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) **Plaintiff's Memorandum of Law in Opposition to Defendant-Intervenor's Motion to Dismiss Amended Complaint**

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INTRODUCTION

Defendant-Intervenor ("OIN" or "the Nation") moves to dismiss the Amended Complaint (AC) as to all defendants based on the equitable defense applied in *Cayuga*[1] and *Oneida*[2] and its claim that it, rather than Plaintiff ("Stockbridge" or "SMC"), possesses recognized Indian title to the claim area. In addition, OIN seeks dismissal of Stockbridge's claims for affirmative relief against it based on its sovereign immunity from suit.

This Court should not dismiss Stockbridge's claims against OIN. *Cayuga* and *Oneida* make clear that the critical factor in determining whether a claim is barred is whether the claim is inherently disruptive, not whether it is possessory. Deciding which Tribe possesses the recognized Indian title and what remedies may be available would not be disruptive to justified societal expectations under the scheme of settled land ownership. OIN has waived its immunity, and whether the subject lands are Stockbridge or Oneida is of exceptional importance, even if the *Sherrill* equitable defense is later determined to bar Stockbridge's claims against the State and county/municipal defendants.[3]

THE DISPUTE BETWEEN STOCKBRIDGE AND THE NATION

Before 1987, OIN did not assert an interest in the claim area. Indeed, from 1950 to 1987, Stockbridge and OIN, jointly represented by the same counsel, pursued separate land claims

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[1] *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005) (*Cayuga*).

[2] *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010).

[3] This Court's Order of October 25, 2011 (D.E. 281) directed the State defendants to supplement their 2004 motion to dismiss and the defendant counties and municipalities to file any motion to dismiss by December 19, 2011. In this Memorandum, Stockbridge addresses why the equitable defense invoked in *Cayuga* and *Oneida* does not bar its claims against OIN, reserving its response regarding why that defense does not compel dismissal of its claims against the State and county/municipal defendants for its opposition to their December 19 papers. This Memorandum fully addresses OIN's argument that the claims against all defendants should be dismissed because OIN, rather than Stockbridge, possesses unextinguished Indian title to the subject lands.

against the both United States in the Indian Claims Commission (ICC) and State and local governments in federal district court that acknowledged the validity of the other's claims. Significantly, none of OIN's own land-claim actions have ever asserted a claim to the subject lands.[4] Yet in 1987, despite more than three decades' acquiescence in the joint pursuit of claims asserting separate Oneida and Stockbridge treaty reservations, OIN intervened in this action as a defendant for all purposes seeking dismissal based on the claim that it, rather than Stockbridge, retained recognized Indian title to the subject lands.

Following its all-purpose intervention, in the late 1990s and early 2000s, OIN purchased 3,760 acres within Stockbridge's treaty reservation, together with another 13,000-plus acres within its own 1788 Treaty reservation. In 2004, Stockbridge amended its complaint seeking the land's return and damages. AC, Ex. B. The Nation's refusal to pay property taxes on its recent acquisitions led to the Supreme Court's 2005 decision in *Sherrill*,[5] which in turn led to the Second Circuit's decisions in *Cayuga* and *Oneida*. Notwithstanding *Sherrill* and its progeny, OIN continues to claim that the subject lands are part of the Oneida treaty reservation, refuses to pay local property taxes,[6] and seeks to have the majority of the land subject to this action placed in trust for its exclusive benefit by the Department of the Interior.[7]

Stockbridge recognizes that *Sherrill* and its progeny have "dramatically altered the legal landscape against which" Stockbridge's claims must be considered.[8] Thus Stockbridge, as to

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[4] *See,e.g.*, Amended Complaint in No. 74-CV-187, Ex. Y and discussion *infra* at 22-23 & n 51. The abbreviation "Ex." herein references exhibits to the supporting Declaration of Don B. Miller.
[5] *City of Sherrill v. Oneida Indian of New York*, 544 U.S. 197 (2005) (*Sherrill*).
[6] *See Oneida Indian Nation of New York v. Madison County, Oneida County, N.Y.*, 605 F.3d 149, 161-62 (2d Cir. 2010), *cert. granted* 131 S.Ct. 459 (Oct. 12, 2010), *vacated on other grounds and remanded*, 131 S.Ct. 704 (Jan. 10, 2011), *on remand*, – F.3d --, 2011 WL 4978126. Ex.C.
[7] *See gen'ly New York v. Salazar*, No. 08-CV-644 (N.D.N.Y.).
[8] *Cayuga*, 413 F.3d at 273.

OIN only, abandons any claim based on the illegality of the original transfer, including its second claim for relief under the Nonintercourse Act, 25 U.S.C. §177. AC ¶¶ 48-50. In addition, while Stockbridge in this action has always asserted only Fifth Amendment-protected property rights, in the wake of *Sherrill*, it no longer asserts that its unextinguished Indian title gives rise to governmental jurisdiction. *See* AC ¶ 4.

Abandonment of the Nonintercourse Act claim against OIN conforms the parties' views regarding the parameters of this Tribe-versus-Tribe dispute. In its 2004 papers seeking the Amended Complaint's dismissal, OIN denied that it claims under its recently acquired fee title, asserting the superior possessory right based on its federal law and treaty rights predating the illegal state purchases. 2004 Mem 5. The merits of the Tribe-versus-Tribe dispute are now framed as described in OIN's 2004 Memorandum, i.e., liability pursuant to the claims "alleged in the complaint depend[s] upon whether the 1788 state treaty gave the Stockbridge a federally-protected [sic] possessory right to land superior to that of the Oneidas and, if so, whether it survived the 1794 federal treaty . . . ." *Id*. at 4.

The 2004 Amended Complaint alleges unextinguished Stockbridge Indian title. AC ¶¶ 16-24. Stripped of allegations regarding the illegality of the ancient conveyances, it continues to state claims for relief against OIN under the federal common law,[9] AC ¶ 47, and the 1788 and 1794 Treaties. AC ¶ 52.

[9] Indian common-law rights to tribal lands were not pre-empted by the Nonintercourse Act—the common law still furnishes an independent basis for legal relief. *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236-240 (1985) (*Oneida II*).

ARGUMENT

A. The *Sherrill* Equitable Defense Does Not Bar Stockbridge's Claims against the Nation.

Oneida establishes "that the dispositive question in ascertaining the applicability of *Sherrill's* equitable defense is not whether a current possessory right is asserted, but whether a plaintiff's claim is inherently disruptive."[10] Stockbridge's claims against OIN are fundamentally different from the Nonintercourse Act claims barred in *Cayuga* and *Oneida*. In those cases, tribal plaintiffs claimed that their unextinguished Indian title conferred a right of possession superior to that arising from the defendants' fee titles.[11] Because "not only the Counties and the State of New York, but also . . . private landowners and a plethora of associated parties" all had justifiable expectations, the "scheme of 'settled land ownership' . . . would be disrupted" by an award pursuant to the tribes' possessory claims.[12] This dispute, in contrast, pits Stockbridge's recognized-Indian-title claim against OIN's Indian-title claim.

This is primarily a dispute about which tribe's Indian title is superior, not whether Stockbridge's Indian title is superior to OIN's fee title.[13] Therefore, awarding relief against OIN would not be disruptive to the scheme of settled land ownership, which deals exclusively with

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[10] *Oneida*, 617 F.3d at 136.

[11] Indian title, aboriginal or recognized, is the right of Indians to exclusively use and occupy land. The holder of the underlying fee title to Indian land, also referred to as the right of preemption or sovereign title, is the "discovering" European sovereign or its successor who holds the exclusive right to acquire Indian land once the Indian title is extinguished by the sovereign. *See Seneca Nation of Indians v. New York*, 206 F.Supp.2d 448, 504 (W.D.N.Y. 2002).

[12] *Oneida*, 617 F.3d at 127, *quoting Cayuga*, 413 F.3d at 275.

