UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE STOCKBRIDGE-MUNSEE COMMUNITY also known as the STOCKBRIDGE-MUNSEE BAND OF MOHICAN INDIANS,

Plaintiff,

-against-

86-CV-1140

THE ONEIDA INDIAN NATION OF NEW YORK,

(LEK/DEP)

Defendant-Intervenor

-against-

THE STATE OF NEW YORK, GEORGE PATAKI, Individually and as Governor of the State of New York; NEW YORK STATE DEPARTMENT OF TRANSPORTATION, JOSEPH BOARDMAN, as Commissioner of Transportation; THE COUNTY OF MADISON, NEW YORK; THE COUNTY OF ONEIDA, NEW YORK; THE TOWN OF AUGUST, NEW YORK; THE TOWN OF LINCOLN, NEW YORK; THE VILLAGE OF MUNNSVILLE, NEW YORK; THE TOWN OF SMITHFIELD, NEW YORK; THE TOWN OF STOCKBRIDGE, NEW YORK; and THE TOWN OF VERNON, NEW YORK,

Defendants.

JOINT REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT NON-INTERVENOR DEFENDANTS' MOTIONS TO DISMISS

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PRELIMINARY STATEMENT

This Joint Reply Memorandum of Law is submitted by the non-intervenor defendants in further support of their motions (Dkt. Nos. 232, 290 & 291) to dismiss the Amended Complaint pursuant to FRCP 12(b)(1) and 12(b)(6) and in response to the memorandum in opposition (Dkt. No. 295 - "Stockbridge Opp. Mem.") by plaintiff Stockbridge-Munsee Community ("plaintiff," "Stockbridge" or "Tribe").

As set forth below, the Eleventh Amendment is a bar to this land claim action and the fiction of the Ex parte Young exception to such immunity is not available to save the plaintiff's purported "prospective" claims against nominal State officer defendants. Moreover and in any event, binding precedent of the Second Circuit forecloses any possibility that the plaintiff may prevail on the merits such that all non-intervenor defendants are entitled to dismissal of the Amended Complaint for failure to state a cause of action.

ARGUMENT

I. THE FICTION OF EX PARTE YOUNG DOES NOT APPLY

Plaintiff does not dispute that the Eleventh Amendment bars this suit as against the State and has abandoned all but one claim – "an ejection claim for future possession of land against State officers in their individual capacities." Stockbridge Opp. Mem., at 2. Stockbridge seeks to avoid the full effect of such immunity, relying on Ex parte Young, 209 U.S. 123 (1908), and suggesting that it seeks prospective relief only as against State officials allegedly acting in violation of federal law. Id. at 1-2.[1] Plaintiff's attempt to cloak its sole remaining claim for ejectment or possession in the fiction of Ex parte Young to end-run the Eleventh Amendment bar is, however, unavailing. The Ex

1 See also, Stockbridge Opp. Mem., at 6 n.7 ("[t]he Tribe is not pursuing an official-capacity suit against the state officers and is not seeking a declaration of the State's title or any relief against the State itself. Instead, it now seeks only future possessory relief against the state officers using the fiction of a Young suit…").

parte Young exception cannot have any application here and to deny the State defendants' motion to dismiss on this jurisdictional ground would be directly contrary to both Supreme Court and Second Circuit precedent.

A. Coeur d'Alene And Western Mohegan Compel Dismissal Since The Plaintiff's Claim For Possession Is Fundamentally Inconsistent With The State's Exercise Of Fee Title Over The Land, Its Sovereignty and Jurisdiction.

In Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997), the Supreme Court refused to extend Ex parte Young in the same manner that the plaintiff here invites the Court to do, expressly rejecting rote application of the Ex parte Young fiction. The Court stated: "[t]o interpret Young to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against a state officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle … that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." 521 U.S. 270. The Supreme Court expressly instructed that "[t]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the Young exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." Id. See also, Oneida Indian Nation of New York v. County of Oneida, 617 F.3d 114, 138 (2d Cir. 2010) (noting that in the context of laches that "adroit manipulation of the remedy sought will not rescue a claim").

