UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE STOCKBRIDGE-MUNSEE COMMUNITY, Plaintiff, v. THE ONEIDA INDIAN NATION OF NEW YORK, Defendant-Intervenor, and THE STATE OF NEW YORK, et al., Defendants.	)	C.A. No. 86-CV-1140 LEK/GJD

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT ONEIDA INDIAN NATION OF NEW YORK'S
MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

After this Court lifted the stay that for many years shielded Plaintiff from dismissal of its complaint, after a subsequent round of additional summary judgment briefing, and while those motions were ripe for decision, the Stockbridge-Munsee Community (SMC) filed an amended complaint. Among other things, the amended complaint adds claims for damages from and ejectment of the Oneida Indian Nation of New York, which in 1987 had intervened as a defendant to seek dismissal of SMC's original complaint against the State and Municipal defendants.

As to the Nation, SMC's claims in its amended complaint are barred by tribal sovereign immunity. Fed. R. Civ. P. 12(b)(1). SMC's amended complaint also must be dismissed because it fails as a matter of law to state a claim against any party upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). First, the 1788 state treaty upon which the Stockbridge claim is principally based merely recognized that the Stockbridge could live on the Oneida reservation; it did not eliminate Oneida title to those lands. The land reverted to the Oneidas when the Stockbridge left New York. Second, the 1794 federal Treaty of Canandaigua acknowledges the land in issue here as the Oneidas' "property" and "reservation," and the Supreme Court has held that the treaty provision generally promising not to disturb "Indian friends" on the land did not transfer any property interest to those friends. Finally, federal treaties and statutes demonstrate that the Stockbridge relinquished any rights to land in New York or, else, that the federal government stripped them of those rights.

THE STOCKBRIDGE CLAIM

After the Stockbridge Indians sold or leased their remaining land in Massachusetts, the tribe moved to central New York in the 1780s, where it resided, by invitation, on land belonging to the Oneida Nation. (¶ 16). The Stockbridge paid the Oneidas nothing to live on the land.[1]

In 1783, Congress passed a resolution protecting the Oneidas' land in recognition of their alliance during the Revolutionary War. 25 J. Cont. Cong. 681, 687 (Oct. 15, 1783). The following year, the Treaty of Ft. Stanwix "secured" the Oneidas "in the possession of the lands on which they are settled." Treaty with the Six Nations, 7 Stat. 15 (Oct. 22, 1784).

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[1]SMC's amended complaint abandons prior contentions that the Stockbridge developed their own "aboriginal title" in the Oneidas' land and that the Oneidas, outside of any state or federal treaty, had made a "grant" of land that the Stockbridge could sue upon.

On September 22, 1788, the State of New York made a treaty with the Oneidas, known as the Treaty of Ft. Schuyler (attached as Exhibit 1 to Smith Declaration). Article I of the treaty provided that "[t]he Oneidas do cede and grant all their lands to the people of the State of New York forever." Article II qualified that cession: "Of the said ceded lands," article II expressly "reserved" a tract, that includes all of the land claimed by SMC, for the Oneidas to "hold to themselves and their posterity forever for their own use and cultivation." At the Oneidas' request, 1 Hough 230,[2] New York also agreed to confirm that "the Stockbridge Indians and their posterity forever are to enjoy their settlements on the lands heretofore given to them by the Oneidas for that purpose." The Stockbridge were not a party to the 1788 state treaty. The Oneidas were the only tribal party.

Four months after the 1788 state treaty, the federal Treaty of Ft. Harmar again "secured and confirmed" the Oneidas in the possession of their lands, never mentioning any Stockbridge rights. 7 Stat. 33 (Jan. 9, 1789).

In 1794, a Stockbridge chief was among those who signed the Treaty of Canandaigua, agreeing to its terms. (¶ 22). 7 Stat. 44, 46 (Nov. 11, 1794) (Exhibit 3 to Smith Declaration). The land SMC claims here is part of the Oneida Nation's "reservation" and its "property" acknowledged under article II of the 1794 treaty. The 1794 treaty does not mention the Stockbridge or refer to any property or reservation of the Stockbridge Indians, who are instead among the generically described "Indian friends" residing on Oneida property. (¶ 22) (alleging that SMC "was an 'Indian friend'" under the treaty). Under the terms of the Treaty of Canandaigua, the Stockbridge were "tenants by sufferance" whose occupancy was and is not

[2] 1 Franklin B. Hough, Proceedings of the Commissioner of Indian Affairs Appointed by Law for the Extinguishment of Indian Title in the State of New York (1861). The relevant pages are attached to the accompanying Smith Declaration as Exhibit 2.

protected by federal law. *See Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 121, n.18 (1960). Another federal treaty signed shortly after the Treaty of Canandaigua confirms that the Stockbridge had no federally-protected interest in the Oneidas' property. It refers to the Stockbridge Indians "dwelling" and "residing" in "the country of the Oneidas." 7 Stat. 47 (Dec. 2, 1794) (Exhibit 4 to Smith Declaration).

