UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE STOCKBRIDGE-MUNSEE COMMUNITY, *Plaintiff*, *v.* THE STATE OF NEW YORK, *et al*., *Defendants*, and THE ONEIDA INDIAN NATION OF NEW YORK, *Defendant-Intervenor*.	:	Civil Action No. 86-CV-1140 (LEK/DEP)

DEFENDANT-INTERVENOR ONEIDA INDIAN NATION'S REPLY SUPPORTING MOTION TO DISMISS AMENDED STOCKBRIDGE COMPLAINT

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A. All of the Claims that the Nation Intervened to Dismiss Must Be Dismissed under *Oneida*.

All claims that were in this case when the Nation intervened in 1987 challenge the validity of the State's land purchases. Those claims are no longer viable in light of the Second Circuit's *Oneida* decision, 617 F.3d 114, 125 (2d Cir. 2010), for the reasons stated in the Oneida Nation's supplemental memorandum (DE 285) and in the supplemental memorandum filed by the State and municipal defendants (DE 290).[1] When it intervened, the Nation sought only dismissal of claims against the named defendants, and the Second Circuit's *Oneida* decision now compels that dismissal. The Nation sought no relief from the Stockbridge: no land, no damages, no injunctive or declaratory judgment. When the claims upon which the Nation intervened are dismissed, the sole purpose of the Oneida Nation's intervention will be moot.

B. There Is No Exception to *Oneida* Allowing Recovery of Land and Trespass Damages from the Oneida Nation.

The Stockbridge tribe's amended complaint (DE 228) adds the Oneida Nation as a party to claims for eviction and trespass damages that are identical to those made against the State and municipal defendants. The fact that the Nation as landowner is an Indian tribe and not part of what the Stockbridge call the "dominant society" (Opp. 6), cannot make any difference under the Second Circuit's *Oneida* decision. The equitable defense recognized in *Oneida* applies to the Oneida Nation just as much as any other landowner. If the State, which itself bought Oneida land in violation of federal law, cannot be sued even for its illegal profits (as held in *Oneida*),

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[1] The State and municipal defendants are correct that the equitable defense applied in *Oneida* requires dismissal, but mistaken in characterizing that defense as "laches, acquiescence and impossibility." The Supreme Court in *Sherrill* did not apply laches or any other traditional defense in terms. The Court invoked a broader equitable principle that it said was "evoke[d]" by those doctrines. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005). The Second Circuit clarified in *Oneida* that the equitable defense was distinct from laches. *Oneida*, 617 F.3d at 127-28; *see Onondaga Nation v. New York*, 2010 WL 3806492, at *7 (N.D.N.Y. Sept. 22, 2010) (referring to distinct "*Sherrill* formulation" of laches).

there cannot be an exception to the defense allowing suit by the Stockbridge against the Oneida Nation. The application of *Oneida* is simple and straightforward—and completely dispositive.[2]

The Stockbridge contend that it makes a difference that the "Stockbridge's claims against [the Nation] did not accrue until [the Nation] purchased the property in the late 1990s and early 2000s." (Opp. 5). But the date the Nation acquired fee title to the land does not matter under *Oneida*. There is no suggestion in that case that a tribe can sue a landowner who bought property in the 1990s or later, even if the purchaser was fully aware of a tribal land claim. Many people bought Oneida land after the Test Case and Reservation Case were filed and knew about the litigation, and yet the Oneidas cannot sue with respect to their land.

The Stockbridge argue that the Court should disregard the challenge to the Oneida Nation's fee title as of "secondary importance" because "the relief sought is grounded primarily in the distinctive and distinguishable, recognized-Indian-title nature of the claim itself," (Opp. 6), suggesting that the Indian title dispute is of concern only to the Oneidas and the Stockbridge. But the allegations and claims for relief in the amended complaint are all concerned with the implications of the claimed Indian title for the property rights and other interests of the "dominant society" — provided that the Stockbridge can show that the State transactions were invalid. The Second Circuit has precluded the assertion of those claims.

