to an action that is filed within the applicable statute of limitations, nor is it available against the United States.") (citations and brackets omitted). Congress determined the time-frame within which the United States and Tribes could bring suit on Indian claims like this one with the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, 96 Stat. 1976 (1982). See also 28 U.S.C. § 2415. The legislation established a detailed

scheme which entrusted to Executive Branch officials the task of identifying and listing valid Indian claims.[7] Thus, the holding in Cayuga is contrary to the express will of Congress in two respects: (a) by applying laches, it disregards the statute through which Congress precisely defined the circumstances under which damages claims concerning Indian lands will be treated as time-barred; and (b) by barring such claims, Cayuga gives effect to transactions that were in violation of the express language of 25 U.S.C. § 177.

(4) *Money damages are not disruptive.* Monetary relief – whether in the form of trespass damages, damages for the current market value or for the fair rental value of the lands, or other forms – is not in itself disruptive, especially when awarded against the State as the original wrongdoer rather than against other parties who trace their title to the State. Such relief, therefore, should not be barred as an available form of relief for the claims raised here, particularly because the State profited from its violation of the Nonintercourse Act. Monetary damages, in fact, would provide final resolution to this land claim without disrupting settled expectations of ownership, governance or sovereignty in the claim area.

(5) *Laches requires a showing that Plaintiffs' delay is not excusable.* To the extent Cayuga holds that Indian land claims such as these may be dismissed on the ground of laches without regard to whether or not Plaintiffs' delay is excusable, the United States asserts that it

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[7]The Mohawk claim is included on the list of claims pursuant to 28 U.S.C. § 2415. See 48 Fed. Reg. 13698, 13920 (March 31, 1983). For such a listed claim, the Act's express statutory limitations period is not triggered unless and until the Secretary formally determines that the claim is not suitable for litigation and/or submits a proposed legislative resolution to Congress. See id.; Oneida II, 470 U.S. at 243. Moreover, Congress expressly determined that possessory claims for land have *no* statute of limitations. See 28 U.S.C. § 2415(c). Thus, the United States' and the Mohawk Plaintiffs' complaints were unquestionably filed within the Congressionally-mandated statutory limitations period. See 28 U.S.C. § 2415.

was wrongly decided. Cayuga elaborated a number of equitable considerations to be applied to land claims, which focus on the length of time between the wrong and the bringing of suit in the context of changes in the character of the lands over that time. See Cayuga, 413 F.3d at 277. These factors emphasize the second prong of a laches inquiry - the prejudice to the Defendant. These factors neglect a crucial aspect of the first prong - whether the Plaintiffs' delay is reasonable. The established doctrine of laches, in contrast to Cayuga's analysis, provides that "[a] party asserting the equitable defense of laches must establish both plaintiff's *unreasonable* lack of diligence under the circumstances in initiating an action, as well as prejudice from such a delay." King v. Innovation Books, 976 F.2d 824, 832 (2d Cir. 1992) (emphasis added).[9] There is no record before this Court to determine whether, in fact, the Mohawks' delay in bringing suit here was, or was not, due to an "unreasonable lack of diligence." Thus, it is premature for the Court to rule on the "reasonableness of plaintiffs' delay" prong of laches, as the Court should allow discovery on this issue, conduct evidentiary hearings, and then make relevant factual findings.

(6) *Laches requires findings of fact based upon a fully developed record.* Defendants read the Second Circuit's ruling in Cayuga as mandating dismissal on the pleadings, regardless of the nature of the relief sought, based solely on the following sentence from the opinion: "To frame this point a different way: if the Cayugas filed this complaint today, exactly as worded, a

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[9]With regard to the first prong of a laches query, this Court in Cayuga characterized as "overly simplistic" defendants' argument that "because at the time both the Cayugas and the United States were aware of the 1795 and 1807 treaties, . . . wait[ing] almost two hundred years to commence this lawsuit is inexcusable." Cayuga, 1999 U.S. Dist. LEXIS 10579, at *84-85. This Court's statement indicates that the issue of reasonable or unreasonable delay is, indeed, a complicated one; its resolution requires, at the very least, development of a factual record for this Court to consider.