From 1818 to 1842, the Stockbridge sold to the State of New York the land they occupied within the Oneida reservation. (¶¶ 23, 25-40). All of the Stockbridge left New York. The tribe used the money from those transactions to pay for a new reservation in Wisconsin, a portion of which the tribe did not sell off and continues to occupy. The United States has recognized this Wisconsin reservation, as explained below, to be the Stockbridge's only federally-protected reservation.

SMC now claims that it is entitled to damages and to evict the Oneidas from the land the Oneidas have recently reacquired within the portion of the Oneida reservation the Oneida Nation long ago allowed the Stockbridge to occupy. The Nation itself seeks no relief from any party, having intervened only to seek dismissal of SMC's claim.

Count One of the amended complaint alleges a possessory right under federal common law. Count Two alleges an implied cause of action pursuant to the Nonintercourse Act, 25 U.S.C. § 177. Count Three alleges a cause of action based on "Federal Treaty Protections Arising from the 1788 Treaty of Ft. Schuyler and the 1794 Treaty of Canandaigua." All three theories of liability alleged in the complaint depend upon whether the 1788 state treaty gave the Stockbridge a federally-protected possessory right to land superior to that of the Oneidas and, if so, whether it survived the 1794 federal treaty declaring the land to be the property and reservation of the Oneidas, not of the Stockbridge.

LEGAL ARGUMENT

I. THE STOCKBRIDGE CLAIM AGAINST THE ONEIDA INDIAN NATION OF NEW YORK MUST BE DISMISSED

A. SMC DOES NOT STATE A VIABLE CLAIM TO RELIEF UNDER THE FEDERAL COMMON LAW

1. SMC's claim is based principally on a state treaty (the 1788 Treaty of Ft. Schuyler) and a state statute (a 1789 state statute implementing the treaty), which SMC contends extinguished the Oneidas' aboriginal title and conferred rights on the Stockbridge Indians. To our knowledge, no court has ever recognized a federal common law claim against another Indian tribe based on a state treaty. The Supreme Court has held that the Oneidas stated a federal common law possessory claim to land they held by aboriginal title and pursuant to federal treaties. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 667 (1974). Unlike the Oneidas, SMC has neither aboriginal title nor federal treaty protection. It is now undisputed that the Oneidas, not the Stockbridge, had aboriginal title to the land at issue. The federal Treaty of Canandaigua makes the land at issue the Oneidas' "property" and "reservation," not the property and reservation of the Stockbridge.

SMC alleges the invalidity of the State's purchases from the Stockbridge from 1818 to 1842 and asserts a right to possess such of that land that the Nation has acquired recently in voluntary transactions. The validity of the State's purchases had no effect, however, on the Oneidas' *prior* right to possession based on their aboriginal and treaty title. Thus, even if SMC could defeat the fee titles the Nation has acquired in recent market transactions, the Nation has the superior possessory right based on its federal law and treaty rights predating the illegal state purchases.

2. The SMC cannot have a federal common law claim to land in which the Oneidas' retain their own aboriginal title, which is protected by federal law. The 1788 state treaty did not extinguish the Oneidas' aboriginal title to the land reserved in article II of the treaty. When faced with this argument in the Oneida land claim litigation, this Court ruled that the argument "simply makes no sense" and "cannot reasonably be understood to have divested the Oneidas of their aboriginal title." *Oneida Indian Nation v. State of New York*, 194 F. Supp.2d 104, 140 (N.D.N.Y. 2002). The Second Circuit agreed. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 156 n.13 (2d Cir. 2003), *cert. granted*, No. 03-855 (June 28, 2004); *see also United States v. Boylan*, 256 F. 468, 481 (N.D.N.Y 1919) (Oneida reservation was not conveyed by the State).