[2] The Stockbridge have abandoned their Nonintercourse Act claim against the Nation. (Opp. 3). That does not alter the fact that the Stockbridge are asserting the superiority of their purported Indian title over fee title by seeking "possessory relief and damages." (Opp. 8). Any such theory fails after *Oneida*. 617 F.3d at 137-38 (unconscionable contract). The Oneidas' fee title is no different from that of any other landowner, and derives from the same chain of title beginning with the state transactions. It makes no difference to the viability of the damages and ejectment claims that the Oneida Nation disputes that the Stockbridge had Indian title.

C. Tax and Trust Issues the Stockbridge Have Declined to Litigate Elsewhere Are Not Reasons to Keep This Case Alive.

The Stockbridge tribe's suggestion that the Court should decide the issues anyway because of tax or trust disputes is ironic, because the Stockbridge worked hard to avoid any resolution of those issues in litigation involving tax exemptions and trust land. *Stockbridge-Munsee Cmty. v. U.S. Dep't of the Interior*, No. 08-CV-1031 (D.D.C.) (DE 10), Stockbridge-Munsee Community's Memorandum of Points and Authorities In Response to Court's Order of 9/18/08 Granting Oneida Nation of New York's Motion to Intervene, 7 (in APA challenge by Stockbridge to Oneida trust decision, "Stockbridge does not ask this Court to decide which tribe has the superior Indian title claim or whether the Stockbridge parcels can be placed in trust for the Nation");[3] *Oneida Indian Nation v. Oneida Cnty.*, No. 05-CV-945 (N.D.N.Y.) (DE 12), Memorandum of Law in Support of Stockbridge-Munsee Motion to Intervene, 19-20 (limiting intervention to prevent determination of the merits of the Stockbridge's claim). Although the Stockbridge point to possible state tax exemptions for land that it owns within the Oneida reservation (Opp. 7), this is not the right forum for the Stockbridge to litigate those tax issues. *Oneida Indian Nation v. Madison Cnty.*, -- F.3d --, 2011 WL 4978126, at *21-22 (2d Cir. Oct. 20, 2011) (declining to exercise supplemental jurisdiction over state tax exemptions). The Stockbridge cannot assert a tax exemption in the Oneida Nation owned land involved in this case, and they do not even claim to have asserted a tax exemption as to any land that they have

[3] When the federal court in the District of Columbia transferred the Stockbridge tribe's trust challenge to this Court, the Stockbridge abandoned the trust challenge and dismissed their case. Order and Notice of Voluntary Dismissal, *Stockbridge-Munsee Cmty. v. U.S. Dept't of Interior*, 09-cv-50 (DE 24) (N.D.N.Y., filed Mar. 30, 2009). They have no trust issues to litigate and cannot use this land claim case to revive a trust case that they dismissed.

actually bought and possess in New York. There is no tax or trust dispute to adjudicate in this case.[4] Also, the 1856 Stockbridge treaty eliminates reservation status regardless. *See infra,* p.10.

D. The Nation Is Immune to New Claims Added in the Amended Complaint.

The Stockbridge emphasize that in 1987 the Oneida Nation intervened in the lawsuit it filed "for all purposes." That begs the question whether such intervention as a defendant in response to a certain set of claims pleaded in a particular complaint is a waiver of sovereign immunity with respect to claims added later. The Stockbridge cite nothing to support the idea that the Oneida Nation's intervention to oppose claims and relief against the State and its subdivisions in the original complaint allows the Stockbridge to amend to sue the Oneida Nation for money damages and to obtain possession of its land. Moreover, the Nation cannot have waived immunity to claims that the Stockbridge acknowledge had not even *accrued* at the time of intervention in 1987 (Opp. 5).