[13] *See* 2004 Mem 9: "[Stockbridge fails to state viable federal-common-law claim because] [t]he Oneidas' superior possessory right under the 1794 Treaty defeats SMC's federal common law claim." Stockbridge fails to state federal-treaty claim because "federal Treaty of Canandaigua does not give the Stockbridge any possessory right in land that is the 'property' and 'reservation' of the Oneida." (citation omitted).

fee-title-based estates that arise only upon the extinguishment of Indian title.[14] Whether Stockbridge or OIN retains unextinguished recognized Indian title to 3,760 acres in Central New York does not impact broad societal interests. This dispute largely occurs outside the scheme under which fee-title-based rights and relationships are determined and its resolution will have no precedential or disruptive impact on the dominant society's settled expectations.

Moreover, this Indian-title-based dispute possesses few of the characteristics of the Indian-title-versus-fee-title claims found to be inherently disruptive in *Cayuga* and *Oneida*. The claims at issue are not founded on the alleged illegality of the property's initial transfer, i.e., a Nonintercourse Act violation. Because Stockbridge's claims against OIN did not accrue until OIN purchased the property in the late 1990s and early 2000s, the Indian-title dispute is not of ancient origin and does not involve a long delay in seeking relief.[15]

Nor do other equitable considerations suggest that OIN should be permitted to avail itself of the equitable defense invoked in *Cayuga* and *Oneida*. In *Oneida*, OIN asserted that its Indian title was superior to the defendants' long-settled fee title, denying that the disruption to justifiable societal expectations found ultimately dispositive by the Second Circuit might properly be considered. In ironic contrast, OIN here seeks dismissal because *Cayuga* and *Oneida* make "no exception for land owned by Indian tribes"—implicitly relying on the sanctity of the scheme of settled land ownership and its non-Indian predecessors' settled expectations to

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14 *See James v. Watt*, 716 F.2d 71, 74 (1st Cir. 1983) (discussing "two distinct levels of ownership in Indian lands: fee title and Indian title"); *Catawba Indian Tribe v. South Carolina*, 865 F.2d 1444, 1448-49 (4th Cir. 1989) (although Indian title is not a recorded title, it is nonetheless legal title).

15 OIN's purchases within the claim area began on September 1, 1998 and ended on December 15, 2003. Stockbridge amended it complaint and sought relief against OIN on August 5, 2004, within six years of the initial purchase. *See* table, OIN Purchases within Stockbridge Treaty Area. Ex. E.

bar Stockbridge's claims, even though OIN's merits defense is based not on the superiority of its fee title but on the superiority of its Indian title. But OIN, itself a plaintiff in its own land-claim action, does not possess the same set of societal expectations as the dominant society. OIN's own actions have removed this Tribe-versus-Tribe dispute from the realm of the "scheme of settled land ownership" and "societal expectations" protected from disruption by the *Sherrill* defense.

He who comes to equity must do equity. The Nation intervened in this action as a defendant for all purposes in 1987, asserting the superiority of its own Indian title as the basis for dismissing Stockbridge's complaint. After voluntarily becoming a defendant in this action, OIN purchased, in the late 1990s and early 2000s, approximately 3,760 acres within this action's claim area. In 2005, the year after Stockbridge amended its complaint to seek the return of these lands, OIN represented that these lands lay within the Oneida reservation and asked the Secretary of the Interior to accept title to them in trust for OIN. The Nation therefore stands on very different equitable grounds from the "innumerable innocent purchasers"[16] having no connection to the historical injustice, the concern for whom formed the cornerstone of the *Sherrill* equitable defense applied in *Cayuga* and *Oneida*. The Nation has no justifiable expectations worthy of protection under the principles of federal equity practice.

These unique circumstances make the fact that the relief sought also implicates OIN's fee title a concern of secondary importance. That the relief sought is grounded primarily in the distinctive, and distinguishable, recognized-Indian-title nature of the claim itself, together with the peculiar equitable considerations at play, ensures that the scheme of settled land ownership will not be disrupted.

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16 *Cayuga*, 413 F.3d at 277 *quoting Yankton Sioux Tribe v. U.S.*, 472 U.S. 351, 357 (1926).

In *Cayuga* and *Oneida*, the *Sherrill* equitable defense was applied to bar "legally viable [claims] within the statute of limitations." 617 F.3d at 124. Even if Stockbridge's possessory claim against the defendants who assert right-of-preemption-based titles are found to be barred, whether Stockbridge retains recognized Indian title will continue to be of great importance.[17] Stockbridge owns a 122-acre property within the claim area, AC ¶ 4, and whether it retains its recognized Indian title could be of significance to Stockbridge's rights under various federal statutory schemes. *See, e.g.* 25 C.F.R. Parts 151.10 & 151.11 (different standards applicable to on- and off-reservation secretarial trust acquisitions under 25 U.S.C. §465); 28 U.S.C. §§ 1492 & 2505 (authorizing either house of Congress to refer claims to the United States Court of Federal Claims).

In addition, whether Stockbridge retains recognized Indian title, as well as the status of its land as reservation land, will determine the taxability of Stockbridge's 122-acre property. *See Oneida Indian Nation v. Madison County*, – F.3d --, 2011 WL 4978126 at *56-57 (2d Cir., Oct. 20, 2011), Ex. C, explaining that New York Real Property Tax Law § 454 provides that the "real property in any reservation owned by the Indian nation, tribe, or band occupying them shall be exempt from taxation," and that New York Indian Law § 6 provides that no state taxes shall be assessed for any purpose on such lands. *Id*. at 57 (emphasis deleted and other emphasis added). Like OIN, which continues to vigorously contest the State's and Counties' unrelenting efforts to

[17] The Amended Complaint, Ex. B (D.E.228), seeks declaratory relief in addition to ejectment and damages. AC, Prayer, ¶¶ 1-3. Paragraph 1 seeks a declaration that OIN's rights in the claim area have been extinguished and OIN argues, 2011 Mem 5 n.2, that Stockbridge lacks standing to seek a declaration addressing only OIN's rights. But whether its rights are extinguished is firmly within the controversy framed by the pleadings; *see Seneca Nation of Indians v. New York*, 382 F.3d 245, 262 (2d Cir. 2002) ("grant of possessory rights . . . extinguished the Senecas' own possessory rights in that property."). Stockbridge also seeks a companion declaration that its title to the claim area has never been extinguished. Prayer, ¶ 3.

secure a judicial disestablishment of the Oneida reservation,[18] whether Stockbridge continues to possess recognized Indian title and the status of its reservation will continue to be of great importance to Stockbridge in the post-*Cayuga/Oneida* world.

Indian treaty rights and claims to land carry with them their own set of powerful historical, legal and equitable underpinnings. Nearly 200 years of Indian law jurisprudence has recognized that this Country's solemn guarantees, to which our national honor has been pledged, are not to be lightly cast aside. While the potential for widespread disruption to the dominant society's long-settled expectations may now "in appropriate circumstances, . . . [bar] legally viable" land claims,[19] where treaty rights can be vindicated without such disruption, the federal courts still have an unflagging obligation to do so.

For all of the above reasons, this Court should not apply the bar of the *Sherrill* equitable defense. Awarding possessory relief and damages in an Indian title dispute lying largely outside the realm of the scheme of settled land ownership would not be disruptive. In the alternative, should the Court deem such relief disruptive, the fundamentally distinctive nature of this dispute ensures that, at the very least, the declaratory relief Stockbridge seeks would not be disruptive.