District Court would be required to find the claim subject to the defense of laches under Sherrill and *could* dismiss on that basis." Cayuga, 413 F.3d at 278 (emphasis added). Cayuga "require[s]" that the claim is *subject to* the defense of laches. Holding that a particular defense *can* bar a claim, however, does not mean that the defense *must* bar the claim or any form of relief. Whether a defense actually bars relief in a particular case requires a fact-specific inquiry; this cannot be resolved on the basis of pleadings alone.[9/]

To the extent that Cayuga authorizes a court to dismiss an action on laches on the basis of pleadings alone, without considering the complete factual record, the opinion was wrongly decided. It is well-established that "[t]he equitable nature of laches necessarily requires that the resolution be based on the circumstances peculiar to each case." Tri-Star Pictures, Inc. v. Leisure Time Productions, B.V., 17 F.3d 38, 44 (2d Cir. 1994). "The inquiry is a factual one," id., and accordingly generally requires discovery to create a complete factual record that will enable the Court to ascertain if laches applies. See id. ("The record is not so clear that we can conclude with certainty that the injunctive relief sought . . . is foreclosed by laches.").

This Court recognized the fact-intensive nature of a laches defense in its 2003 Memorandum Opinion. Canadian St. Regis Band of Mohawk Indians v. New York, 278 F. Supp. 2d 313 (N.D.N.Y. 2003). This Court held that laches is a "fact intensive inquiry," and a motion "confined to a review of the pleadings" is, therefore, "improper" unless it is "clear on the face" of the pleadings that laches applies:

[9/] In Cayuga, the Second Circuit, concluding that laches barred relief, expressly referred to and relied upon findings of this Court. 413 F.3d at 277 (referring to this Court's findings on the ejectment issue); id. at 279-80 (referring to this Court's findings on the issue as to whether delay of the Cayugas in bringing their action was reasonable). Thus, Cayuga does not hold that a laches analysis can be conducted without some consideration of the factual record.

> The court is aware that ordinarily the applicability of laches involves a fact intensive inquiry, thus making it improper to consider on a motion such as this which is confined to a review of the pleadings. . . . By the same token, laches may be raised by a motion limited to a review of the pleadings when "it is clear on the face" and no set of facts can be proven "to avoid th[at] insuperable bar."

Id. at 332-33 (citations omitted).

Here, the *only* relevant fact that is arguably "clear on the face" of the pleadings is that there has been a long period of time from the initial acquisition of lands by Defendants to when the instant lawsuits were filed. A long passage of time, however, is not alone sufficient to support a finding of laches. The defense of laches instead requires "proof of (1) lack of diligence by the party against whom the defense is asserted and (2) prejudice to the party asserting the defense." Kansas v. Colorado, 514 U.S. 673, 687 (1995); Stone v. Williams, 873 F.2d 620, 625 (2d Cir. 1989). Neither Sherrill nor Cayuga held that a long passage of time, by itself, was dispositive on the laches issue. In fact, both courts took several factors or "considerations" into account before concluding that equitable remedies such as laches or acquiescence barred relief. Cayuga, 413 F.3d at 277.

In contrast to Cayuga, where the trial court conducted detailed evidentiary hearings after the parties engaged in discovery, discovery in this action has barely begun. As this Court recognized in its 2002 Memorandum Decision and Order, Dkt. 221, Canadian St. Regis Band of Mohawk Indians v. New York, 205 F.R.D. 88 (N.D.N.Y. 2002), this case is "in its procedural infancy." Litigation in this case until very recently has focused on legal briefing of numerous motions to dismiss and on various procedural motions. It was not until 2004, pursuant to an Order issued by Magistrate Judge Lowe, Dkt. 309, that the parties provided disclosures pursuant to Fed. R. Civ. P. 26(a)(1)(A) and (B) and exchanged a first set of interrogatories and requests

for production. Further, due to a stay in the litigation to foster settlement discussion, which was extended several times, Dkt. 367; Dkt. 390; Dkt. 430; and Dkt. 441, no responses to the initial interrogatories or requests for production have been exchanged. Consequently, unlike in Cayuga, there has been virtually no development of the factual record here for the Court to consider when evaluating the merits of the laches defense. Because laches is a fact-laden inquiry, in order to ascertain whether any proposed remedy is actually barred, it is imperative that the parties be allowed the opportunity to flesh out, through discovery, the relevant facts.[10/]

In particular, further discovery is necessary to determine whether Cayuga is applicable to certain lands within the claim area. As indicated in exhibits attached to the opposition brief filed by the St. Regis Mohawk Tribe and the Mohawk Nation Council of Chiefs[11/], there is evidence that a portion of the claim area known as the Hogansburg Triangle is owned and occupied by the Tribes for a period of time. In Cayuga and Sherrill, in contrast, virtually all of the Cayugas and Oneidas had vacated the lands at issue and had not returned to these lands until fairly recently. This does not appear to be the case in the instant action. With regard to those lands owned and;