The Stockbridge discussion of *Wichita and Affiliated Tribes v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986), leaves something important out. (Opp. 24-25). The D.C. Circuit held that the original plaintiff tribe (the Wichita) was immune to the second tribe's (the Caddo's) cross-claim, and *also* held that a "third" tribe (the Delaware) was immune to a cross-claim even though it had

[4] The Stockbridge tribe's only response to the Nation's observation that it has no standing to seek a declaratory judgment adjudicating only the Oneida Nation's rights (and not its own) is to point to a "companion declaration that its title to the claim area has never been extinguished." (Opp. 7 n.17). But that "companion" declaration concerns an entirely different proposition: that the State transactions in the mid-19th century did not extinguish the *Stockbridge's* rights because the transactions were illegal and therefore invalid. *Oneida* forecloses that relief, and it cannot, in any event, be a basis for standing to seek different relief against the Nation. It is not clear what the Stockbridge mean when they say that the question whether the Nation's "rights are extinguished is firmly within the controversy framed by the pleadings." (*Id.*) But—as the Nation pointed out—standing "is not dispensed in gross." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008). The Stockbridge tribe must have an injury in fact supporting the tribe's standing for each form of relief, but it has not identified any injury entitling the tribe to seek a declaratory judgment adjudicating only Oneida rights. It is not enough that the issue is "framed by the pleadings." Besides, there is no real-world dispute that would be resolved.

intervened as a defendant. *Id.* at 775 n.10. *Wichita* does not suggest that an intervening defendant (unlike a plaintiff) automatically waives sovereign immunity to new claims. Here, the Oneida Nation is immune to the claims and requested relief that the Stockbridge tribe added in the amended complaint, for the same reason that the intervening Delaware tribe was immune to the Caddo cross-claim. Or, put in the terms used in *Wichita*: the Oneida Nation's intervention made it a party to the claims pleaded against the State and its subdivisions. It did not make it a party to claims that were not in the case when the Nation intervened.

E. The 1788 State Treaty Did Not Cede Land to the Stockbridge.

The Stockbridge claim to Indian title fails as a matter of law. The tribe has now changed the theory on which it finds Stockbridge title in the 1788 Ft. Schuyler treaty, a state treaty. Because the Second Circuit decided that the Oneidas reserved to themselves the land described in article II from cession to the State (and did not cede it to the State in article I and then get it back in article II), *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 156 n.13 (2d Cir. 2003) (citing this Court's decision in *Oneida Indian Nation v. New York*, 194 F. Supp. 2d 104, 139 (N.D.N.Y. 2002)), the Stockbridge now recast their interpretation of the 1788 treaty. *Compare* Opp. 9-10 n.24, 15, *with* Supplemental Memorandum in Support of Motion for Partial Summary Judgment (DE 221), 6; Memorandum of Law in Support of Stockbridge-Munsee Motion to Intervene (DE 12), 8-9, 15-18, *Oneida Indian Nation v. County of Oneida*, No. 05-CV-0945 (N.D.N.Y.). The Stockbridge tribe's new argument – that the Oneidas ceded land to the Stockbridge in article II – fails for three reasons.

First, unlike the explicit terms of cession to the State in article I, the language of article II referring to the Stockbridge does not say the Oneidas cede any land to the Stockbridge. Nor does it add the Stockbridge land to the cession to the State in article I. Only by adopting the circular

cession-retrocession theory rejected both by this Court and by the Second Circuit can the Stockbridge argue that there was a cession of the Stockbridge-occupied tract.

Article II's use of language other than cession (the Stockbridge are entitled to "enjoy * * * their settlements") to describe the Stockbridge's occupancy on part of the Oneida reservation placed the State's imprimatur on that occupancy, but did not alter the status of the land as reserved from the Oneidas' cession, and thus retained by the Oneidas. There is no dispute that the Stockbridge tract is included within the metes and bounds of the land reserved by the Oneidas in article II of the 1788 state treaty. The language of the treaty distinguishes the Oneidas' right to "hold" all of the reserved land from the Stockbridge tribe's right only to "enjoy" a particular tract, just as a lessee has the right to quiet enjoyment of land owned by someone else. That language does not imply the extinguishment of all Oneida rights. The Stockbridge tribe's subordinate tenure is aptly captured in the later (1794) federal Treaty of Canandaigua's grant of protection to "Indian friends residing" on the Oneida reservation described in article II of the 1788 state treaty—a characterization the Stockbridge accepted as a signatory to the federal treaty. Thus, article II's phrase, "notwithstanding any reservation of lands to the Oneidas for their own use," means that, despite the reservation of all the land described in article II for the Oneidas' use, this tract of reserved land is to be used by the Stockbridge.