The language of the 1788 state treaty is the language of cession and reservation, not cession and retrocession. *United States v. Winans*, 198 U.S. 371, 377 (1905); *United States v. Klamath & Moadoc Indians*, 304 U.S. 119, 122-23 (1938). As was true in *Worcester v. Georgia*, 31 U.S. 515, 552 (1832), "[t]he actual subject of contract was the dividing line between the two nations; and [the tribe's] attention may very well have been confined to that subject." Even if the words of the treaty could be given a different technical meaning, the courts do not interpret Indian treaties "narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them." *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Worcester*, 31 U.S. at 552-53; *id.* at 563, 582 (M'Lean, J., concurring). The only tribe whose understanding matters to the interpretation of the 1788 state treaty is the Oneida, who made the treaty, not the Stockbridge. Moreover, contemporaneous state documents do not support SMC's interpretation. They confirm that the

Oneidas retained their aboriginal rights in the event that the Stockbridge – as it happened – ceased to occupy the land. *See* section II, below.

Regardless of what the parties to the 1788 state treaty intended, there is no authority for the Stockbridge claim that the State could extinguish aboriginal title, not so that it could exercise the right of preemption, but so that the Oneidas could transfer the land to another tribe. *Oneida Indian Nation v. State of New York*, 860 F.2d 1145 (2d Cir. 1988), did not consider that question.[3]

3. Even if the 1788 state treaty had extinguished the Oneidas' rights, the later federal Treaty of Canandaigua restored them. The words of the federal treaty are unambiguous: all the land reserved in the 1788 state treaty is the Oneidas' "property" and "reservation." There is no mention in the federal treaty of a Stockbridge reservation within the Oneidas' borders. Instead, the occupancy of other tribes, such as the Stockbridge, is protected under the rubric of "Indian friends residing thereon." That language did not confer any property rights on the Indian friends. It certainly provides no basis for the Oneidas' "friends" to sue their hosts for damages and eviction. The fact that a Stockbridge chief signed the 1794 federal treaty proves that there was no controversy or misunderstanding about the Stockbridge tribe's status: under the federal treaty, as under the state treaty, the Stockbridge were protected against encroachments by non-Indian

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[3]The 1788 state treaty came after New York had ratified the Constitution, and after Congress determined that the Constitution had been "established" according to the terms of Article VII, stripping the states of power over Indian affairs. Resolution of Sept. 13, 1788, in 4 The Founder's Constitution 670. New scholarship has called into question the Second Circuit's conclusion that the new Constitution's restrictions on state power were not effective until the President was sworn into office in March 1789. *Oneida Indian Nation v. State of New York*, 691 F.2d 1070, 1079 n.6 (2d Cir. 1982) (citing *Owings v. Speed,* 18 U.S. 420 (1820)); *see* G. Lawson & G. Seidman, When Did the Constitution Become Law? 77 Notre Dame L. Rev. 1 (2001); V. Kevasan, Essay: When Did the Articles of Confederation Cease to Be Law? 78 Notre Dame L. Rev. 35 (2002); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting for four justices).

settlers. The Stockbridge did not have the legal right to evict the Oneidas who had invited them to live on their land. The 1794 treaty confirms that the United States, the Oneidas and the Stockbridge understood that the property at issue belonged to the Oneidas.

The Oneidas' federal possessory right to the land in question is superior to the Stockbridge claim. In *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 121 & n.18 (1960), the Supreme Court rejected the Tuscaroras' claim to treaty protection against a statute permitting the Federal Power Commission to take land by eminent domain for power generation. The Court noted that the Tuscaroras first lived on Oneida land after leaving North Carolina in the eighteenth century. "The Tuscaroras had no proprietary interest in the Oneidas' lands in central New York but were there as 'guests' of the Oneidas or as 'tenants at will or by sufferance.'" *Id.* The Tuscaroras moved to Seneca lands. Despite two pre-constitutional federal treaties expressly "securing" the Tuscarora in the lands they then occupied, the 1794 Treaty of Canandaigua "recognized that the Senecas alone had possessory rights to the western New York area here involved and, as a result of that treaty, a large tract of western New York lands, including the tract now owned by the Tuscaroras, was secured to the Senecas." *Id.* The same is true with regard to the Oneidas, who "alone had possessory rights to the * * * area here involved" under the identical terms of the same federal treaty. *Id.*[4]

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[4]Article III of the Treaty of Canandaigua protected the Senecas' property and promised not to disturb the Senecas or their "Indian friends" thereon. Article III similarly protected the Oneidas' property and promised not to disturb them or their "Indian friends" thereon. The *Tuscarora* decision makes it clear that the "Indian friends" reference did not affect the Seneca property right protected by the treaty. It can be no different with the Stockbridge. Indeed, the equivalence of the "Indian friends" provision, as it relates to the Oneidas' and the Senecas' Indian friends, is conclusively established in Article IV, which treats the two together: "The United States [has] described and acknowledged what lands *belong* to the Oneidas . . . and Senecas, and engaged never to claim the same, nor to disturb them, . . . or their Indian friends residing thereon. . . ." (emphasis added).