[10/]In the recent decision issued in the Oneida land claims action, Judge Kahn rejected the arguments of the Oneida plaintiffs and the United States that laches could not be applied to the possessory claims for relief without providing an opportunity for *additional* discovery. Oneida Indian Nation v. New York, 2007 U.S. Dist. LEXIS 36940, at *22-23. In Oneida, however, there was a considerable record before the court, and the court had conducted several evidentiary hearings. Moreover, the Second Circuit in Cayuga did not conclude that laches could be found in the absence of an evidentiary record; indeed, it specifically relied on this Court's findings of fact, and its evidentiary hearings, in conducting a laches analysis. Cayuga, 413 F.3d at 277 (referring to this Court's findings on the ejectment issue); id. at 279-80 (referring to this Court's findings on the issue as to whether delay of the Cayugas in bringing their action was reasonable). Thus, the actual issue in Oneida was whether *additional* discovery, beyond the record already before the court, was necessary. Here, there have been no evidentiary hearings and virtually no discovery has taken place.

[11/]See Dkt. 474, Exhibit 1, Fisher Declaration, and related attachments.

occupied by the Mohawk Tribes, a possessory claim would not raise questions as to the validity of title or good faith purchasers. Such tribal ownership and occupation of lands within the existing reservation would avoid the impacts of a present possessory relief upon which Cayuga premised its holding. Cayuga, therefore, may not be applicable, with respect to these lands. The burden rests with the Defendants to establish that laches applies in this context. In light of the preliminary information provided by the Tribes, at the very least, additional discovery is needed to determine the extent and duration of tribal land ownership in the Hogansburg Triangle, so that this Court can determine whether Cayuga is applicable based on the specific circumstances of this case.

II. The Second Circuit's Decision may be Read not to Foreclose an Alternative, Nonposessory Remedy for Violations of the Nonintercourse Act.

According to the plain language of the Nonintercourse Act, attempted transfers of real property made in violation of the Act have no "validity in law or equity." 25 U.S.C. § 177. However, vindication of present possessory rights need not be the only possible remedy for a violation of the Act. A preliminary review of historical records indicates that the State sold some parcels of land identified in the United States' Amended Complaint-in-Intervention for more than it paid the Mohawks. Thus, the State profited from its unlawful transactions with the Mohawks. See Declaration of Michael Oberg, attached hereto as Exhibit A. While it may no longer be possible or practicable to undo the State's unlawful transactions, or, if Cayuga stands, to completely compensate the Mohawks for the present value of the lands and past damages by awarding trespass damages, this Court nonetheless has the inherent authority to reform the past transactions to make them consistent with one of the main purposes of the Nonintercourse Act, ensuring that tribes are fairly compensated for lands that were acquired from them.

There is direct precedent for the theory of relief advocated here. Judge Lawrence E. Kahn recently held in the Oneida land claim litigation that a claim for fair compensation, similar to the type of relief sought here, survives Cayuga. Judge Kahn reasoned that Sherrill and Cayuga only barred possessory land claims, Oneida, 2007 U.S. Dist. LEXIS 36940, at *26, and that the relief sought by the plaintiffs in Oneida constituted only "retrospective relief in the form of damages, that is not based on Plaintiffs' continuing possessory rights to the claimed land, and does not void the agreements." Id. at *31-32. The court ruled that it had the authority to "reform the agreements through an exercise of its equitable power, which implicitly recognizes and confirms the transfer of property made pursuant to the agreements subject to attack." Id. Judge Kahn's decision correctly recognized that a nonpossessory theory of relief is fully consistent with Cayuga, stating that "the Court does not believe that the higher courts intended to or have barred Plaintiffs from receiving any relief; to do so would deny the Oneidas the right to seek redress for long-suffered wrongs." Id. at *7.

The recent Oneida decision is consistent with other court decisions which have recognized that, when a possessory right could not be vindicated due to equitable considerations, plaintiffs were entitled to monetary compensation for illegally obtained profits, thereby in effect confirming the underlying sale of the lands. See United States v. Minnesota, 270 U.S. 181, 206 (1926) (holding that with regard to lands patented to the State in derogation of the rights of Indians, the "United States is entitled to a cancellation of the patents as to these lands, unless the state has sold the lands, and in that event is entitled to recover their value").