B. The Amended Complaint States a Viable Legal Claim.

OIN has failed to meet its burden of showing that Stockbridge's Amended Complaint fails to state a legal claim. The Amended Complaint asserts *prima facie* claims under the federal

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18 *See* OIN's November 29, 2011 Response in Opposition to Petition for Rehearing En Banc in *Oneida Indian Nation v. Madison County* (2d Cir., No. 05-6408). Ex. DD. Whether the lands at issue here are within the Oneida Reservation will also determine their taxability for OIN. *See* discussion at Br. 14, Ex. EE, and at 2011 WL 4978126 at *56-57, Ex. C. The State of New York argues in its recently filed amicus brief that this question "is of exceptional importance." Brief of Amicus Curiae State of New York in Support of Petition for Rehearing *En Banc*, at 1(filed November 29, 2011). Ex. EE .

19 *Oneida*, 617 F.3d at 124.

common law and the Treaties of 1788 and 1794, i.e., that plaintiff is an Indian tribe, AC ¶ 4, the subject land is tribal land, AC ¶¶ 12, 17-22, the United States has never consented to or approved its alienation, AC ¶ 24, and the trust relationship between the United states and the tribe has not been terminated or abandoned, AC ¶ 4.[20] Under Fed. R. Civ. P. 12(b)(6), the Court must "accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the non-moving party."[21]

1. <u>The 1788 Treaty and the 1789 Act Created Permanent Recognized Title in Stockbridge</u>.

The 1788 Treaty[22] and its 1789 implementing act extinguished Oneida aboriginal title and created permanent occupancy rights in Stockbridge.[23] AC ¶¶ 17 & 18, Exs. F & G, *see* Affidavit of William A. Starna at 3, ¶¶ 5b & 5c, Ex.A (hereinafter "Aff."). The first article of the 1788 Treaty of Fort Schuyler provided that the "Oneidas do cede and grant all their lands to the people of the State of New York forever." The Treaty's second article, as judicially construed, provided that the Oneidas reserved for their own use a described portion of the lands ceded in article one.[24] The second article's last clause expressly excluded the six-mile-square tract from

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[20] These allegations also establish a *prima facie* Nonintercourse Act claim, s*ee Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994), but Stockbridge no longer asserts such claims against OIN. The Nonintercourse Act did not preempt Indian common-law rights to tribal lands, thus the common law still furnishes an independent basis for legal relief. *Oneida II*, 470 U.S. at 236-240.

[21] *Hayden v. Paterson*, 594 F.3d 150, 157 (2d Cir. 2010) *quoting Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir. 1999); *see Ruston v. Town Bd. for Town of Skaneateles*, 610 F.3d 55, 58-59 (2d Cir. 2010).

[22] The Second Circuit has expressly held that the 1788 Treaty of Fort Schuyler was a valid exercise of the sovereign power to extinguish Indian title. *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145 (2d Cir. 1988), *cert. denied* 493 U.S. 871 (1989).

[23] *See Seneca Nation*, 382 F.3d at 262 ("grant of possessory rights . . . extinguished the Senecas' own possessory rights in that property.").

[24] Stockbridge's claims do not, as OIN asserts, rest on the argument that the Oneidas ceded their reservation to the State rather than reserved it. 2011 Mem 3-4. Stockbridge's claims recognize

the lands reserved by the Oneidas, designating it as a permanent Stockbridge reservation:

> and further *notwithstanding any reservations of lands to the Oneidas for their own use*, the New England Indians (. . . Brothertown . . .) and their posterity forever, and *the Stockbridge Indians [sic] and their posterity forever are to enjoy their settlements on the lands heretofore given to them by the Oneidas for that purpose, that is to say*, a tract of two miles in breadth and three miles in length for the New England Indians, and *a tract of six miles square for the Stockbridge Indians*.

(emphasis added) AC ¶ 17, Ex. F. This provision made plain that the area reserved by Oneidas in the first part of article two did not include the Stockbridge lands, which were to be separately and permanently reserved to Stockbridge by the State. AC ¶ 17; Aff. at 3 ¶ 5c, Ex. A.

In 1789, the New York Legislature implemented the Treaty by statute and permanently established the Stockbridge Reservation, decreeing: "that the tract of land, confirmed by the Oneida Indians to the Stockbridge Indians at the said treaty, shall be and remain to the said Stockbridge Indians and their posterity . . . ."[25] AC ¶ 18; Aff. at 4-5 ¶ 5e.

The Nation did not retain its aboriginal title or a reversionary interest, as shown plainly by the Treaty terms conveying the land to "the Stockbridge Indians and their posterity forever" and the implementing act's terms confirming the grant. It is a cardinal rule of federal Indian law

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that the Oneidas reserved their own reservation, but dispute that they also reserved the New Stockbridge reservation. OIN argues that the only tribe whose understanding matters to the interpretation of the 1788 Treaty is the Oneida, 2004 Mem 6. But the Oneidas would not have understood that they were retaining their aboriginal title to lands separately set aside for the Stockbridge "and their posterity forever." As the Supreme Court explained in *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985), "even though legal ambiguities are resolved to the benefit of the Indians, courts cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims." (internal quotations and citations omitted).

[25] *AN ACT for the sale and disposition of lands, belonging to the people of this State*, Laws of the State of New York, Vol. III, Chap. 32, 69-72 (Albany, 1877). Ex. G.

that the declaration of permanent possessory rights creates recognized Indian title.[26] And the Oneidas' own demands at the treaty negotiations show conclusively that they did not intend to retain any reversionary interest. Aff. at 3 ¶¶ 5c & d. The minutes of the negotiations reveal that the Oneidas "insist[ed]" that the Stockbridge "must be established in their Settlements by [the State]" and that the agreement at the Treaty council be reduced to writing so "that it may be established forever, for we mean to settle Matters once (sic) for all."[27] Aff. at 8-9 ¶ 11.

OIN's argument that it retained a reversionary right in the Stockbridge reservation despite the plain language of the Treaty, its implementing statute and the treaty-negotiation minutes is further undermined by the fact that, had that been their intent, no treaty provision regarding Stockbridge would have been necessary. The Oneidas' 1785 grant to Stockbridge[28] was void and unenforceable under state and federal law.[29] Thus, until the grant was confirmed by the State, Stockbridge was a tenant-at-will whose continued residence in Oneida aboriginal territory was at the Oneidas' sufferance.[30] If the Oneidas' goal at the 1788 Treaty was to continue

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26 *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-78 (1955); Felix S. Cohen, *Handbook of Federal Indian Law* at 476 (Miche, 1982) (if treaty purports to recognize "permanent rights to particularly described land it creates a recognized Indian title.").

27 Hough, Proceedings of the Commissioners of Indian Affairs Appointed by Law for the Extinguishment of Indian Title in the State of New York, Albany (1861) at 230, Ex. H .

28 In 1785, Oneida and Stockbridge leaders jointly sought the State's formal confirmation of the Oneidas' grant to Stockbridge, Aff. at 8 ¶ 10, Ex. A, and confirming legislation passed the State Senate in 1785 but failed in the Assembly. Aff. at 3 ¶ 5a, 7-8 ¶¶ 8-10. Shortly thereafter, Stockbridge headman Aupaumut wrote Governor Clinton requesting the return of "our Deed which I left in your hands . . . ." ¶10.

29 *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 593 (1823); *see Seneca Nation*, 206 F.Supp.2d at 503 ("Indian tribe has no independent power to convey its aboriginal title to another.").

30 Although in the 1788 Treaty negotiations, the Oneidas mentioned Tuscarora as one of the "brothers" to be established by the State in their settlements, neither the 1788 Treaty nor the 1789 implementing act made any provision for them. The Supreme Court therefore accurately noted that "[t]he 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.'" *FPC v.*

Stockbridge's guest status, it would have been unnecessary to carve out a separate Stockbridge tract or say anything in the treaty about Stockbridge land tenure—Stockbridge would merely stay on the land and, if they left, it would again be Oneida land. The only conceivable purpose of the provision creating a Stockbridge reservation was to effect a change in the nature of its occupancy rights, and the only construction that avoids rendering superfluous the 1788 Treaty provisions regarding Stockbridge is that the Treaty was intended to establish a permanent Stockbridge Reservation under sovereign law, just as the historical record shows the Oneidas expressly demanded and the words of the Treaty and its implementing act expressly provided.