SMC's argument ultimately is self-defeating. If (as SMC claims) the state could shift possessory rights from one tribe to another in 1788, then surely the federal government had the power to do the same in 1794. The language of the federal treaty permits only one meaning: the land belongs to the Oneidas, not the "Indian friends." The Oneidas' superior possessory right under the 1794 federal treaty defeats SMC's federal common law claim.

B. SMC DOES NOT STATE A CLAIM TO RELIEF UNDER THE NONINTERCOURSE ACT

SMC's claim against the Nation based on the Nonintercourse Act fails for the same reason as its federal common law claim. The Oneida Indian Nation is not liable to SMC for the Stockbridge land transactions with the state. Regardless of the validity of those transactions, the Nation has a superior right of possession, based on its pre-existing unextinguished aboriginal title and on its federal treaty title to the land.

C. SMC DOES NOT STATE A CLAIM TO RELIEF BASED ON A FEDERAL TREATY

1. As explained in section I, the federal Treaty of Canandaigua does not give the Stockbridge any possessory right in land that is the "property" and "reservation" of the Oneida. *See Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. at. 121, n.18.

2. The 1788 state treaty and implementing legislation do not themselves confer any rights under federal law. The Supremacy Clause of the Constitution includes pre-constitutional treaties made under the "authority of the United States," i.e., by the Congress and commissioners acting on its behalf. Treaties made by a state acting under its own authority are not treaties made under the authority of the United States. Even if the state treaty and implementing statute supported the SMC position – which they do not – SMC's claims based on those documents are state law claims, not federal claims. SMC does not invoke supplemental jurisdiction under 28

U.S.C. § 1367. If SMC is advancing a state law claim, that claim must be dismissed for lack of subject matter jurisdiction. For the reasons explained in section I(A), that state law claim also fails as a matter of law.

D. THE NATION IS IMMUNE TO SMC'S CLAIM FOR DAMAGES AND EJECTMENT

SMC's claims against the Nation are also barred by the Nation's sovereign immunity. "As a matter of federal law, an Indian tribe enjoys sovereign immunity from suit except where 'Congress has authorized the suit or the tribe has waived its immunity.'" *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001) (quoting *Kiowa Tribe v. Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998)); *see also Ok. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are ... barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."). Congress has not authorized SMC's affirmative claims against the Nation. And the Nation did not waive its immunity to the affirmative relief that SMC seeks merely by intervening as a defendant for the limited purpose of dismissing SMC's original complaint, which sought different relief from different defendants and involved different lands. Because sovereign immunity is jurisdictional, SMC's amended complaint must be dismissed as to the Nation pursuant to Fed. R. Civ. P. 12(b)(1). *Garcia*, 268 F.3d at 84.

Waivers of sovereign immunity, including by a tribe, must be unequivocally expressed and are narrowly construed in favor of the sovereign. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); *SEC v. Credit Bancorp, Ltd.*, 297 F.3d 127, 136 (2d Cir. 2002); *see also C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001) (waiver by Indian tribe must be "clear"); *Garcia*, 268 F.3d at 86 (same). Although a tribe may waive its immunity to suit by voluntarily participating in litigation, such action does not operate

as a blanket waiver of the tribe's immunity. Instead, the scope of a tribe's waiver is limited to the "terms" by which it "consent[s] to be sued in any court," which "define that court's jurisdiction to entertain the suit." *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)) (internal quotations omitted); *see also Credit Bancorp, Ltd.*, 297 F.3d at 136 (court has no jurisdiction beyond extent of waiver). Accordingly, a tribe that either initiates or intervenes in a cause of action merely "consent[s] to the court's adjudication of the merits of that particular controversy." *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989); *see also Oneida Indian Nation of Wisc. v. New York*, 732 F.2d 261, 266 (2d Cir. 1984). It does not, however, "consent to be sued on a [claim] based upon a cause of action as to which it [has] not otherwise given its consent to be sued." *United States v. Forma*, 42 F.3d 759, 764 (2d Cir. 1994) (federal sovereign immunity) (citation omitted).