The United States requests disgorgement of unlawfully obtained profits here, if remedies premised on a current right of possession are deemed to be barred. Such relief should be

measured by the differences between what the State paid the Mohawks for their lands and what the State in turn obtained from third parties upon subsequent sale of those lands. Such relief, since it would in effect reform and thereby confirm the transaction, would, by its very nature, not be possessory, and would have the added equitable benefit of ensuring that the State is not rewarded for its unlawful purchases from the Mohawks**,** since it would require disgorgement of any profits made through the unlawful undertaking.[12/] Moreover, by accepting the transactions as final and effectuating them in accordance with the purposes of the Nonintercourse Act in this manner – rather than fashioning a remedy premised on the transactions being void and the Mohawks having a present right of possession – this Court would provide a judicial resolution to this longstanding land claim in a manner that confirms current title to and rights of possession of lands situated within the boundaries of the original Mohawk Reservation.

As explained below, the United States was of the view when it filed its certiorari petition seeking review of the Second Circuit's decision in Cayuga that that ruling would effectively foreclose all claims and forms of relief by and on behalf of New York tribes based on transactions such as these. As the court found in Oneida, however, the Cayuga decision does not

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[12/]The extent to which the State made a profit from the sales of lands at issue is not yet fully known, as discovery needs to be undertaken to examine applicable records. It is important to bear in mind that, at this stage of the litigation, the United States need not demonstrate that it will prevail at trial, or conclusively prove a right to a particular remedy; instead, to defeat a Rule 12(c) motion, the United States need only show that there are facts which, if subsequently developed and proven at trial, would entitle it to relief. Burnette v. Carothers, 192 F.3d 52, 56 (2d Cir. 1999). Further, if this Court were to convert Defendants' Motions into motions for summary judgement, the Oberg Declaration demonstrates that, based on preliminary research, evidence supports the United States' alternative Nonintercourse Act remedy. Thus, there are genuine issues of material fact which must be resolved by this Court, and summary judgment should be denied. Further discovery on this claim is warranted, Oberg Declaration ¶¶ 4 & 8, and should be allowed to proceed.

bar the sort of relief described here, which is not premised on – and indeed is inconsistent with – a present right of possession. Indeed, such relief, in the wake of Cayuga, is necessary to prevent the harsh result of denying the Mohawks any relief at all for the wrongs they suffered.

1. Nonpossessory forms of relief are available for violation of the Nonintercourse Act.

The Nonintercourse Act strictly prohibits the "purchase, grant, lease, or other conveyance of lands" without federal approval. 25 U.S.C. § 177. However, and as the Supreme Court has noted, the Act does not "speak directly to the question of remedies for unlawful conveyances of Indian land." Oneida II, 470 U.S. at 237. The Act provides that no unlawful conveyance "shall be of any validity in law or equity." 25 U.S.C. § 177. Congress, therefore, intended the Indians' right of possession to survive a land transaction in violation of the Act, and possessory land claims are appropriate under the Act. However, if laches does bar relief premised on a current right of possession, the logical response is not to ignore the clear statutory violation, as the State argues, but to fashion alternative relief. Such relief for the unlawful transaction might focus on the terms of the illegal transaction itself, instead of on actual recovery of the lost land, so as to require the return of unlawfully obtained profits. Such disgorgement would not vindicate any possessory right – indeed, it would be premised on an inability to do so, and would be predicated upon an acquiescence in and acceptance of the transactions as a result. See Oneida, 2007 U.S. Dist. LEXIS 36940, at *31-32. Moreover, such a remedy is consistent with the purpose of the Nonintercourse Act, which sought to ensure that a fair price would be paid for tribal lands.

Ample precedent, in addition to the recent decision in Oneida, supports this approach. In United States v. Minnesota, 270 U.S. 181 (1926), Indian land had been mistakenly conveyed to Minnesota, which in turn had conveyed much of it to good-faith third party purchasers. The