The Supreme Court determined in Coeur d'Alene that the tribe's suit was the "functional equivalent of a quiet title action" implicating "special sovereignty interests" in part because "substantially all the benefits of ownership and control [of the subject lands] would shift from the State to the Tribe." 521 U.S. at 281-82. The same is true in this case and, if this Court were to grant the relief requested by the plaintiff, the State's sovereignty interests in its lands "would be affected

in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." Id. at 287.

Properly abiding by the instruction of Coeur d'Alene and following its holding (since it "squarely applies"), the Second Circuit has already rejected efforts of another tribal plaintiff to invoke the Ex parte Young fiction, whose purported possessory land claims against state officials were asserted to be "more limited" and therefore less offensive to state sovereignty interests than the "quiet title" claims in Coeur d'Alene. Western Mohegan Tribe and Nation v. Orange County, 395 F.3d 18, 22 (2d Cir. 2004). The plaintiff-tribe's efforts in Western Mohegan are indistinguishable from Stockbridge's attempts here to down-play the impact of its claims on State sovereignty and invoke the doctrine of Ex parte Young. In Western Mohegan, the Tribe sought "ownership and right to possess their reservation lands in the State of New York." 395 F.3d at 19. Regardless of how the tribe's claim against the Governor and the relief sought in Western Mohegan were limited, captioned or phrased, "the tribe's claim [was] fundamentally inconsistent with the State of New York's exercise of fee title over the contested areas" such that Ex parte Young did not apply. Id.

So too in this instance - Stockbridge's claim for possession of land owned by the State is fundamentally inconsistent with the State's exercise of fee title, its sovereignty and jurisdiction. Because this "suit calls to mind the literal land grab effort made by the plaintiffs in Coeur d'Alene" (Hill v. Kemp, 478 F.3d 1236 (10th Cir. 2007)), Eleventh Amendment immunity should bar the suit and the Ex parte Young exception cannot have any application. The interests implicated here2 make this case "sufficiently different from that giving rise to the traditional Ex parte Young action so as to preclude the availability of that doctrine." Virginia Office for Protection and Advocacy v. Stewart,

2 Although Stockbridge attempts to minimize the State's sovereignty interests by stating that the land is "less than an acre of unused and vacant farmland" (Stockbridge Opp. Mem. at 19), as set forth in the State defendants' initial brief (Dkt. No. 232-2 at pp.14-15), whether the sovereign immunity of the State is to be respected should not be dependent on the relative size or particular current or former uses of the parcel sought to be recovered.

__U.S.__, 131 S.Ct. 1632, 1649 (2011) (quoting Seminole Tribe of Florida v. Florida, 517 U.S. 44, 73 (1996)).

Accordingly, plaintiff's attempt to invoke the fiction of Ex parte Young to end-run the Eleventh Amendment bar is unavailing since plaintiff's claim for possession of land owned by the State is fundamentally inconsistent with the State's exercise of fee title, its sovereignty and jurisdiction. Coeur d'Alene and Western Mohegan compel dismissal here.3

B. Plaintiff's Claims Cannot "Properly" Be Characterized As Either Prospective Or Against State Officials, But Are Instead Claims Against The State Itself For Alleged Past Wrongs.

The foregoing section should end the Court's inquiry on the issue of the Eleventh Amendment as barring this suit as against both the State and its officials due to inapplicability of the Ex parte Young fiction. Even if the Court were to further entertain the plaintiff's artifice of "elementary mechanics of captions and pleading," however, plaintiff's claims cannot withstand such scrutiny. Plaintiff's attempt to avoid the dismissal compelled by Coeur d'Alene and Western Mohegan by asking the Court to employ the "straightforward inquiry" suggested by the Supreme Court in the Verizon case does not change the result at all. Stockbridge Opp. Mem., at 4-11. In fact, such analysis would reaffirm that the Ex parte Young exception has no application here because plaintiff's claims cannot "properly" be characterized as either prospective or against state officials, but are instead claims against the State itself for alleged past wrongs.