1. The Nation, by intervening as a defendant in this case, did not waive its immunity to any of the affirmative claims that SMC now has asserted against it. As noted, the Nation intervened for the limited purpose of dismissing SMC's original complaint against the State and Municipal Defendants. It has asserted no claims against SMC or against another defendant. In other words, the Nation does not seek a declaration of rights, monetary damages, ejectment, or possession of any land in issue. To the extent that the Nation's intervention in this case operates as a waiver of the Nation's immunity, therefore, it does so only to the extent of the court's adjudication of the claims in SMC's original complaint and nothing more. The Nation has not waived its sovereign immunity as to any other issue or claim. *See Forma*, 42 F.3d at 764.

Courts consistently have held that a tribe or other sovereign that intervenes in an action, either for a limited purpose or generally, without asserting affirmative claims, does not otherwise

waive its sovereign immunity beyond a determination of the sole issue on which it has moved to intervene. In *Sac & Fox Nation v. Babbitt*, 92 F. Supp.2d 1124, 1126 (D. Kan. 2000), *rev'd on other grounds*, *Sac & Fox Nation v. Norton*, 240 F.3d 1250 (10th Cir. 2001), for example, plaintiffs filed suit against the Secretary of the Interior to enjoin the Secretary from taking a certain tract of land into trust for the Wyandotte Tribe. Plaintiffs also sought a declaration that another tract of land was not an Indian reservation. *Id.* After the court granted a temporary restraining order prohibiting the Secretary from taking the first tract into trust, the Tribe intervened as a defendant for the purpose of appealing the order. *Id.* Subsequently, in answering the complaint, the Tribe invoked its sovereign immunity and asserted that the court lacked jurisdiction to entertain the suit. *Id.* The court held that, although the Tribe voluntarily intervened as a defendant, thereby consenting to a determination on appeal from the temporary restraining order, the Tribe nonetheless did not waive its sovereign immunity as to either taking the first tract into trust or declaring the second tract reservation land. *Id.* at 1127. After reaching this conclusion, the court went on to note that the "absence of a waiver is particularly strong as to the latter issue because the primary relief requested in the complaint and the relief which required the emergency intervention" by the Tribe was the injunction against taking the first tract into trust. *Id.*[5]

In *Driver v. Helms*, 456 F. Supp. 496, 496 (D.R.I. 1978), plaintiffs filed suit for declaratory and injunctive relief and for money damages against government officials who

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[5]Because the court determined that equity and good conscience would not allow the suit to proceed without the Tribe as a party -- in other words, that the Tribe was an indispensable party -- the court dismissed the suit. *Sac & Fox Nation*, 92 F. Supp.2d at 1127-28. On appeal, the Tenth Circuit reversed and remanded, in part because it determined that the Tribe was not an indispensable party. 240 F.3d at 1259. Although the Tenth Circuit did not explicitly address the issue of whether the Tribe's limited intervention operated as a waiver, the court's indispensable party ruling assumed that the Tribe retained its immunity and could not be joined.

allegedly had been opening their mail. The United States intervened as a party defendant in order to seek a stay to protect its interests in a related criminal investigation. It also filed an answer, objected to interrogatories, and opposed discovery and other motions. *Id.* at 496-97. The United States eventually moved to dismiss on sovereign immunity grounds immediately after one defendant had filed a cross claim against it for indemnification. *Id.* at 497. The court granted the motion because the only relief that the United States was then seeking was "to be dismissed from the suit." *Id.* at 499.[6] Likewise, because the only relief that the Nation now or ever has sought in this matter is dismissal, and because the Nation has not otherwise waived its immunity, SMC's amended complaint must be dismissed as to the Nation.

Furthermore, not only does SMC's amended complaint involve affirmative claims as to which the Nation has not waived its sovereign immunity, but the claims themselves actually involve lands that were not at issue in the original complaint. (Original Cmpl. ¶ 10 (describing subject land only as land within six-mile-square tract in which ownership interest is asserted by the State or Municipal Defendants)); s*ee also, e.g.*, *Miller v. Tony and Susan Alamo Foundation*, 134 F.3d 910, 916 (8th Cir. 1998) (United States intervention to claim proceeds from sale of one property was not a waiver over garnishment claim on another property); *McClendon*, 885 F.2d at 630 (tribe merely consented to be bound by adverse determination of ownership of disputed land