The 1809 committee report and 1811 quitclaim deed and related documents relied on by OIN, 2004 Mem 17-18, do not show that the State and the Oneidas understood that the Oneidas had retained a reversionary interest in the six-mile square. Aff. at 3 ¶ 5d. Rather, they reveal that the Oneidas' supposed reversionary interest was in land outside the New Stockbridge reservation, i.e., lands that the 1789 implementing act had placed in the Brothertown Reservation against the Oneidas' wishes and contrary to the 1788 Treaty's terms.[31] The "claim . . . set up by the Oneida nation of Indians to the lands occupied by the Brothertown and Stockbridge Indians" referenced in the 1811 state statute, Ex. I , was in fact a claim, not to Stockbridge's six-mile

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Tuscarora Indian Nation, 362 U.S. 99, 121 & n. 4 (1960), *quoting* Hough, Census of the State of New York, 510 (1857).

[31] The 1774 deed from the Oneidas to the New England Indians provided for a Brothertown reservation of 12-by-13 miles, but the 1788 Treaty had provided for a reduced Brothertown Reservation of 2-by-3 miles. In a change that explains lingering Oneida claims to additional lands, the 1789 implementing statute established a Brothertown Reservation comprised, not of the Treaty's 2-by-3-mile tract, but of "all that part of the tract of land, formerly given to them by the Oneida Indians, which is included in the cession lately made by the Oneida Indians, to the people of this State . . . ." Ex. G. In other words, without the Oneidas' consent, the 1789 Act had substantially departed from the 1788 Treaty's provisions and created a much larger Brothertown Reservation to be comprised of all the land described in the 1774 deed from the Oneidas to the Brothertown except for whatever portion of those lands lay within the Oneida Reservation created by the 1788 Treaty. *See* Ex. H.

square, but to the tract described in the Oneidas' 1774 Brothertown grant, Aff. at 2-3 ¶ 5d(1), which the Oneidas had attempted to rescind at the 1788 Treaty but which the State nonetheless granted, in large part, to Brothertown in the 1789 implementing statute. The metes-and-bounds description in the Governor's request for an Attorney General's opinion, Ex. J, is identical to the metes-and-bounds description in the Oneidas' 1774 deed to the New England Indians, Ex. K. Aff. at 2-3 ¶ 5d(1), Ex. A. Therefore, the land that was the subject of the Oneidas' complaint, the Governor's 1811 investigation, and the subsequent 1811 treaty, was the 1774 Brothertown tract (or a portion thereof), not the statutorily designated six-mile-square "New Stockbridge" reservation. *Id*. The 1809 New York State Assembly committee report likely referred to the same Oneida claim. Aff. at 4 ¶ 5d(2), 13-14 ¶ 15.[32]

Importantly, the 1811 statute concerned "the lands occupied by the Brothertown and Stockbridge Indians." In contrast, the 1791-1813 series of New York statutes concerning the six-mile-square referred to it uniformly as "New Stockbridge." Legislative acts in 1791 and 1797 used the term "New Stockbridge," Exs. N & O, and in 1801, the legislature decreed that the six-

[32] The fact that the Governor's 1811 request to the Attorney General (referencing the claimed reversionary interest) did not concern the lands of New Stockbridge strengthens the likelihood that the 1809 Committee Report was likewise referring to lands outside the six-mile-square. This Report expresses the House's agreement with a select committee's recommendation that the request of the Stockbridge to sell some of their preacher's land should be denied. But in report language omitted from OIN's quotation, the select committee heavily qualifies the reason for its negative recommendation, stating that "with respect to selling a part of their land, *the committee can only say that from the best information they can obtain, it appears* that the [Oneidas gave the land to the Stockbridge, retaining a remainder interest]." Ex.L (emphasis added). However, it is unlikely that the land referred to in the 1809 report is within the six-mile-square. *See* AC Ex. B & C (maps showing the Sargeant tract lying adjacent to, but outside, the six-mile-square on its Northeast corner). Ex. B. The 1796 Belknap-Morse Report, Ex. M, notes that "Mr. Sargeant resides in the village of New Stockbridge . . . . The legislature of New York have lately granted him a tract of land containing one square mile, which *is to be located in that part of their late purchase of the Oneida reservation adjoining New Stockbridge*," (emphasis added), *i.e.*, within the area of the grant attempted to be resumed by the Oneidas in the 1788 Treaty but nonetheless included in the Brothertown tract by the State in the 1789 Act.

mile-square "shall be called New-Stockbridge." Ex. P. The 1806 act used the legislatively-defined term "New Stockbridge" to refer to the six-mile-square, Ex. Q, and the 1813 act confirming the Stockbridge reservation, Ex. R, again decreed:

> [t]hat the tract of land six miles square, confirmed by the Oneida Indians to the Stockbridge Indians, by the treaty held at Fort-Stanwix in the year one thousand seven hundred and eighty-eight, *shall be called New-Stockbridge*, and be and remain to the said Stockbridge Indians and their posterity for ever . . . .

(Emphasis added). AC ¶ 23. Significantly, in the next paragraph, this 1813 act stated, in language identical to that contained in the 1811 statute, that the Oneidas had set up a claim to lands occupied by "Brothertown and Stockbridge Indians" and provided, again in identical language, that the claim be investigated and, if warranted, purchased. *See* Exs. I and R. Plainly, New York used the phrase "lands occupied by Brothertown and Stockbridge Indians" to refer to lands other than those described by the legislatively-defined term "New Stockbridge."

The Second Circuit upheld the 1788 Treaty of Fort Schuyler as a valid exercise of the sovereign right to purchase Indian lands and extinguish Indian title.[33] AC ¶ 18. The 1788 Treaty was a binding agreement in which the Oneidas retained title only to the particular lands described as their Reservation, and that description expressly excluded New Stockbridge. The 1788 Treaty and its 1789 implementing statute unambiguously extinguished Oneida title to the lands of the six-mile-square tract and, as demanded by the Oneidas, established it as permanent reservation for Stockbridge. Because the Oneidas retained title only to the particular lands

[33] *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145 (2d Cir. 1988), *cert. denied* 493 U.S. 871 (1989). OIN asserts that, while the State possessed the power to extinguish Indian title for the purpose of exercising its right of preemption, it lacked the power to extinguish "so the Oneidas could transfer the land to another tribe," 2004 Mem 7. But the Treaty minutes show that the extinguishment of Oneida title and the creation of permanent rights in Stockbridge were demands by the Oneidas—conditions that the State would need to meet in order to exercise its right of preemption.

described in the Treaty as their reservation, OIN's reliance on the Second Circuit's 2003 ruling in *City of Sherrill* is misplaced. 2004 Mem 6, 2011 Mem 4. Contrary to OIN's assertion, Stockbridge does not argue that the Oneidas ceded their reservation to the State, *see* n. 24 *supra*. It does argue, however, that the Oneidas ceded their other lands and that the lands of the Stockbridge reservation were among those ceded and not among those reserved by the Oneidas. OIN's claim that *City of Sherrill* held otherwise is mistaken. The *City of Sherrill* litigation simply did not address whether Stockbridge lands were within the Oneida reservation. On remand from the Supreme Court, the Second Circuit ruled that the "parties to this litigation do not . . . purport to put at issue the boundaries of the OIN's or Stockbridge's reservation." Because the issue whether the Stockbridge reservation was within the boundaries of the Oneida reservation was not before the court, Stockbridge's motion to intervene was denied.[34]

The 1788 Treaty and the 1789 Act created permanent Stockbridge property rights. Once recognition and extinguishment of Indian title became the exclusive province of the Federal Government upon the effective date of the Constitution, March 4, 1789,[35] AC ¶ 19, only clear

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[34] *Oneida Indian Nation of New York v. Madison County, Oneida County, N.Y.*, 605 F.3d 149, 161-62 (2d Cir. 2010), *cert. granted* 131 S.Ct. 459 (Oct. 12, 2010), *vacated on other grounds and remanded*, 131 S.Ct. 704 (Jan. 10, 2011). On remand, the Second Circuit ruled that the district court was required to decline supplemental jurisdiction over OIN's claim that its property acquired on the open market, including 3,760 acres located within the Stockbridge reservation, was "Indian reservation" property under New York law and thus was exempt from taxation. -- F.3d --, 2011 WL 4978126. Ex.C. Although defendant counties have petitioned for rehearing on the question whether the Oneida reservation, whatever its boundaries, was disestablished, the *City of Sherrill* federal-court litigation will conclude without addressing whether the lands of the Stockbridge reservation lie within the boundaries of the Oneida reservation.