Second, contrary to the Stockbridge's new argument, the State lacked authority in 1788 under the Articles of Confederation to transfer land from one tribe to another. The Second Circuit's decision in *Oneida Indian Nation v. New York*, 860 F.2d 1145 (2d Cir. 1988), did not recognize unlimited state authority to extinguish Indian title. The Second Circuit's holding that the treaty of Ft. Schuyler validly ceded Oneida land *to the State* was based on the State's

succession to the colonial right of preemption, a right of first purchase of Indian land necessary to convey possession by a fee title for resale. *See generally* Cohen's Handbook of Federal Indian Law § 15.04[2], 969-972 (2005 ed.) (explaining relationship of Indian title and fee title). The court thus carved out an exception from the "sole and exclusive right and power" of the Congress to "regulat[e] the trade and manag[e] all affairs with the Indians" for state land purchases based on the legislative right of the states. *Oneida Indian Nation*, 860 F.2d at 1154 (quoting Article IX(4)); *id.* at 1160-61 (holding that the Articles "did not preclude New York from making the 1785 and 1788 purchases of Oneida land within its borders"). State power to extinguish Indian title was limited and incidental to the state's exercise of the right of preemption, or first purchase.

The transaction the Stockbridge tribe now posits—a state transfer of land from one tribe to another—is not a purchase by the State or an exercise of the right of preemption. The State did not pay the Oneidas for Stockbridge land, and the Oneidas did not cede the land to the State. The only thing the Stockbridge tribe could have acquired from the State, absent a purchase by the State from the Oneidas, was a so-called "naked fee" subject to the Oneidas' Indian title. *See Fletcher v. Peck*, 6 Cranch 87, 121-22 (1810) (Georgia could sell fee title to Indian land even though Indian title had not been extinguished). The State could not create or convey Indian title. The State also had no power to transfer land from the Oneidas to the Stockbridge by unilateral legislation. The 1789 state statute thus could not have given the Stockbridge any rights not conferred in the 1788 state treaty.

Third, the Stockbridge tribe's attempt to prove that the 1788 treaty excluded the Stockbridge tract from the Oneida reservation runs headlong into the tribe's reliance on the 1794 federal Treaty of Canandaigua, which refers to the 1788 state treaty for the scope of the Oneidas' "property" and "reservation." If the Stockbridge tract was not part of the Oneida reservation

described in the state treaty, it could not later be included in (or protected by) the federal treaty that acknowledged the Oneida reservation as the one described in the 1788 state treaty. Yet the Stockbridge's original and amended complaints rely on the 1794 federal treaty as protecting Stockbridge occupancy as Indian friends of the Oneidas, described by the federal treaty as residing on the Oneida reservation. Complaint, ¶ 16 (referring to Stockbridge as "Indian friends residing"); ¶ 43 (claiming violation of a right of occupancy under the federal treaty); Amended Complaint, ¶ 21-22 (asserting that Stockbridge tribe "was an 'Indian friend' of the Oneida Nation under article II); ¶ 52 (alleging violation of treaty rights). *See also* Opp. 20 ("Stockbridge's claims *are* based on the 1794 Treaty"). The Stockbridge signed the Treaty of Canandaigua, (Opp. 16), which proves that they accepted their status as "Indian friends" residing on the Oneida reservation under federal protection but without a reservation of their own. Like the Tuscarora Indians discussed in *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 121 & n.18 (1960), the Stockbridge tribe did not have the property rights of the Oneidas, their hosts.