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[6]Other examples where courts have held that intervening as a party, without raising affirmative claims for relief, does not waive sovereign immunity include *Credit Bancorp, Ltd.*, 297 F.3d at 141 (United States' intervention to seek stay to protect interests in criminal investigation was not a waiver regarding civil tax liability of defendant); *In re DOE Energy Stripper Well Exemption Litig.*, 956 F.2d 282, 285 (Temp. Emer. Ct. App. 1992) (State's intervention to stake claim in escrow fund was not a waiver concerning liability to the fund); *Lac Du Flambeau Band v. Norton*, 327 F. Supp.2d 995, 1000 (W.D. Wisc. 2004) (Tribe's intervention to assert immunity defense was not a waiver on any other issue); *Pollack v. Bd. of Trs.*, No. 99 C 710, 2004 WL 1470028, at *2 (N.D. Ill. June 30, 2004) (State intervention to settle qui tam claims was not a waiver regarding at-issue retaliation claims) (Exhibit 5 to Smith Declaration).

and nothing more); *Sac & Fox Nation*, 92 F. Supp.2d at 1127 (intervention in dispute involving one tract of land clearly not waiver as to another dispute involving different tract). In fact, as asserted by SMC in the amended complaint (¶ 43), the only subject lands that the Nation currently possesses were purchased by the Nation *after* the original complaint was filed. It cannot reasonably be asserted that the Nation, by intervening in response to the original complaint, unequivocally waived its immunity to suit as to land that it did not then own. In other words, because SMC seeks affirmative relief -- namely, ejectment and trespass damages -- involving land that was not and indeed could not have been at issue in the original complaint, it plainly is asserting affirmative claims beyond the scope of the Nation's limited waiver.

2. Even if the Nation had initiated suit against SMC seeking a declaration, which it has not done, that ownership and the right to possession of the lands at issue belong to the Nation, not to SMC, the Nation's sovereign immunity would still bar the affirmative relief that SMC seeks (which would then be counterclaims). It is well established that "a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions are pleaded in a counterclaim to an action filed by the tribe." *Potawatomi*, 498 U.S. at 509 (citing *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 511-12 (1940)).

In *Potawatomi*, the Tenth Circuit held that, in an action by the Citizen Band Potawatomi Indian Tribe of Oklahoma to enjoin the State of Oklahoma from enforcing its state cigarette taxes against the Tribe, tribal sovereign immunity barred the State's counterclaim for declaratory and injunctive relief. 888 F.2d 1303, 1304-05 (10th Cir. 1989), *aff'd in part and rev'd in part*, 498 U.S. 905 (1991). The State's counterclaim sought a declaration that the State had jurisdiction to tax the Tribe's cigarette sales and could enforce its tax laws against the Tribe for selling cigarettes without collecting and remitting state taxes. *Id.* at 1304. The Supreme Court

affirmed the Tenth Circuit's conclusion that the State's declaratory judgment counterclaim was barred in its entirety by the Tribe's sovereign immunity, which the Tribe had not waived "merely by filing an action for injunctive relief." *Potawatomi*, 498 U.S. at 509-10. Significantly, moreover, the Court held the counterclaim barred even though, in ruling on the Tribe's claim, the Court ruled in favor of the State on one of the precise issues raised in the State's request for a declaratory judgment -- namely, the State's authority to tax the Tribe's sales of cigarettes to nonmembers. *See id.* at 512-13. Thus, the Court distinguished an adverse ruling on the Tribe's prayer for relief from a declaratory judgment in favor of the opposing party.

Although there is a narrow exception to the general bar of sovereign immunity for counterclaims that sound in recoupment, *see U.S. Fid. & Guar. Co.*, 309 U.S. at 511; *Forma*, 42 F.3d at 764, that exception is inapplicable here. "A claim in recoupment is one that arises from the same transaction or occurrence of the opposing claim, seeks relief of the same kind or nature and seeks an amount not in excess of the opposing party's claim." 3 James Wm. Moore, et al., *Moore's Federal Practice* ¶ 13.11 (3d ed. 2004); *see also Potawatomi*, 888 F.2d at 1305 ("Recoupment … is an equitable defense that applies only to suits for money damages."). The exception permits a party sued by the sovereign to "'recoup damages … so as to reduce or defeat the [sovereign's] claim,'" *Forma*, 42 F.3d at 765 (quoting *In re Greenstreet, Inc.*, 209 F.2d 660, 663 (7th Cir. 1954)), but "does not permit any affirmative recovery against [the sovereign] on a counterclaim that lacks an independent jurisdictional basis," *id.*; *see also Moore's Federal Practice* ¶ 13.11 ("[A] claim in recoupment may not seek an affirmative judgment, but is strictly defensive in nature and is used to diminish or defeat the opposing party's recovery.").