[35] OIN also suggests that in 1789 New York lacked power to implement the 1788 Treaty and extinguish Oneida title. 2004 Mem 7 & n.3. This is wrong. The 1789 implementing act was passed on February 25, 1789. Ex.G. As successor sovereign to the Crown, New York, on February 25, 1789, was still empowered to honor its bargain with the Oneidas and permanently settle the Stockbridge on the six-mile square. The United States did not begin operations under the Constitution until March 4, 1789. *See The Oneida Indian Nation of New York v. New York,*

and unambiguous Congressional action after that date could extinguish Stockbridge title and resurrect Oneida title. No such action was ever attempted. AC ¶ 24.

2. The 1794 Treaty of Canandaigua Recognized and Confirmed Stockbridge Title.

In article II of the 1794 Treaty of Canandaigua, the United States promised to never disturb any of the signatory tribes, which included Stockbridge, in the "free use and enjoyment" of their Confederal-period reservations, thereby extending federal recognition and protection to the Stockbridge Reservation.[36] AC ¶ 21, Aff. at 5 ¶ 5g. The Indian Claims Commission held that article II of the 1794 Treaty "related to the lands of the Stockbridges" and that "[a]rticle II pledged the United States never to disturb them in their free use and enjoyment of New Stockbridge."[37] The Commission found:

> In short, the Trade and Intercourse Act applies regardless of the nature or extent of the Indians' title in the land, so long as the tribe has some property interest. . . . Nor does it matter how the tribe may have obtained its interest in the land. . . . The Stockbridges received an interest in New Stockbridge *from the State of New York* under a treaty entered into September 22, 1788, and under a law of the New York State Assembly enacted April 10, 1813. *The interest created was a right to permanent use and occupancy. . . . [I]t is clear that their interest in New Stockbridge was no less compensable than is the interest possessed by a tribe holding land under aboriginal title or by federally recognized title . . . .*[38]

In addition, as a signatory to the 1794 Treaty, Stockbridge, like other signatory tribes, received

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201 F.R.D. 64, 70 and n.10 (N.D. N.Y. 2001); *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145 (2d Cir. 1988), *cert. denied* 493 U.S. 871 (1989).

[36] Article II, 7 Stat. 44, Ex. S, states:

> The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New-York [sic], and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

[37] *The Stockbridge Munsee Community v. U. S.*, 25 Ind.Cl.Comm. 281, 295 (1971). Ex.T.

[38] *Id*. at 291-92, Ex. T (emphasis added) (citations omitted).

annuities under the Treaty from the United States.[39] Aff. at 5 & 11 ¶¶ 5g & 13; Ex. A.

The Supreme Court has recognized that art. II acknowledged an Oneida reservation comprised of only those lands reserved by the Oneida in its treaty with New York.[40] This did not include the Stockbridge reservation because the Confederal-period Treaty with New York had extinguished all Oneida aboriginal title and interest to the Stockbridge tract by expressly excluding it from those lands reserved by the Oneidas and set aside as its reservation. *See* Aff. at 5 & 11 ¶¶ 5h & 13.

OIN argues that the 1794 Treaty extinguished Stockbridge title to New Stockbridge and returned it to the Oneidas. 2004 Mem 7. But such a construction is incompatible with the central purpose of the 1794 Treaty, which was to "remove from [the Indians'] minds all causes of complaint, and establish a firm and permanent friendship with them." 7 Stat. 44, Aff. at 5 & 11 ¶¶ 5h & 14. Congress plainly did not intend to extinguish or diminish, without mention, property rights secured to a signatory tribe under the 1788 state treaty. *Id.*

The Nation posits that because both the Tuscarora and Stockbridge were "Indian friends" and the Tuscarora were guests or tenants at will of the Senecas, the Treaty must have likewise regarded Stockbridge as a guest or tenant at will of the Oneidas. 2004 Mem 8. But unlike the Tuscaroras, who had no reservation under a pre-Constitutional treaty and possessed no

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39 *See Six Nations, et al. v. United States*, 32 Ind. Cl. Comm. 440 (1973), which dealt with claims arising under the 1794 Treaty. Stockbridge shared in the final award based on the United States' failure to pay annuities due the tribes. H.R. Doc. No. 477, 29th Cong., 1st Sess. 29 (1846), describes the annuities paid by the United States to Stockbridge as a signatory to the 1794 Treaty of Canandaigua.

40 *Sherrill*, 544 U.S. at 204-05 ("1794 treaty 'acknowledged' the Oneida reservation as established by the Treaty of Fort Schuyler . . . .") (*quoting* 1794 Treaty).

recognized title to any former Oneida or Seneca lands,[41] the Stockbridge possessed permanent property rights guaranteed by the 1788 Treaty. Aff. at 4 ¶ 5f. And OIN's assertion that the 1794 Treaty's articles concerning the Oneida and Seneca are "identical" is incorrect—the Treaty's description of the land acknowledged as Oneida property must be found in another document, the 1788 state treaty, but its description of the land acknowledged as the Seneca reservation is contained in the text of the 1794 Treaty itself, without reference to any outside document.[42] Thus, the 1794 Treaty's description of Oneida lands, by relying on the 1788 Treaty's description, excludes the New Stockbridge reservation; whereas its description of Seneca lands includes whatever lands the Tuscaroras were residing on.

The notion that Indian property rights lawfully extinguished by a prior sovereign might be resurrected by a subsequent acknowledgment of those rights in the 1794 Treaty of Canandaigua was put to rest by the Second Circuit in *Seneca Nation of Indians v. New York*, 382 F.3d 245 (2d Cir. 2004). There, the court of appeals rejected a Seneca claim to land "acknowledged to be the property of the Seneka nation" by article III of 1794 Treaty, *id*. at 268, because its Indian title to that land had previously been extinguished by the lawful act of a prior sovereign and had vested in the Crown in 1764 and then in the State upon the American

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41 *See United States v. Winnebago Tribe of Nebraska*, 542 F.2d 1002, 1005 (8th Cir. 1976) ("Contrary to the facts presented here, the Indian lands taken in Tuscarora were not . . . reserved by treaty."). The two pre-constitutional federal treaties that supposedly "expressly 'secur[ed]' the Tuscarora in the lands they then occupied," 2004 Mem 8, did not relate to lands the Tuscaroras occupied on the Seneca reserve, "[b]ut . . . to other lands." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 121 & n.18 (1960).

42 Article II acknowledges "the land reserved to the Oneida . . . *in [its] treaties with the state of New York*, and called [its] reservation[], to be [its] property." (emphasis added). In contrast, Art. III begins, not with a reference to the 1788 Treaty, but with a declaration that "[t]he land of the Seneka nation is bounded as follows: [metes-and-bounds description]," followed by an acknowledgment that those particularly described lands are the property of the Senecas. Article IV then states "[t]he United States having thus *described* and acknowledged what lands belong to the Oneidas . . . and Senekas . . . ." Ex. S (Emphasis added).