Court explained that "the patenting [of the land] was contrary to law and in derogation of the rights of the Indians," and determined by way of remedy that "the United States is entitled to a cancellation of the patents as to these lands, unless the State has sold the lands, and in that event is entitled to recover their value." Id. at 206. Similarly, in Yankton Sioux Tribe of Indians v. United States, 272 U.S. 351 (1926), the Supreme Court redressed the infringement of a Tribal right to land with monetary compensation that resulted, in effect, in a post factum sale of the land. There the Court observed that the Yankton Sioux Tribe had a claim to fee title to a tract of land over which the United States had possession and, as for a remedy, found that "since the Indians are the owners of it in fee, they are entitled to just compensation as for a taking under the power of eminent domain." Id. at 359. Moreover, in Felix v. Patrick, 145 U.S. 317 (1892), the Court emphasized the distinction between an Indian plaintiff's right to land and the relief that could be afforded to remedy the infringement of that right. In Felix, the plaintiffs, heirs of an Indian who, they alleged, had been defrauded of scrip allowing her to locate and patent land, were denied recovery of a tract of land acquired by the fraudulent use of the scrip. See id. at 325-26. Although the scrip had been acquired from the Indian in violation of a statute providing that "no transfer or conveyance of such scrip should be valid," id. at 325, due to the passage of time, the land at issue, though originally "wild," was now part of "one of the most thriving and rapidly growing cities of the west." Id. at 334, 318. The Court held that the plaintiffs' claimed right to the land did not necessarily entitle them to the relief sought – possession of the land. See id. at 332-35. The Court explained that "justice requires only what the law, in the absence of the

statutory limitation, would demand - the repayment of the value of the scrip, with legal interest thereon." Id. at 334.[13/]

This manner of proceeding is analogous to the way courts generally redress the loss of property that has been conveyed to a good faith, third-party purchaser. See Townsend v. Vanderwerker, 160 U.S. 171, 182 (1895) ("The American cases are also to the effect that, where the defendant has only partially disabled himself from carrying out the contract, the plaintiff may be entitled to a specific performance so far as it can be enforced, and may receive compensation in damages for the deficiency."). In Townsend, the Supreme Court approvingly cited Kempshall v. Stone, 5 Johns. Ch. 193 (N.Y. 1821), where a contract for sale of land could not be enforced because of "the lands having passed into the hands of a bona fide purchaser without notice," leaving the plaintiff with a remedy "at law for compensation in damages." Id. at 181. Thus, at law, where an entitlement to real property cannot be vindicated through possession, courts may order compensatory damages for the value of the lost property at the time of the transaction.

In this case, the Mohawks have lost their lands through a series of transactions that are prohibited under the Nonintercourse Act. If their lands cannot be returned as specified by the Act, and if Cayuga precludes an award of trespass damages for wrongful possession, general remedial principles permit the Court to award the Mohawks compensatory damages in an amount

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[13/]The Felix plaintiffs ultimately did not receive any relief. The Court was not satisfied "that she did not receive full value for the scrip" when she conveyed it, and, in any event, found it "improbable" that anything could be proved about "the nature of the original transaction." Id. at 333. None of the cases cited above involved the Nonintercourse Act, and therefore they do not support the Second Circuit's holding that possessory claims seeking to remedy Nonintercourse Act violations are subject to laches. They instead provide examples of the Supreme Court substituting compensatory remedies for possession when the actual return of Indian lands is not possible.

equal to the difference between what the State paid for the lands and the price the State required from third party purchasers of those same lands when it sold them.[14/]

A federal court is presumed to have at its disposal all equitable powers to fashion relief in such a way as to do justice and enforce the Congressional policy underlying a statutory enactment. "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes. As this Court long ago recognized, there is inherent in the Courts of Equity a jurisdiction to give effect to the policy of the legislature." Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 291-92 (1960) (internal quotation omitted). A court looks to the language of the statute to determine if the scope of available remedies in equity has been clearly limited, and "this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). See also Conboy v. AT&T Corp., 241 F.3d 242, 255 (2d Cir. 2001).

The Nonintercourse Act does not contain a "comprehensive scheme of remedies" that might limit remedies to those expressly stated. Conboy, 241 F.3d at 255. See Oneida II, 470 U.S. at 1253 ("[T]he Nonintercourse Act of 1793 did not establish a comprehensive remedial plan for

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[14/]NYPA alleges in its Motion that, as a result of an 1856 statute enacted by the New York Legislature, the Mohawks were fully compensated for the Islands. NYPA Mot. at 7. Its allegation is not substantiated. There are serious questions as to whether the monies authorized in the 1856 statute were ever paid to the Mohawks. See St. Regis Tribe of Mohawk Indians v. State, 5 N.Y.2d 24, 39 (1958). Further, Defendants fail to cite to any evidence that the sum authorized in the 1856 statute was greater than or equal to the market value of the Islands at the time they were acquired by the State. Thus, there is a need to conduct further discovery on these factual issues to determine whether, and to what extent, the Mohawks did, in fact, receive fair compensation for the full value of the Island lands.