SMC's affirmative claims for ejectment and trespass damages certainly would not sound in recoupment were the Nation herein seeking a declaratory judgment for itself, rather than

merely defending against SMC's claims.[7] SMC's claims for ejectment and monetary damages "clearly [are] not based in recoupment, as they far exceed[ ] the nature and scope" of declaratory relief. *Cayuga Indian Nation v. Village of Union Springs*, 293 F. Supp.2d 183, 195 (N.D.N.Y. 2003) (discussing dismissal of counterclaims in *Oneida Indian Nation v. City of Sherrill*, 145 F. Supp.2d 226 (N.D.N.Y. 2001)). Nor are SMC's claims defensive in nature. Instead, SMC is seeking from the Nation an affirmative recovery, in the form of property and damages -- precisely the kind and nature of relief against which sovereign immunity protects.

Because intervening as a defendant does not expose the Nation to greater liability than suing as a plaintiff, SMC's amended complaint must be dismissed as to the Nation.

II. SMC'S COMPLAINT MUST BE DISMISSED AS TO ALL DEFENDANTS

SMC fails to state a claim against any defendant because the Stockbridge Indians had no possessory right in the Oneida land they occupied once the tribe moved from New York to Wisconsin. That is so for two reasons. *First*, under the terms of the 1788 state treaty, the Oneidas retained aboriginal title and the right to re-occupy the land occupied by the Stockbridge if the Stockbridge moved away, as they did by SMC's own admission by 1842. The Stockbridge departure triggered the Oneidas' reversionary interest in the land. *Second*, the Stockbridge sought and accepted a federal reservation in Wisconsin. In so doing, they relinquished any federal possessory rights to land in New York.

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[7]Because the Nation is not, in fact, seeking a declaratory judgment or any other form of affirmative relief, SMC's affirmative claims against the Nation, which therefore are not counterclaims, cannot fall under the recoupment exception. *See, e.g.*, *Driver*, 456 F. Supp. at 499 ("Here the only relief the United States now seeks is to be dismissed from the suit; the cases relating to recoupment are wholly inapposite.").

1. As explained in section I, SMC relies on supposed possessory rights derived from the 1788 state treaty and state implementing legislation. As a New York State Assembly committee explained in an 1809 report:

> [T]he Oneida Indians gave the said tract of land to the Stockbridge Indians, on the following terms; *the Stockbridge Indians were to occupy and enjoy the land and that if at any time the Stockbridge Indians should quit the said land, in that case it was to remain the property of the said Oneida Indians.*

N.Y. Assembly J. 316 (March 14, 1809) (emphasis added) (Exhibit 6 to Smith Declaration). The Committee therefore recommended denial of a petition to the legislature by the Stockbridge to convey some of the land. It was for the same reason, when the Stockbridge sought permission in 1811 to sell land, that New York's Governor asked the State Attorney General for an opinion whether the Stockbridge had the power to sell the land they occupied, "or whether the cession [the 1788 state treaty] merely grants a right of occupancy, *with a reversion to the Oneida Indians whenever the grantees shall remove, or cease to possess the lands* described in the treaty or grant." Annual Report of the State Historian 342-43 (1811) (emphasis added) (Exhibit 7 to Smith Declaration); *see also* Act of March 29, 1811, 34 N.Y. Laws ch. 79, § V (directing the Governor to investigate the Oneidas claim to the land occupied by the Stockbridge) (Exhibit 8 to Smith Declaration). The Attorney General's formal opinion apparently did not survive, but his conclusion is evident from the State's subsequent payment to the Oneidas for a quitclaim purporting to release their reversionary interest in Stockbridge land (Exhibit 9 to Smith Declaration). In his subsequent 1812 report to the State legislature, the Governor advised that the Oneidas reversionary interest had been extinguished by a treaty in July of 1811. Annual Report of the State Historian 480 (1812) (Exhibit 10 to Smith Declaration). The Governor contrasted the Oneidas' "important claim" with a claim he purchased from the Senecas after explaining to them the "slenderness of their title." *Id.*

Like any other conveyance of a tribe's claim or interest in land, the quitclaim was of "no validity in law or equity" unless transferred by a treaty under the auspices of a federal commissioner and proclaimed by the President with the advice and consent of the Senate. 25 U.S.C. § 177. What matters for present purposes is that the quitclaim shows the understanding of the State and the Oneidas that the 1788 state treaty gave the Stockbridge at best a limited right to occupy land that remained the property and reservation of the Oneidas (as the 1794 federal treaty states).