Revolution. The Second Circuit affirmed the district court ruling that, in order to restore the land to the Senecas, the 1794 Treaty would have had to express its intent to divest the State's title "with such certainty as to put it beyond reasonable question." 206 F.Supp.2d at 530. But because the 1794 Treaty "expresses no intention to divest New York of its title," 382 F.3d at 271, its mere description and acknowledgment of certain property as belonging to the Senecas was not a sufficiently clear statement of intent to divest the State of its title.

The rationale of *Seneca Nation* controls here because the certainty-beyond-reasonable-question standard for divesting state title is similar, if not identical, to the standard for extinguishing Indian title, *i.e.*, intent must be "'plain and unambiguous' . . . and will not be 'lightly implied.'" *Oneida II*, 470 U.S. at 248-49 (*quoting United States v. Santa Fe Pacific R. Co.* 314 U.S. at 346 and 354). In *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) , the Court held that there "must be 'clear evidence that Congress actually envisioned the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" *Id.* at 202-03, *quoting United States v. Dion*, 476 U.S. 734, 740 (1986). Here, OIN admits that the Stockbridge reservation is not mentioned in the 1794 treaty, 2004 Mem 7, and the 1794 Treaty contains no mention of extinguishing title to the six-mile-square. At most, an extinguishment of Stockbridge title could only be implied and the authorities cited establish that extinguishment of either State or Indian title may not be implied.[43] Therefore, even assuming *arguendo* that article II of the 1794 Treaty did describe and acknowledge an Oneida reservation that included the lands of New Stockbridge,

[43] The Nation's argument that the United States had the power to break earlier treaties and enter into any treaty arrangement it chose with the Oneidas, even if that meant giving the land of one tribe to another, 2004 Mem 9, is beside the point. The question presented here is not whether it had the power, but whether it intended to exercise it. Article II's incorporation by reference of the 1788 Treaty's description of the Oneida reservation establishes that it did not.

it may not be construed to extinguish pre-existing Stockbridge treaty rights.

Finally, OIN's assertion that Stockbridge fails to state a claim based on a federal treaty because its claims are based only on the 1788 State treaty fails because Stockbridge's claims are based on the 1794 Treaty, *see* AC ¶¶ 21, 22 52; *Sherrill*, 544 U.S. at 204-05 (1794 Treaty "acknowledged the Oneida Reservation as established by the Treaty of Fort Schuyler."); *Seneca*, 382 F.3d at 265 (upon revolution, people of each state succeeded to rights of the Crown); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 523 (1986) (Blackmun, J. dissenting) (Court long has respected grants of land to Indian tribes by prior governments.).

3. The 1856 Treaty Did Not Extinguish Stockbridge Title to the Six-mile-square.

OIN also contends that the 1856 Treaty between the United States and Stockbridge granting a reservation in Wisconsin, 11 Stat. 663, extinguished Stockbridge title to the claim area. However, the clear text of the 1856 Treaty disposes of the contention that the 1856 Treaty extinguished Stockbridge title to the six-mile-square. The claims-relinquishment provision in article 1 of the 1856 Treaty applies only to claims to particular lands in Wisconsin and Minnesota, not to all claims to "land elsewhere" as OIN asserts. 2011 Mem 6. Moreover, that provision applies only to claims against the United States, providing that "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*." Ex.U (Emphasis added). The abrogation of claims provision makes no mention of New York reservation lands and is plainly limited to claims against the United States. Were it not so limited, its effect would be to abrogate all Stockbridge claims against everybody in the world, thus rendering the italicized portion quoted above meaningless.

In *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003), *rev'd on other grounds*, 544 U.S.197 (2005), the Second Circuit held that the treaty providing Kansas lands for New York Indians did not affect the Oneidas' rights in their New York reservation because it did not require removal and the Oneidas did not remove or release their claims to their New York lands. The broader reading of the 1856 Treaty advocated by the Nation in this case would violate the rule that the intent to extinguish Indian title must be unambiguous and clear and will not be implied. As in *City of Sherrill*, the fact that article 1 of the 1856 Treaty expressly provided for the cession of certain described lands reinforces an absence of intent to extinguish title to other lands not identified. *See* 337 F.3d at 161. Moreover, removal from New York was not required, as shown by article 6, which contemplated that some Stockbridge might not remove from New York. Thus, the Second Circuit's holding in *City of Sherrill*, that "the Treaty's text contains neither an obligation to remove nor any indication of a congressional intention to disestablish the Oneidas' New York reservation," 337 F.3d at 162, is equally applicable here.[44]

[44] *See United States v. Santa Fe Pacific R. Co.* 314 U.S. 339, 354 (1941) (Absence of "plain intent or agreement on part of Walapais to abandon their ancestral lands if Congress would create a reservation," together with rule that "extinguishment cannot be lightly implied" meant that 1865 act of Congress establishing reservation for Walapais did not extinguish their aboriginal title to other lands.) While OIN is correct that the teachings of *Santa Fe* apply in this case, it picks the wrong part of the *Santa Fe* analysis to apply – under the facts presented here, it is the analysis concerning the 1865 reservation that informs this case, not the analysis regarding the 1883 reservation. Similarly, the provisions of the Act of Feb. 6, 1871, 16 stat. 404, Ch 38, Nation Ex. 18, which provide merely that the Stockbridge Tribe "may be located" on certain Wisconsin lands, cannot be read to "restrict" Stockbridge to those lands, much less extinguish property rights that are not mentioned in the Act. Nor can Stockbridge's constitution be read as a relinquishment of treaty property rights in New York. Whether or not Stockbridge's governmental jurisdiction is limited to its Wisconsin reservation can have no bearing on the question whether it retains its Fifth Amendment protected property rights, and Stockbridge does not assert that it retains governmental jurisdiction over its New Stockbridge reservation.

C. The Nation Has Waived Its Immunity to Stockbridge's Claims for Relief.

Stockbridge filed this action in 1986 seeking a declaration of its ownership and right to possess the lands of the New Stockbridge reservation together with relief restoring it to possession and trespass damages. The complaint named as defendants all units of government that possessed land within the claim area, sought declaratory and ejectment/damages relief with respect to "all of the subject lands claimed by any defendant herein," and stated that Stockbridge, by excluding lands claimed by others, did not waive any rights it may have against such lands or claimants.[45]

In 1987, OIN moved under Fed.R.Civ.P. 24(a)(2) to intervene and be treated as a defendant "for all purposes" based on its competing claim of ownership of the New Stockbridge reservation. It asserted that disposition of this action may impair or impede its ability to protect that interest and that its "interest is adverse to all existing parties and thus is not represented by any of them."[46] In the alternative, it moved to intervene under Rule 24(c), asserting that "[t]he Nation's defense and plaintiff's claims have a question of law in common, specifically who is entitled to ownership of the subject lands."[47] The Nation's accompanying proposed Order provided that "[t]he Nation shall be treated as a party defendant for all purposes."[48]

Although OIN's intervention motion had asserted that its interest is adverse to that of all existing parties, it argued the opposite in its reply to defendants' opposition. Defendants' opposition had argued that intervention should not be permitted, but if it were to be allowed, OIN should be aligned as a plaintiff rather than a defendant because it asserted title in itself. But OIN

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[45] Complaint, Ex. V (D.E. 1).
[46] Motion to Intervene, at 1, Ex D.
[47] *Id*. at 1-2.
[48] *Id*. at last page.

