13-3069-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

STOCKBRIDGE-MUNSEE COMMUNITY,

Plaintiff-Counter-Defendant-Appellant,

v.

STATE OF NEW YORK, MARIO CUOMO, as Governor of the State of New York, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, FRANKLIN WHITE, as Commissioner of Transportation, MADISON COUNTY, THE COUNTY OF MADISON NEW YORK, ONEIDA

(Additional Caption On the Reverse)

On Appeal from the United States District Court
for the Northern District of New York (Albany)

REPLY BRIEF FOR PLAINTIFF-COUNTER-DEFENDANT-APPELLANT STOCKBRIDGE-MUNSEE COMMUNITY

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COUNTY, NEW YORK, TOWN OF AUGUSTA, NEW YORK, TOWN OF LINCOLN, NEW YORK, VILLAGE OF MUNNSVILLE, NEW YORK, TOWN OF SMITHFIELD, NEW YORK, TOWN OF STOCKBRIDGE, NEW YORK, TOWN OF VERNON, NEW YORK,

Defendants-Counter-Claimants-Appellees,

and

ONEIDA INDIAN NATION OF NEW YORK,

Defendant-Intervernor-Appellee.

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A. The District Court Erred in Ruling that the Equitable Bar Would Apply to Stockbridge's Claims against OIN.

1. Stockbridge's challenge to OIN's Indian title does not threaten to disrupt non-Indian landowners' settled expectations or the scheme of settled land ownership.

OIN argues that Stockbridge's Indian title claim should be barred because it necessarily challenges OIN's fee title and implicitly all non-Indians who hold title under a chain originating in the illegal state transactions. For the reasons set forth in Appellant's brief at 25-35, however, OIN plainly does not stand on the same equitable ground as do the innumerable innocent purchasers that the *Sherrill* defense was crafted to protect and its arguments to the contrary are unavailing.

The assertion that the equities favor OIN's reliance on the *Sherrill* defense because it would be "very odd if the only party the Stockbridge could sue over the State's illegal land acquisitions is the tribe that allowed Stockbridge to occupy its land in the first place," Br. 13, as well as OIN's other equitable arguments, overlook the fact that this unique circumstance is of OIN's own making. After failing for nearly two centuries to assert any post-1788 claim to New Stockbridge and supporting Stockbridge's land-claim litigation for almost 40 years, *see* Appellant's Br.30 and n.29, OIN broke ranks with the other tribal plaintiffs in the Oneida land-claim actions and, for the first time, claimed New Stockbridge as its own. Rather than seek a simple dismissal on Rule 19 grounds, it intervened as a

defendant for all purposes to obtain a ruling on the merits that its Indian title is superior to Stockbridge's. It then opposed other defendants' dismissal motions (A76) and thereafter purchased more than 3,700 acres in the claim area of the action in which it had voluntarily intervened.[1] Equity will not extricate one from a self-created hardship.

OIN further argues that Stockbridge's claim of Indian title to OIN's land is subject to the equitable bar because it necessarily also challenges the fee title of all landowners who claim under a title chain originating in the illegal state transactions. Br. 19. While Stockbridge acknowledges that its challenge to OIN's claim of possessory Indian title and its assertion of an unextinguished right of possession implicates OIN's asserted fee-simple-absolute title (though not its non-possessory underlying sovereign fee title), the unique circumstances of this case render that a secondary concern of insufficient weight to justify application of the equitable bar. The interests protected by the *Cayuga* equitable bar – not disrupting the settled expectations of numerous innocent landowners and the settled scheme of land ownership – would not be threatened allowing this action to proceed against OIN.

[1] Upon development of a factual record, the facts would demonstrate mutuality in the Oneidas' grant to Stockbridge, i.e., that the Oneidas' received benefits of equal value, including inserting Stockbridge as a buffer between the Oneida villages and oncoming non-Indian settlement. "Anticipating that settlers might try to acquire land occupied by the Stockbridge, the Oneidas asked the State to recognize Stockbridge occupancy." Br. 7.