Curiously, the Stockbridge rely on findings of the Indian Claims Commission (ICC) in a Stockbridge case against the United States as support for their position. (Opp. 16). Although the ICC concluded that the Stockbridge had an interest in land for which they could seek compensation from the United States, the ICC also found that "[t]he Stockbridges being 'Indian friends' of the Oneidas, residing within the boundaries of the reservation created by the Treaty of September 22, 1788 [the state Ft. Schuyler treaty], with New York, Article II pledged the United States never to disturb them in their free use and enjoyment of New Stockbridge." *Stockbridge-Munsee Cmty. v. United States*, 25 Ind. Cl. Comm., 281, 295 (1971). In other words, the ICC relied on the inclusion of "New Stockbridge" within the Oneida reservation as a source of the

federal government's obligation to protect the Stockbridge interests.[5] The ICC declined to hold that the Stockbridge had "reservation title" under the federal treaty. *Id.* at 291. The Commission deemed it sufficient that the Stockbridge had a "compensable interest" even if it was subject to a reversionary interest in the Oneidas. *Id.* at 291-92; *id.* at 294 (finding of fact).

The language of the Treaty of Canandaigua is so clear about which tribe has the "property" and "reservation" that, as a matter of federal supremacy, it would override any contrary effect of the 1788 state treaty and 1789 state statute, if there were any. *Seneca Nation of Indians v. New York*, 382 F.3d 245 (2d Cir. 2004), is inapposite because that case concerned the effect of a federal treaty on state land rights, not tribal land rights. The federal government *does* have the power to eliminate tribal land rights. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-78 (1955); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

F. The Stockbridge Tribe Accepted a Wisconsin Reservation.

The Stockbridge claim that the Oneida Nation "picks the wrong part of the *Santa Fe* analysis to apply" (Opp. 21 n.44), does not square with the facts. The Stockbridge do not dispute that they left New York, moved to Wisconsin, accepted a federal reservation there, and reside on it still. Under *Santa Fe*, that means that they gave up any prior federal protection of land in New

[5] The ICC also found—contrary to the current position of the Stockbridge—that the March 29, 1811 quitclaim by the Oneidas to the State "purchased from the Oneidas whatever right, title, reversion or claim the latter might have had in the tract of land occupied by the Stockbridge Indians." *Id.* at 294. The Stockbridge now say that their tract is not included in the metes and bounds description in the quitclaim. (Opp. 14). The Stockbridge had previously relied on the identical metes and bounds description to argue that the tribe's rights originated from a "cession" by the Oneidas to the New England Indians in 1774. Plaintiff's Reply to Defendant's Motion for Judgment on the Pleadings or Alternatively, Summary Judgment (DE 80), 9, 12 n. 5. Whether or not Stockbridge land was actually within the New England Indians tract described in the 1811 quitclaim, the State's negotiation of the quitclaim shows that all concerned understood that the 1788 state treaty had not extinguished Oneida title over land reserved by the Oneidas from cession but occupied by the Brothertown and the Stockbridge. The State did not buy and refused to approve sales of Stockbridge land before the quitclaim.

York. *Santa Fe* held that the Walapais retained their existing reservation when they refused to accept and relocate to a substitute provided by the federal government, but then lost it when they accepted and relocated to a new one, just as the Stockbridge did. *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 357-58 (1941). The Stockbridge cannot avoid the "part of the *Santa Fe* analysis" applicable to a tribe that accepts and moves to a new federal reservation. This point is only reinforced by the 1856 federal treaty with the Stockbridge, 11 Stat. 663, in which the Stockbridge released the federal government from any obligation with respect to Stockbridge land rights anywhere else ("all such and other claims set up by or for them or any of them are hereby abrogated, and the United States released and discharged therefrom"), including in New York.

Conclusion

The amended complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, counsel in this action, hereby certifies that on December 22, 2011, I caused to be electronically filed the attached Reply in Support of Motion to Dismiss Defendants Complaint, using the CM/ECF system, which sent electronic notification of such filing to counsel of record.

/s/ Michael R. Smith
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