opposed alignment as a plaintiff, replying that it "is making no claim, and is seeking no damages or other relief from the defendants, in this action. OIN simply seeks the dismissal of the plaintiffs' claims on the ground that the land claimed by plaintiffs belongs to OIN. *Thus, OIN's interests are aligned with those of the defendants . . . .*"[49] OIN misleadingly explained that it seeks no affirmative relief in this suit "because such claims are already pending in two other suits in which OIN is involved. Some of the lands at issue in this case are included in . . . Civil Action No. 70-CV-35 . . . [and] [s]ome . . . are also included [in] . . . No. 74-CV-187."[50] But that was inaccurate, as none of the lands claimed in this action were ever the subject of either the Oneidas' test case against the Counties (No. 70-CV-35) or the Oneidas' possessory claims asserted in No. 74-CV-187.[51]

Judge McAvoy granted OIN's intervention motion under Rule 24(a)(2) and ordered, as requested by OIN, that "[t]he Nation shall be treated as a party defendant for all purposes."[52] After voluntarily intervening as a defendant, OIN, beginning in the 1990s and continuing into the early 2000s, purchased approximately 3,760 acres within the New Stockbridge Reservation, the area subject to the claims asserted in this action.[53] In 2004, Stockbridge amended its complaint to assert, among other things, the same claims for relief against OIN it had asserted against the other governmental defendants in the original complaint.[54] OIN now moves to dismiss Stockbridge's claims for affirmative relief against OIN, claiming that it intervened for the limited

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49 Reply to Oppositions to the Oneida's Motion to Intervene, Ex. W at 6. (emphasis added).
50 Id. at 6-7.
51 *See* Map of State Transactions, Bureau of Land Management (9-1-03), Ex. X; Amended Complaint in No. 74-CV-187 at 4, n. 1, Ex. Y ("New Stockbridge Tract . . . the subject of . . . No. 86-CV-1140 . . . is not included in the present Amended Complaint or otherwise currently included in the present case.").
52 Ex. Z (D.E. 25).
53 Affidavit of Paul Miller, November 9, 2005 Ex. AA; table of OIN Purchases, Ex. E .
54 First Amended Complaint, Ex. B (D.E. 228).

purpose of seeking dismissal and waived its sovereign immunity only to that extent.

But the terms upon which OIN voluntarily intervened in this action cannot be ignored, as they define the scope of the Court's jurisdiction.[55] The scope of a tribe's waiver is defined by the "terms" by which it "consents to be sued,"[56] and in this case those terms are that "[t]he Nation shall be treated as a party defendant for all purposes" in a suit that expressly seeks affirmative relief respecting all lands claimed by any named defendant. Such unconditional terms of participation in this action constitute an express waiver of OIN's immunity for a full adjudication of the claims raised in the amended complaint, particularly where OIN elected to defend against Stockbridge's claim of title on the merits of its own competing title claim. In these unique circumstances, the subject matter of the suit determines the extent of OIN's waiver. Indeed, as OIN correctly notes, a tribe that intervenes in an action "consent[s] to the court's adjudication of the merits of that particular controversy."[57]

The rule applicable here was set forth in *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 773 (DC Cir. 1986), where the court of appeals ruled that two tribes' voluntary, unlimited intervention as party defendants "was an express waiver of their right not to be joined in the Wichitas' suit." The Wichita Tribe had filed suit against the Secretary of the Interior challenging a scheme for distributing income among the three successors to a tribe that no longer existed in its original form. The second and third tribes intervened as defendants without limiting the purposes for which they sought to participate, with the second tribe filing a cross claim against the Department. The court of appeals ruled that the second and third tribes' voluntary intervention as defendants was an express waiver of their sovereign immunity, but that

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[55] *S.E.C. v. Credit Bancorp, Ltd*., 297 F.3d 127, 136 (2d Cir. 2002).
[56] *Jicarilla Apache Tribe v. Hodel*, 821, F.2d 537, 539 (10th Cir. 1987).
[57] 2004 Mem 11, *quoting McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989).

the plaintiff tribe had not waived its immunity to the second tribe's cross claim. Because the Wichitas and the third tribe were indispensable parties in whose absence the second tribe's cross claim could not proceed, the cross claim was dismissed. The court explained the distinction between voluntarily intervening as a defendant and initiating litigation as a plaintiff:

> Unlike a situation where a tribe enters a suit as a plaintiff, anticipating that it can only improve or maintain its *status quo*, a tribe intervening as a defendant fully realizes that it might lose that which it already has—preserving its *status quo* is the whole point of the intervention. By so intervening, a party renders itself vulnerable to complete adjudication by the federal court of the issues in litigation between the intervener and the adverse party.[58]

Wichita's distinction between the consequences of intervention as a plaintiff and intervention as a defendant is critical here and illustrates why, when intervening as a defendant only for the purpose of seeking dismissal, sovereign entities generally assert their immunity as a defense and seek dismissal for failure to join a required party under Rule 19, expressly stating that they seek to participate in the litigation for the limited purpose of seeking dismissal and that they waive their immunity for that purpose only.[59]

In this case, OIN intervened as a defendant but did not limit its waiver of sovereign

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58 *Id*. (quotation marks and citations omitted).

59 *See, e.g., Lac Du Flambeau Band v. Norton*, 327 F.Supp.2d 995, 1000 (W.D. Wis. 2004) ("The Ho-Chunk Nation moved for intervention for the purpose of challenging the court's jurisdiction on the ground that OIN was an indispensable party. . . . Its consent to be sued is limited to a determination on the sole issue on which it moved to intervene. It has not waived its immunity as it relates to any other issue."); *Miami Tribe of Oklahoma v. Walden*, 206 F.R.D. 238, 239 (S.D. Ill. 2001) ("Illinois seeks to intervene in this [possessory land-claim] suit for the limited purpose of moving to dismiss the suit for lack of jurisdiction [under Rule 19]."); Limited Intervenor Cherokee Nation's Motion to Dismiss in *Vann v. Kempthorne*, 534 F.3d 741 (D.C. Cir. 2008) at 1 & n. 1, Ex. BB (Cherokees move to dismiss for failure to join indispensable party but, "[b]y making this motion, the Cherokee Nation seeks to intervene solely for the limited purpose of filing a motion to dismiss. [It] does not, by making this motion, waive its sovereign immunity or consent to be sued with regard to any issue presented in this case, and [it] expressly reserves its immunity from suit."); *LeBeau v. United States*, 115 F.Supp.2d 1172, 1181 (S.D.S.D. 2000) (district court granted several tribes' motions to intervene for sole purpose of seeking dismissal under Rule 19).

immunity to seeking dismissal of Stockbridge's claims. In fact, its intervention papers do not mention sovereign immunity at all and its answer in intervention admits jurisdiction.[60] If the only thing OIN sought to gain from its participation in this action was the dismissal of Stockbridge's claims while preserving its immunity from unconsented suit, it would have expressly stated that by intervening as a defendant it was waiving its immunity only for the limited purpose of seeking dismissal and not for any other purpose. It then would have sought dismissal under Rule 19(b) as a party that was necessary—OIN had satisfied the standards for necessary-party status by successfully intervening under Rule 24(a)(2), which embodies the same standards as Rule 19(a)[61]—but which could not be joined because it was immune to suit absent its consent and the action could not properly proceed in its absence.

Instead, OIN sought and was granted "treat[ment] as a party defendant for all purposes." It chose to defend, not on the comparatively simple basis of its sovereign immunity and indispensability, but on the much more complex, fact-intensive basis of the merits of its own claim of title. It would appear, then, that OIN may have been seeking to achieve more from its intervention than simply dismissal of Stockbridge's claim. If it was attempting to position itself as the sole tribal claimant to New Stockbridge, intending at some future date to assert possessory and damages claims to New Stockbridge lands against the State and municipal defendants, merely obtaining dismissal of Stockbridge's claims on jurisdictional grounds under Rule 19 would not be enough. Because a Rule 19 inquiry may not reach the merits,[62] Stockbridge could

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60 Answer in Intervention at 1, ¶2 Ex. D.