Indian title to New Stockbridge remains unextinguished, just as Indian title to the Cayuga, Oneida and Onondaga reservations remains unextinguished. But while *Cayuga* and its progeny have closed the court-house doors and held that those valid legal claims may not be heard because they are too disruptive – leaving those tribes with valid claims to innocent purchasers' land for which there is no judicial remedy – that result should not obtain here. This Court's *Oneida* ruling makes it plain that, in deciding whether to apply the equitable bar, disruption of settled expectations is the operative factor, not merely whether a claim is possessory, 617 F.3d at 127. Because no other title dispute in the Stockbridge claim area, or any other Indian land-claim area for that matter, would involve a determination of which of two Indian tribes retains the right to possess treaty-protected lands under an unextinguished Indian title, the resolution of this Indian-title-versus-Indian-title dispute would not threaten to disrupt "settled land titles over a 'large swath of central New York State.'" *Oneida*, 617 F.3d at 124, *quoting Cayuga*, 413 F.3d at 275. It is therefore not an "appropriate circumstance," *Oneida, id.*, for employing a "'nuclear weapon' of the law"[2] to bar "a claim [that] is legally viable and within the statute of limitations." *Oneida*, *id.*, *quoting Cayuga* at 273.

2. Stockbridge has not abandoned its possessory claim or pared down its claim to seek only declaratory relief.

OIN expends considerable effort rebutting an argument that Stockbridge

[2] *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999).

does not make. Stockbridge has not abandoned its possessory claim against OIN or pared down its claim to seek only declaratory relief. As Stockbridge explained in its opening brief at note 32, the issue is whether Stockbridge's claims against OIN are so disruptive as to deprive the federal courts of jurisdiction to hear them. *See Oneida*, 617 F.3d at 136. But a determination that this unique possessory claim may proceed would not necessarily be a determination that, on remand, a possessory remedy would be appropriate. *See City of Sherrill v. Oneida Indian of New York*, 544 U.S. 197, 213 (2005) (*Sherrill*) ("[*Oneida II*] reserved for another day the question whether 'equitable considerations' should limit the relief available to the present-day Oneidas.") (citation omitted). Thus, while Stockbridge's claim is based on a possessory right (Indian title), *Oneida II* makes plain that the district court could consider the equities in the remedies phase and, if appropriate, limit relief to the declaratory relief that is also sought in the Amended Complaint. *See* Appellant's Br. at 33 and n. 35.

3. Federal question jurisdiction does not depend upon Stockbridge seeking a determination that the old land acquisitions by the State were invalid. Where it is undisputed among the competing tribal claimants that the Indian title remains unextinguished, the applicable treaties and common law provide federal-law protection for a claim to a current right to use and possess land by the tribe holding unextinguished recognized Indian title.

Because *Cayuga* and its progeny do not purport to disturb *Oneida II* or find that Indian title has been extinguished, but rather hold only that these "legally

valid" claims may nonetheless be barred by equitable doctrines, where the contest for ownership of the possessory Indian title is between two Indian tribes claiming under the same treaties and neither asserts that the possessory Indian title has been extinguished by virtue of the old state transactions, it is unnecessary to determine the validity of the old transactions in order to sustain federal-question jurisdiction. The treaties themselves, which guarantee a permanent and on-going right of possession which has not been extinguished, are the source of federal-cause-of-action jurisdiction independent of the validity of the mesne conveyances.[3]

OIN's suggestion that Stockbridge fails to state a claim based on a federal treaty because its claims are based solely on the 1788 state treaty fails, first, because Stockbridge does in fact assert non-frivolous claims under the 1794 Treaty of Canandaigua. AC , ¶¶21, 22, 52, A112-14 & 121.[4] The argument also fails

[3] 28 U.S.C. §1331 provides for federal "jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Stockbridge recognizes, however, that its possessory claim cannot be divorced entirely from the flaw in the original 19th century dispossession. However, for the reasons set forth in Stockbridge's opening brief at 24-34 and supra at §A.1., this should not subject the claim to *Oneida's* broad "inherently disruptive" standard. This Court fashioned the *Sherrill* equitable defense in equity and it should apply it according to equitable principles. OIN does not satisfy the elements of the defense and has no justifiable expectations of the kind shielded by the *Sherrill* defense. This is a one-of-a-kind claim, the resolution of which would pose absolutely no threat to the thousands of innocent landowners and the scheme of settled land ownership.

[4] The Indian Claims Commission (ICC) found that Article II of the 1794 Treaty "pledged the United States never to disturb [Stockbridge] in their free use and enjoyment of New Stockbridge." *The Stockbridge Munsee Community v. U. S.*, 25

because Stockbridge's assertion of claims under the 1788 Treaty in itself states a federal question. *See Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145 (2d Cir. 1988) (1788 Treaty is valid under federal law and property rights recognized therein are protectable in the federal courts);[5] *Johnson v. M'Intosh*, 21 U.S. 543, 587-588 (U.S. 1823) ("The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our Courts.") (emphasis added); *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); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 748-49 (1835) (under the law of nations, the laws of a

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Ind.Cl.Comm. 281, 295 (1971). *See* Stockbridge's memorandum in opposition to OIN's motion to dismiss below at A254-55 for a more complete discussion of the ICC's findings and conclusions. Dr. Starna concluded that "[i]n the 1794 Treaty of Canandaigua, The United States recognized the New Stockbridge reservation…." A280. *See Sherrill*, 544 U.S. at 204-05 (1794 Treaty "acknowledged the Oneida Reservation as established by the Treaty of Fort Schuyler.").