dealing with violations of Indian property rights."). Accordingly, the full range of equitable remedies, including disgorgement and restitution,[15] are at this Court's disposal to do justice and to ensure that the purposes of the Nonintercourse Act are fulfilled with respect to transactions that were covered by the statute. Id. at 1253-54. See also S.E.C. v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1307 (2d Cir. 1971) ("[T]he Supreme Court has upheld the power of the Government without specific statutory authority to seek restitution, and has upheld the lower courts in granting restitution, as an ancillary remedy in the exercise of the courts' general equity powers to afford complete relief."). Thus, it is not necessary in the case at bar to determine the scope of any implied "private" right of action under the Nonintercourse Act here, as the United States is asserting the claim here. The United States clearly has the authority to enforce violations of the Nonintercourse Act, and to seek any appropriate remedy associated with its claim.

2. Requiring compensation for profits made through the illegal transactions is appropriate relief for violations of the Nonintercourse Act.

The "general rule" regarding remedies is "that all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies." Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 68 (1992). Providing the Mohawks with compensation that remedies the unlawful profits gained by the State as a result of its violations of the Nonintercourse Act comports with one of the Act's primary

[15] Disgorgement and restitution are very similar, if not the same, remedy. See S.E.C. v. Cavanagh, 445 F.3d 105, 118 (2d Cir. 2006) ("Thus, if one equity court compelled 'restitution' of wrongly gained assets while another ordered 'disgorgement' and a third held that cheating trustees must 'make good the trust' from which they stole, the remedies may have been identical.").

goals, that of ensuring that Indians are not defrauded through unregulated and contrived sales of their lands outside federal supervision.

The United States' Amended Complaint-in-Intervention requests that this Court award "monetary remedies" and "appropriate monetary damages" against Defendants. U.S. Am. Compl.-in-Int., at Wherefore Clause ¶¶ 2 & 4. Further, the United States seeks "such other relief as this Court may deem just and proper."[16] Id. ¶ 6. The nonposessory remedy for lands lost to the Mohawks due to violations of the Nonintercourse Act is therefore fairly included in the United States' Complaint.

The Supreme Court, in Oneida II, considered whether and to what extent remedies were explicitly specified under the Nonintercourse Act. It concluded that the "Act . . . does not speak directly to the question of remedies for unlawful conveyances of Indian land." Oneida II, 470 U.S. at 237. The Court noted that Section 8 of the 1793 statute – the provision that eventually became 25 U.S.C. § 177 – "contains no remedial provision," and "does not address directly the

[16]Fed. R. Civ. P. 54(c) provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Rule 54(c) confirms the broad power of the federal courts to provide a plaintiff with whatever relief is appropriate, regardless of whether that relief was sought in the complaint. Thus, omissions in the prayer for relief do not prevent the federal courts from redressing meritorious claims and providing appropriate relief. Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 65-66 (1978); Pension Benefit Guar. Corp. v. E. Dayton Tool & Die Co., 14 F.3d 1122, 1126 (6th Cir. 1994), cert. denied, 513 U.S. 816 (1994); Ring v. Spina, 148 F.2d 647, 653 (2d Cir. 1945).

problem of restoring unlawfully conveyed land to the Indians." Id. at 238-39.[17] Accordingly, this Court must "presume the availability of all appropriate remedies." Gwinnett, 503 U.S. at 66.

Generally, "[i]n framing . . . remedies . . . , courts must act primarily to effectuate the policy of the [statute] and to protect the public interest while giving necessary respect to the private interests involved." Porter, 328 U.S. at 400; Mitchell, 361 U.S. at 292 (courts are "to provide complete relief in the light of statutory purposes"). One "obvious purpose" of the Nonintercourse Act, as described by the Supreme Court, is "to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, acting as parens patriae for the Indians, to vacate any disposition of their lands made without its consent." Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960).

The Act serves to protect Indian lands by declaring void sales of those lands made without the consent of the United States. 25 U.S.C. § 177. It also ensures fair compensation to Indians by requiring that agents of a state "propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State" only at a "treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same." Id.[18] While the statute declares

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[17]The Court explained: "The relevant clause of § 8 provides simply that 'no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution . . . .' 1 Stat. 330." Oneida II, 470 U.S. at 238.