In Verizon, under facts having no similarity to this case, the Supreme Court stated that "[i]n

3 In decisions dismissing similar land claims, other Circuit Courts of Appeals have reached the same determination as the Second Circuit did in Western Mohegan by following Coeur d'Alene. See e.g., Anderson-Tully Company v. McDaniel, 571 F.3d 760 (8th Cir. 2009) (action to quiet title to two bodies of water and to enjoin state attorney general from attempting to claim the waters for public use barred by Eleventh Amendment); Ysleta Del Sur Pueblo v. Laney, 199 F.3d 281 (5th Cir. 2000) (tribal suit to eject state officials from state-owned highway maintenance facility could not proceed under Ex parte Young exception), cert. denied, 529 U.S. 1131 (2000); MacDonald v. Village of Northport, Michigan, 164 F.3d 964 (6th Cir. 1999) (suit against state treasurer seeking to amend plat to remove road and declaration that right-of-way was "lawful property of the Plaintiff's" barred by Eleventh Amendment).

determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" Verizon Maryland, Inc., v. Public Service Commissioner of Maryland, 535 U.S. 635, 645 (2002) (citing Coeur d'Alene, 521 U.S. at 296, 298-99). The Supreme Court further noted that dismissal is required when the "past liability of the State, or any of its commissioners, is at issue" because allowing such a suit to proceed could impose the functional equivalent to an impermissible "monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." Verizon, 535 U.S. at 646 (citing Edelman v. Jordan, 415 U.S. 651, 668 (1974)).

In determining whether relief is properly characterized as prospective, the Court must focus on the "nature of the relief requested, not the label placed on it." N.Y. City Health & Hosps. Corp. v. Pearles, 50 F.3d 129, 135 (2d Cir. 1995). See also, Coeur d'Alene, 521 U.S. at 270. The overriding question is whether the relief will "remedy future rather than past wrongs." Elephant Butte Irr. Dist. of New Mexico v. Dept. of the Interior, 160 F.3d 602, 611 (10th Cir 1998).

The Ex parte Young doctrine will not apply if the effect of the relief would be the functional equivalent of a money judgment against the state, as was the case in both Coeur d'Alene and Western Mohegan. See, TFWS, Inc. v. Schaefer, 242 F.3d 198, 205 (4th Cir. 2001) (noting that the Supreme Court in Coeur d'Alene determined that the Young rule did not apply because the tribe's suit "was not really a suit to enjoin state officials from an ongoing violation of federal law. Rather, it was the 'functional equivalent' of a suit against the State of Idaho itself because it sought to dispossess the State from land within its borders and to remove that land from the State's regulatory authority."); Papasan v. Allain, 478 U.S. 265, 278 (1986) ("Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was

illegal under federal law is barred even when the state official is the named defendant. This is true even if the relief is expressly denominated as damages. It is also true if the relief is tantamount to an award of damages for a past violation of federal law, even though styled as something else.").

Here, plaintiff specifically predicates the sought-after relief upon the State's acquisition of land in fifteen transactions between 1818 and 1847 that allegedly were not approved by the United States government. Dkt. No. 228, at ¶¶ 25-40. While plaintiff purports to "only" seek to eject the State officials from such land and to recover "future possession" based on these historic transactions, the land is owned by the "People of the State of New York" - not the Governor or DOT Commissioner. See, Deed at Exhibit D to Amended Complaint, Dkt. No. 228. See also, Highway Law §§10, 30; Executive Law §213; Public Lands Law §27. Therefore, the relief sought by Stockbridge can neither be "properly characterized as prospective," nor properly asserted against State officials. The individually named State defendants in this case are former Governor George Pataki and former DOT Commissioner Joseph Boardman (Dkt. No. 228, ¶¶5, 7). Manifestly, they played no role in the historic events giving rise to this claim; and, due to the fact that neither of these nominal defendants today hold State office, there is no basis for this Court to grant prospective ejectment relief against them on the fiction that they are sued in their individual capacities.