61 *See MasterCard Intern. Inc. v. Visa Intern. Services Ass'n, Inc.*, 471 F.3d 377, 389, 390 (2d Cir. 2006).

62 *Republic of the Philippines v. Pimental*, 128 S.Ct. 2180, 2189 (2008).

in turn seek dismissal of OIN's claim on the same grounds.[63] Thus, OIN needed to obtain a merits ruling that it, rather than Stockbridge, was entitled to ownership of the subject lands—an objective that could be accomplished only through participating initially as a defendant.

To support its contention that its intervention "for all purposes" was, in fact, an intervention for the limited purpose of seeking dismissal, OIN relies on the district court ruling in *Sac & Fox Nation v. Babbitt*, 92 F.Supp.2d 1124 (D. Kan. 2000), *rev'd on other grounds, Sac & Fox Nation v. Norton*, 240 F.3d 1250 (10th Cir. 2001). But *Sac & Fox* involved very different circumstances from those at issue here. Most significantly, the defendant-intervenor tribe in *Sac & Fox* did not expressly seek from the outset to be treated as a defendant for all purposes. Indeed, due to the emergency circumstances under which the Wyandotte Tribe's participation in the litigation began, there was uncertainty about the terms upon which it had consented to the court's jurisdiction, as for a time it neither explicitly reserved nor waived its immunity. Eventually, the Wyandotte Tribe elected to assert its immunity and sought dismissal under Rule 19. The district court declined to apply the *Wichita* rule because, "*under the circumstances of this case*, we do not believe that . . . there has been a clear and unequivocal waiver of sovereign immunity." 92 F.Supp. 2d at 1127 (italics added). But in this case there has been a clear and unequivocal waiver of sovereign immunity—OIN intervened and expressly sought treatment as a defendant for all purposes in an action seeking ejectment and damages from any named defendant and, unlike the Wyandotte Tribe, OIN did not assert its immunity to seek dismissal

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63 *See Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, *1459 (9th Cir.1994) (where two tribes claim a non-frivolous interest in the same reservation, action by one tribe cannot proceed in other tribe's absence); Matthew L. M. Fletcher, The Comparative Rights of Indispensable Sovereigns, 40 Gonz. L. Rev. 1, (2004-2005) ("one tribe cannot seek to litigate the respective rights of tribe under a treaty without the presence of the absent treaty signatory tribes."); *Oneida Indian Tribe of Indians of Wisconsin v. AGB Properties*, 2002 WL 31005165 (N.D.N.Y. 2002), Ex. CC.

under Rule 19.

OIN also argues that Stockbridge's Amended Complaint must be dismissed because the original complaint involved different lands and, as OIN could not have intended to waive its immunity as to land it did not then own, Stockbridge "plainly is asserting affirmative claims beyond the scope of OIN's limited waiver," 2004 Mem 14. But this argument begs the question of whether OIN's waiver was in fact limited. None of the authority relied on by OIN for the proposition that intervention in a dispute involving one tract of land is not a waiver as to another dispute involving a different tract addressed the circumstance where a defendant-intervenor sovereign had expressly generally waived its immunity, conditioning its participation in litigation on mandatory ("shall") treatment as a party defendant "for all purposes." Nor does the relief sought in the Amended Complaint here involve lands that are the subject of a different dispute—the original complaint expressly stated that it concerned all the lands of the New Stockbridge reservation and that it was seeking affirmative relief from any named defendant. Where OIN has voluntarily intervened as a defendant for all purposes and without limitation, asserting its own title in an action that seeks relief with respect to "all of the subject lands claimed by any defendant herein," that waiver is broad enough to encompass the change in circumstances brought about by OIN's own actions, i.e., its post-intervention purchase of over 3,700 acres in the Stockbridge claim area.

OIN is unfairly seeking to avoid the consequences of its own actions. It chose to be a defendant "for all purposes" in this action, electing to resist alignment as a plaintiff on the pretense that it was pursuing ejectment and damages relief against the State defendants in other actions. It chose to defend on the merits of its title versus Stockbridge's rather than on its sovereign immunity and indispensability, and it chose to purchase several thousand acres in the

claim area after voluntarily intervening as a defendant in an action in which the plaintiff was seeking ejectment and damages relief against any named defendant. Now it seeks to redefine the terms by which it consented to this Court's jurisdiction. But this Court should not permit OIN to have it both ways. This Court's decision should be informed by Justice Frankfurter's teaching that "the doctrine [of sovereign immunity] is not absolute, and . . . considerations of fair play must be taken into account in its application."[64] OIN's express and expansive waiver should be applied.

CONCLUSION

Because the critical factor in ascertaining whether the *Sherrill* defense bars a claim is whether the claim is disruptive, not whether it is possessory, this Court should not dismiss Stockbridge's claims against OIN. This dispute pits one Tribe's recognized-Indian-title claims against another's and thus is readily distinguishable from the Indian-title-versus-fee-title disputes in *Cayuga* and *Oneida*. Where the Indian-title dispute arose only recently and is not premised on a Nonintercourse Act challenge to an ancient transfer's validity, whether Stockbridge or OIN retains recognized Indian title and the right to possess 3,760 acres is of little moment to broader societal interests. The determination of superior Indian title would occur outside the realm of the scheme of settled land ownership, which is concerned exclusively with fee-title-based estates, and therefore would not be disruptive to justified societal expectations. In these unique circumstances, where very different equitable considerations are at play, the fact that OIN's fee title is also implicated becomes secondary—relief will not further implicate or threaten disruption to society's broader interest in a predictable scheme of settled land ownership. Alternatively, however, if possessory relief against OIN should be deemed disruptive under the

[64] *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 364 (1955).

Cayuga/Oneida standard, the fundamentally distinctive nature of this dispute ensures that the declaratory relief Stockbridge seeks would not be disruptive.

OIN has waived its immunity, and whether the subject lands are Stockbridge or Oneida is of exceptional importance, even if the *Sherrill* equitable defense is later determined to bar Stockbridge's claims against the State and county/municipal defendants. A determination on this issue will affect Stockbridge's rights under federal Indian statutory schemes and determine the state-tax status of its 122-acre property in the claim area. It is therefore appropriate and necessary that the Court resolve the Indian-title question.

Stockbridge has asserted a viable legal claim under federal common law and treaties. In the 1788 Treaty of Fort Schuyler, the Oneidas reserved a reservation that expressly excluded the New Stockbridge reservation. As demanded by the Oneidas in the 1788 negotiations, the Treaty and its 1789 implementing act created a separate, permanent Stockbridge homeland. Importantly, the Treaty negotiations, the Treaty language itself and the State implementing act contain no suggestion that the Oneidas retained any reversionary interest. The United States then confirmed Stockbridge rights in the 1794 Treaty of Canandaigua, acknowledging as Oneida lands only the Oneida reservation as described in the 1788 Treaty. Thereafter, only a clear and plain expression of Congressional intent could divest Stockbridge of its Fifth Amendment-protected recognized Indian title and no such action was ever attempted.

For all of the foregoing reasons, this Court should deny OIN's Motion to Dismiss.

Dated: December 9, 2011

Respectfully submitted,

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United States District Court
Northern District of New York

Stockbridge-Munsee,

v.

State of New York, et al., Case No. 3:86-cv-1140

v.

Oneida Indian Nation of New York.

Certificate of Service

I hereby certify that on the 9th day of December, 2011, I electronically filed, on behalf of Plaintiff Stockbridge-Munsee Tribe, the attached Plaintiff's Memorandum of Law in Opposition to Defendant-Intervenor's Motion to Dismiss Amended Complaint and supporting Declaration of Don B. Miller with the Clerk using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

1. G. Robert Witmer, Jr. and David Schraver
2. Thomas G. Rafferty
3. Aaron Baldwin
4. Michael R. Smith
5. Rowan D. Wilson
6. Anthony M. Feeherry

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