[18]The Act did not prohibit sales of Indian lands altogether; it did ensure, however, via mandatory federal oversight of such sales, that the Indians would not be coerced or swindled. As President

that purchases of Indian land without approval of the federal government shall not "be of any validity in law or equity," id., it "does not speak directly to the question of remedies for unlawful conveyances of Indian land." Oneida II, 470 U.S. at 237. Considerations, such as subsequent settlement and development of land acquired in violation of the Act, may in certain situations call into question the availability of some remedies, such as restoration of the land to the injured tribe. In such cases, an award of unlawfully obtained profits ensures that, if the unlawful transaction cannot be undone or if remedies cannot be awarded premised on a present-day right of possession, at least the tribe will have received a disgorgement of any benefit the State secured for those lands that were protected by the Nonintercourse Act. Correspondingly, because such a remedy accepts and gives effect to the transaction, the remedy – far from calling current title and possession into question, with the ensuing disruption – essentially confirms the status quo and permits repose.

3. Cayuga can be read to preserve a nonpossessory remedy for violation of the Nonintercourse Act.

The Second Circuit did not state that any requested relief for a violation of the Nonintercourse Act with respect to transactions such as those at issue here is per se disruptive and

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George Washington explained to a Seneca chief, the statute provided "security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under authority of the United States . . . ." Oneida II, 470 U.S. at 237 n.8. Indeed, as the Supreme Court noted, while the 1793 version of the Act gave the President authority to remove illegal settlers from Indian lands, such authority was "apparently . . . intended only to give the President discretionary authority to preserve the peace." Id. at 239 n.11. Given the delicate nature of the relations between settlers and Indians on the frontier, the Act gave the federal government latitude in determining how to redress violations of Indian property rights in order to ensure the Act's goal of preserving the peace was not compromised by a mechanical enforcement of Indian property regardless of the social costs.

therefore subject to, much less actually barred by, equitable defenses like laches. If that had been the case, the court's analysis would have been quite succinct and there would have been no reason for the court to separately analyze each proposed remedy. Instead, the Second Circuit first analyzed the "ejectment claim," which it concluded to be inherently disruptive because it "would call into question title to over 60,000 acres of land in upstate New York." Cayuga, 413 F.3d at 275. The court then considered other types of relief sought: "Although we conclude that plaintiffs' ejectment *claim* is barred by laches, we must also consider whether their other *claims*, *especially their request for trespass damages in the amount of the fair rental value of the land for the entire period of plaintiffs' dispossession*, are likewise subject to dismissal." Id. at 278 (emphasis added).

In its analysis of available relief, the Second Circuit was guided by the question whether the relief sought was necessarily premised upon a continuing right of possession of the land:

> Inasmuch as plaintiffs' trespass claim is based on a violation of their constructive possession, it follows that plaintiffs' inability to secure relief on their ejectment claim alleging constructive possession forecloses plaintiffs' trespass claim. In other words, because plaintiffs are barred by laches from obtaining an order conferring possession in ejectment, no basis remains for finding such constructive possession or immediate right of possession as could support the damages claimed.

Id. The Second Circuit concluded that, because plaintiffs' request for trespass damages necessarily implied that plaintiffs have a right to possess the land, such a remedy also was subject to laches.

Whether this Court were to characterize the nonpossessory remedy as one at law for compensatory damages or in equity for disgorgement and restitution, it does not necessarily implicate the same concerns articulated in Cayuga. The Second Circuit concluded that what it

characterized as a "possessory land claim," i.e., the relief seeking "possession of a large swath of central New York State and the ejectment of tens of thousands of landowners – is indisputably disruptive." Id. at 275. Unlike the remedies at issue in Cayuga, requiring the State to compensate the Mohawks for the unlawful profit from their lands does not seek the ejectment of current landowners, nor is the remedy predicated upon a present-day right to possession. Indeed, such relief is premised upon the *preclusion* of possessory relief; in effect, it provides for a post factum sale of the lands whereby the title of the present landholders is quieted by judicial resolution of this case. See Oneida, 2007 U.S. Dist. LEXIS 36940, at *26 (Oneidas sought "only retrospective relief in the form of damages, is not based on Plaintiffs' continuing possessory rights to the claimed land, and does not void the agreements . . . ." The relief sought "implicitly recognizes and confirms the transfer of property made pursuant to the agreements subject to attack.").

4. This Court has considerable discretion in fashioning relief here.

Because the United States' claim is predicated on violations of the Nonintercourse Act, this Court, in the exercise of its equitable powers, has the authority to fashion any appropriate remedy so as to ensure full relief for the State's violations of federal law. Porter, 328 U.S. at 398; Conboy, 241 F.3d at 255. In the recent Oneida decision, Judge Kahn recognized the broad authority of the federal courts to fashion nonpossessory relief for violations of the Act and, in doing so, looked to the federal common law of "unconscionable consideration." Oneida, 2007 U.S. Dist. LEXIS 36940, at *32 et seq. Although it is appropriate to look to federal common law as guidance,[19] as Judge Kahn did in Oneida, this Court need not ignore the Nonintercourse Act.