Stripping away the fictions, this is a suit for "past wrongs," brought against the State itself and accordingly barred by the Eleventh Amendment. Coeur d'Alene, 521 U.S. at 282, 283 (suit deemed to be against state and therefore barred by Eleventh Amendment); Western Mohegan, 395 F.3d at 23 (tribe's claims barred by Eleventh Amendment since they were fundamentally inconsistent with state's exercise of fee title); Ysleta Del Sur Pueblo, 199 F.3d at 286, 290 (state was real party in interest even though state officials were named in official capacity). See also, John G. and Marie Stella Kennedy Memorial Foundation v. Mauro, 21 F.3d 667 (5th Cir. 1994) (adjudicating

plaintiff's alleged "right to possession" of disputed property "owned" by the state for over a century, although nominally made against state official, would be "retroactive against the State.") (emphasis in original); Virginia Office for Protection and Advocacy, 131 S.Ct. at 1638 (Ex parte Young doctrine does not apply when "the state is the real party in interest" and the "criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought."). Accordingly, the Court should hold that the Ex parte Young exception has no application here.

In re Deposit Insurance Agency, 482 F.3d 612 (2d Cir. 2007), relied on by the plaintiff, is not to the contrary and is entirely distinguishable. Central to the outcome in that case was the fact that the operative portion of the State Banking Law vested "title" to the disputed monies not in the State, but in the individual officer - the defendant Superintendent. 482 F.3d at 619. Moreover, regardless of the banking statute's use of the word "title," the defendant in Deposit Insurance Agency had only a right to temporary "custody" of the monies for the purposes of administering insolvency proceedings, such that neither the state nor the official on its behalf had any right to "beneficial ownership" of the property. Id. These critical distinctions and the overall lack of "special sovereignty interests" in Deposit Insurance Agency removed that case from reach of Coeur d'Alene's holding and the Young exception could be applied. No such distinctions can be drawn here.

C. Dismissal Under The Eleventh Amendment Is Also Required Because Stockbridge Has Not Asserted A Substantial And Non-Frivolous Claim.

Finally, while the inquiry into whether suit lies under Ex parte Young does not normally include a full-fledged analysis of the merits of the claim (Verizon, 535 U.S. at 646), the Court is bound to make a threshold inquiry as to whether the alleged ongoing violation of federal law "is a substantial, and not frivolous, one." In re Deposit Insurance Agency, 482 F.3d at 621.

Here, as explained more fully in the non-intervenor defendants' prior brief and in Point II below, Stockbridge cannot assert a "substantial" and "non-frivolous" claim. Plaintiff instead asserts only "claims which are equitably barred on their face" and subject to dismissal ab initio on the basis of laches because "Sherrill, Cayuga and Oneida foreclose any possibility that the [Stockbridge's] action may prevail." Onondaga Nation v. State of New York, 2010 WL 3806492, *4-*8 (N.D.N.Y. 2010) (Kahn, J.).

II. THE SECOND CIRCUIT DECISIONS IN CAYUGA AND ONEIDA ARE BINDING ON THIS COURT AND REQUIRE DISMISSAL OF STOCKBRIDGE'S LAND CLAIM BASED ON THE SHERRILL EQUITABLE DEFENSES

Stockbridge concedes that "if" this Court follows the Second Circuit decisions in Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266 (2d. Cir. 2005), cert. denied, 126 S.Ct. 2021, 2022 (2006) ("Cayuga") and Oneida Indian Nation of New York v. County of Oneida, 617 F.3d 114 (2d Cir. 2010), cert denied 2011 U.S. LEXIS 7494, 2011 U.S. LEXIS 7567 (Oct. 17, 2011) ("Oneida"), it "will have to dismiss the Tribe's land claim against the non-intervenor defendants." Stockbridge Opp. Mem., at 14. As Stockbridge correctly recognizes, "Cayuga and Oneida would compel dismissal" of its land claim. Id. at 19. The non-intervenor defendants agree and request that the Court grant their motions to dismiss Stockbridge's Amended Complaint.