2. In 1856, the Stockbridge tribe, and the Munsees, sought and accepted a federal reservation in Wisconsin, relinquishing any possessory rights it had in New York pursuant to the principles established in *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 357-58 (1941) (tribe relinquished its land when the tribe requested a new reservation and accepted it). The preamble to the 1856 Stockbridge treaty declares the federal government's willingness "to establish comfortably together all such Stockbridges and Munsees – wherever they may be now located, in Wisconsin, in the State of New York, or West of the Mississippi." Treaty with the Stockbridge and Munsee, 11 Stat. 663 (Feb. 5, 1856) (Exhibit 11 to Smith Declaration). Article I of the 1856 treaty ceded other land in Wisconsin, land purchased for the Stockbridge in Minnesota, and "abrogate[d]" all other Stockbridge claims. Article II gave the Stockbridge a tract of land in Wisconsin, "[i]n consideration of such cession and relinquishment." Thus, the federal government's commitment of funds to buy lands in Wisconsin for the Stockbridge was explicitly premised on the surrender of any other claims, including claims to land in New York. It is impossible to construe the 1856 treaty as allowing the Stockbridge to retain federal possessory rights in 36 square miles of Central New York. *See also* Treaty with the Stockbridge and Munsee, 7 Stat. 580 (Sept. 3, 1839) (referring to the tribes "formerly of New York") (Exhibit

12 to Smith Declaration); Treaty with the Stockbridge Tribe, Supplemental Article, 9 Stat. 955 (Nov. 24, 1848) (noting Stockbridge claim to land on the White River in Indiana, but no land in New York) (Exhibit 13 to Smith Declaration).[8]

The tribe's acceptance of the Wisconsin reservation in place of any other land is reflected in SMC's own constitution (Exhibit 16 to Smith Declaration), which describes its jurisdiction as extending "to all lands purchased, heretofore or hereafter, by the United States for the benefit of said Community." Thus, SMC has renounced jurisdiction in New York. Similarly, under the Stockbridge constitution, membership in SMC is limited to residents of the "original confines of the Stockbridge Reservation" in Wisconsin.

When the Stockbridge left New York and accepted a reservation in Wisconsin, and moved onto it, they gave up any federally-protected possessory rights they could have had in New York. No defendant is liable to SMC for land to which it has no present possessory right.

3. Even if the Stockbridge did not voluntarily relinquish lands beyond the reservation provided in their 1856 treaty, in 1871, by statute, Congress restricted the Stockbridge to those lands. 16 Stat. 404, Ch. 38 (Feb. 6, 1871) (Exhibit 17 to Smith Declaration). This statute provided for a roll to be created of those persons who constituted the Stockbridge Tribe and then provided (§7) that the Stockbridge "maybe located upon lands reserved by . . . this act [part of 1856 Wisconsin reservation], or such other reservation as may be procured for them."

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[8]Four days after the United States made the 1856 treaty with the Stockbridge, it made a related treaty with the Menominee referring to the Stockbridge treaty as "stipulating that *a new home* shall be furnished to the said Stockbridge and Munsee Indians, near the south line of the Menominee reservation." Treaty with the Menominee, 11 Stat. 679 (Feb. 11, 1856) (emphasis added) (Exhibit 14 to Smith Declaration). In 1893, Congress noted that, in 1856, the Stockbridge and Munsees "accepted . . . certain lands as a reservation, to which said Indians removed, and upon which they have ever since resided." 27 Stat. 744, Ch. 219 (March 3, 1893) (Exhibit 15 to Smith Declaration). This other 1856 treaty and 1893 statute further show that, under *Santa Fe*, the Stockbridge relinquished any land they had outside of that provided in their 1856 treaty, on which they all resided.

This restriction of the Stockbridge to their Wisconsin lands was in accord with the 1856 Stockbridge treaty and, regardless, was entirely within the power of Congress, *see Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (Congress has right to unilaterally modify preexisting tribal treaty rights). The Stockbridge constitution, which restricts Stockbridge sovereignty to land in Wisconsin, is fully consistent with this 1871 statute.

CONCLUSION

The amended complaint must be dismissed.

Respectfully submitted,

William W. Taylor, III (102710)
Michael R. Smith (601277)
David A. Reiser (105646)
ZUCKERMAN SPAEDER LLP
1201 Connecticut Avenue, NW
Washington, D.C. 20036
202/778-1800 FAX: 202/822-8106

and

Rowan D. Wilson
Thomas G. Rafferty
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019-7475
212/474-1000 FAX: 212/474-3700

Attorneys for Oneida Indian Nation of New York