[19] See Itar-Tass Russian New Agency v. Russian Kurier, Inc., 153 F.3d 82, 90 (2d Cir. 1998).

Federal common law generally fills the interstices of a federal statute; the common law, therefore, cannot be viewed in isolation from the federal statute at issue. Id. Thus, an appropriate nonpossessory remedy reflects the purposes of the Act and the unlawful nature of the transactions so as to ensure that the State does not benefit from its clear violation of federal law. Judge Kahn's description of the fair price remedy in Oneida as one of "unconscionable consideration," therefore, provides one common law framework to address an appropriate nonpossessory remedy that is consistent with the purposes of the Nonintercourse Act.[20/]

The Nonintercourse Act's purposes, however, are more fully effectuated if the Tribes are compensated 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. Requiring the State to disgorge all of its profits is consistent with one of the primary purposes of the Nonintercourse Act, to prevent unfair land dealings, as Defendants should be precluded from reaping all benefits of the unlawful transactions.[21/] Put another way, any profit the State devised is per se "unconscionable," given the express statutory prohibition against such sale. In any event, this Court need not reach the issue as to what standards it will employ to determine whether the United States will prevail on its fair compensation remedy. All this Court needs to

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[20/]As noted below, in light of the Nonintercourse Act's goal of ensuring tribes fair compensation for their land, any profit or advantage gained by the State due to the violations of the Act, should be deemed unconscionable.

[21/]If discovery reveals that the State did not subsequently sell all of the subject lands to third parties, this Court, in the exercise of its equitable powers, should accordingly consider an alternative approach so as to provide a just nonpossessory remedy to the Mohawks for the unlawful transactions. In such instances, the Mohawks should recover the difference between the amounts paid to them for those lands and their true market value at the time of the unlawful transactions.

determine at this point in the litigation is whether the United States' legal theory for relief survives Cayuga. If it does, Defendants' motion to dismiss must be denied.

5. The Nonpossessory Remedy and the United States' Certiorari Petition in Cayuga

When the United States filed its certiorari petition seeking review of the Second Circuit's decision in Cayuga, the government was of the view that the apparent effect of the Second Circuit's decision was to terminate all of the suits based on similar transactions in violation of the Nonintercourse Act that were then pending in federal court in New York, including this one, and that the Cayuga decision would leave the United States and the affected Tribes without any effective remedy. The United States so informed the Supreme Court in its certiorari petition and reply brief at the petition stage in urging the Supreme Court to grant certiorari to review the Second Circuit's decision. See U.S. Cert. Pet. 12-13, 28-29; U.S. Reply Br. 1, 10.

The Second Circuit's decision in Cayuga referred to the fact that the State and the other defendants in that case had argued that "damages should be limited to the loss suffered by the Cayugas at the time of the treaties, as measured by the difference between the value received by the Cayugas and the fair market value of the lands at that time." 413 F.3d at 271. That was not, however, the ultimate basis for the district court's damages award, which was instead based on the current value of the land and trespass damages. While the government was aware of that possible alternative measure of damages at the time the certiorari petition was filed, the Solicitor General did not focus on the distinctions discussed above in the underlying basis for such remedy – particularly that a remedy of return of illegally obtained profits would not be considered "possessory" in the sense that it is not premised on a current right of the Mohawks to actual or

constructive possession of the land. This alternative approach is not "disruptive" in the sense of calling into question the validity of the title and right of possession of current owners or occupants of the land, but rather it accepts the transactions, giving effect to them by providing for the fair compensation that the Nonintercourse Act was intended to secure, and thereby furthers both the purposes of the Act and the interest in repose.

CONCLUSION

In light of the foregoing, we respectfully ask this Court to deny Defendants' Motions for Judgment on the Pleadings.

DATED this 13th day of July, 2007.

Respectfully submitted,

RONALD J. TENPAS
Acting Assistant Attorney General

/S/
JAMES B. COONEY

Indian Resources Section
Environment and Natural Resources Div.
United States Department of Justice P.O. Box 44378
Washington, D.C. 20026-4378
(202)305-0262
FAX (202)305-0271

DAVID MORAN
THOMAS BLASER
Of Counsel
Attorney Advisors
Division of Indian Affairs
Department of the Interior