In light of Stockbridge's concession that Cayuga and Oneida compel dismissal, any further inquiry by this Court is unnecessary because it must follow binding Second Circuit precedent. See, Onondaga, 2010 WL 3806492 at *7 ("the Court is bound by these precedents to find [plaintiff's] claims equitably barred and subject to dismissal").4 Accordingly, the Court should not entertain the merits of Stockbridge's two arguments challenging the availability and application of the Sherrill equitable defenses (laches, acquiescence, and impossibility) because those arguments are entirely premised on this Court disregarding both Cayuga and Oneida. See, Stockbridge Opp. Mem., at 14, Section II.A ("Cayuga and Oneida Were Wrongly Decided . . ."; id. at 16, Section II.B ("Cayuga and

4 In support of its argument that the Court "should not follow" Second Circuit precedent, Stockbridge cites two law review articles questioning the doctrine of hierarchical precedent. See, Stockbridge Opp. Mem., at 14 n 15. But even those articles recognize the elemental principle governing our multi-tiered federal court system which requires lower courts to follow controlling precedent from higher courts. See, Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 818 (April 1994) (noting that "longstanding doctrine dictates that a court is always bound to follow a precedent established by a court 'superior' to it"); Ashutosh Bhagwat, Separate but Equal?: The Supreme Court, The Lower Federal Courts, and the Nature of the Judicial Power, 80 B.U.L. Rev. 967, 982 (October 2000) ("A strong sense of hierarchy is thus an established part of the current culture of the federal judicial system.").

Oneida Stand in Irreconcilable Conflict with Oneida II and Sherrill . . ."). Stockbridge does not attempt to distinguish those decisions;5 instead, it asks this Court to ignore them. For the reasons discussed in the non-intervenor defendants' joint memorandum of law, those decisions mandate the dismissal of Stockbridge's Amended Complaint. See, non-intervenor defendants' Mem., at 6-13 (Dkt. No. 290).

If the Court considers Stockbridge's arguments, it should nevertheless grant the non-intervenor defendants' motions to dismiss. First, Stockbridge argues that Cayuga and Oneida were wrongly decided because the Second Circuit improperly substituted its judgment for Congress's judgment that a possessory rights action should not be barred by any time limitation defense. See, Stockbridge Opp. Mem., at 14-16. Stockbridge specifically asserts that the Sherrill defenses do not apply here because the amendments to 28 U.S.C. § 2415 in the Indian Land Claims Limitation Act of 1982 did not include a limitations period for actions "to establish the title to, or the right of possession of, real or personal property," 28 U.S.C. § 2415(c). See, Stockbridge Opp. Mem., at 14-16. Second, Stockbridge argues that Cayuga and Oneida erroneously applied Sherrill to bar possessory Indian land claims because Sherrill was limited to barring only certain remedies. See, Stockbridge Opp. Mem., at 16-19.6 Oneida undisputedly rejects this narrow and confined reading

5 Nor does Stockbridge attempt to distinguish two analogous district court cases – one from this very same court and another from a sister federal district court – dismissing the Onondaga and the Shinnecock land clams based on Cayuga. See, Onondaga, 2010 WL 3806492, at *4-*8 (holding that the Onondagas' complaint "asserts claims which are equitably barred on their face" subject to dismissal ab initio on the basis of laches); Shinnecock Indian Nation v. State of New York, 2006 WL 3501099, at *1 (E.D.N.Y. 2006) (Platt, J.)(holding that "[t]he claims the Nation brings and the nature of the relief sought pose the same types of 'pragmatic concerns' that guided the Supreme Court and the Second Circuit recently to deny relief in [Sherrill and Cayuga]").

6 Contrary to Stockbridge's assertion, non-intervenor defendants do not equate the certiorari denials in Cayuga and Oneida with an affirmance. See, Stockbridge Opp. Mem., at 17. It should be noted, however, that if the Supreme Court viewed Cayuga and Oneida to be in an "irreconcilable conflict" with two of its prior decisions (i.e., Sherrill and Oneida II) it could have granted certiorari and corrected those errors. The Court declined to do so. The fact that only two Justices voted to grant certiorari, including the author of Sherrill, does not in any way support Stockbridge's argument that the Sherrill defenses were improperly applied to bar relief in the land claim context. See Stockbridge Opp. Mem., at 17. Cayuga and Oneida are controlling decisions in this Circuit.

of Sherrill. See, Oneida, 617 F.3d. at 135 (citing Sherrill, 544 U.S. at 215 n.9) ("The equitable defense recognized in Sherrill and Cayuga is not limited to 'possessory' claims – to claims premised on the assertion of a current possessory right to tribal lands held by others on the theory that the original transfer of ownership of the lands was in some way flawed. Rather, the defense is properly applied to bar any ancient land claims that are disruptive of significant and justified societal expectations that have arisen as a result of a lapse of time during which the plaintiffs did not seek relief."(emphasis added). In any event, because both of Stockbridge's arguments are predicated on this Court disallowing the application of the Sherrill equitable defenses – contrary to the Second Circuit's decisions in Cayuga and Oneida – they must be rejected.

As discussed in the non-intervenor defendants' joint memorandum of law, Cayuga and Oneida resolved the question of whether a laches-based defense may be invoked to dismiss an ancient Indian land claim. See, non-intervenor defendants' Mem. at 6-10. Cayuga expressly held that the same equitable principles relied on by the Supreme Court in Sherrill barred the Cayugas' possessory land claims. Cayuga, 413 F.3d at 268. Although Sherrill arose in a different context from Cayuga, the Second Circuit nevertheless concluded that the Cayuga land claims were barred for the same reasons that barred the Oneidas' assertion of sovereignty in Sherrill. Id. at 277 ("[T]he doctrine of laches bars the possessory land claim presented by the Cayugas here."). The Second Circuit reinforced the Cayuga holding in Oneida, concluding that any claims premised on the right of a current possessory interest were barred by laches and related equitable doctrines. Oneida, 617 F.3d at 118 ("Cayuga expressly concluded that 'possessory land claims' – any claims premised on the assertion of a current, continuing right to possession as a result of a flaw in the original termination of Indian title – are by their nature disruptive and that, accordingly, the equitable defenses recognized in Sherrill apply to such claims."). Although Stockbridge attempts to escape

from the holdings of Cayuga and Oneida – and urges this Court to adopt a construction of Sherrill rejected by the Second Circuit (see, Stockbridge Opp. Mem., at 14-19) – it is beyond dispute that those cases invoked a laches equitable defense and that such a defense bars Stockbridge's claims. See, non-intervenor defendants' Mem. at 10-13. Because Stockbridge asserts the same possessory land claims[7] that were rejected in both Cayuga and Oneida, its Amended Complaint against the non-intervenor defendants must be dismissed in its entirety.

7 There is no question regarding the possessory nature of Stockbridge's land claim. See, Stockbridge Opp. Mem., at 19 ("the Tribe has alleged that the right of possession belongs to it rather than the State . . .").

CONCLUSION

For the foregoing reasons and the reasons set forth in the non-intervenor defendants' prior motion papers, the Amended Complaint should be dismissed in its entirety as against all non-intervenor defendants.

Dated: Albany, New York
February 2, 2012

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