[5] The original 1986 complaint did not assert claims under the 1788 Treaty of Fort Schuyler and its 1789 implementing act because, prior to this Court's 1988 ruling upholding the 1788 Treaty as a valid exercise of the sovereign right to purchase Indian title, it had been consistently held that that state purchases of Indian land required congressional authorization. Thus, in addition to accommodating intervening changes in Eleventh Amendment jurisprudence and conforming the complaint to the changes occasioned by OIN's all-purpose intervention and subsequent land acquisitions, the amended complaint asserted claims under the 1788 treaty and its implementing act.

predecessor sovereign remain in force and effect until altered by the successor sovereign); *accord Strother v. Lucas,* 37 U.S. (12 Pet.) 419, 435-36 (1838).

B. OIN's Attempt to Convert its Intervention "as a Party Defendant for All Purposes" into a Limited-Purpose Intervention Fails because it Intervened to Obtain a Ruling that it Retains Ownership and the Right to Possession to all of New Stockbridge.

As explained in Stockbridge's opening brief, by intervening as a defendant, "a party 'renders itself 'vulnerable to complete adjudication by the federal court of the issues in litigation between the intervener and the adverse party.'"" *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 773 (DC Cir. 1986) (emphasis added) (*quoting Schneider v. Dumbarton developers, Inc*., 767 F.2d 1007, 1017 (D.C. Cir. 1985) (*quoting U.S. V. State of Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981))). While OIN asserts that it intervened to defend only the particular Stockbridge claims against those State and County/Municipal lands that were defined as "subject lands" in ¶10 of the original complaint, Br. 26-27, its Answer in Intervention belies this assertion and establishes that in fact OIN intervened to litigate the *issue* of its ownership and possessory rights to the entire New Stockbridge reservation. OIN's Affirmative Defense No. 3 states:

> In the late 18th century, the Oneidas … permitted the Stockbridge … to live on a portion of their lands. However, the Oneidas never ceded to the Stockbridge any property interest in, or rights to, this land. Ownership and the right to possession of this land remains in the Oneida Indian Nation.

A65. This defense asserts rights in all of the 1788 Stockbridge Treaty reservation, not merely the lands claimed by the State and its subdivisions. The OIN Memorandum in Support of intervention confirms the broader scope of its voluntary participation in this action. It alleges that Stockbridge "asserts a claim to six square miles of land [sic]" (A50), but that the "[t]he Oneidas did not cede any lands to them …. Rather, the Oneidas merely permitted the Stockbridge to live on a portion of their lands, specifically a six-square mile [sic] tract later known as New Stockbridge. …. However, ownership and the right to possession of that tract always remained in the Oneidas." (A51) (emphasis added). OIN's Memorandum further asserts that "[b]ecause the Oneida Nation asserts in its proposed Answer in Intervention an ownership interest in the six-square miles [sic] of land that is at issue in this case, it has met the second requirement of Rule 24(a)(2)." (A53) (emphasis added). Finally, both OIN's Answer in Intervention and its supporting Memorandum leave no doubt that it was intervening to protect its claimed interest in the entire six-mile-square New Stockbridge tract by arguing that disposition of this action could impair OIN's ability to protect its ownership interests in the tract which, OIN erroneously informed the District Court, were at issue in in other Oneida land-claim cases. (A53-55) (Memorandum); (A65-66) (Answer).

By intervening as a defendant for all purposes and affirmatively asserting ownership and possessory interests in the entire New Stockbridge tract, OIN

defined the terms of its participation in this action which in turn defined the scope of its waiver and the District Court's jurisdiction. OIN thus rendered itself vulnerable to a complete adjudication of the contested Indian title issues.

OIN attempts to bolster its assertion that it intervened only to defend against the claims to the State and County/Municipal lands by arguing that its Answer in Intervention sought no relief other than dismissal of the complaint. Br. 28. However, OIN's Reply to the State and County/Municipal defendants' opposition to its intervention motion demonstrates that in fact OIN did not intervene solely to obtain dismissal, but rather to "seek[] dismissal of the plaintiffs' [sic] claims on the ground that the land claimed by plaintiffs belongs to [OIN]." (A71) (emphasis added). Thus, OIN intervened to obtain a judicial determination that in 1788 and 1794 it retained ownership and possessory rights and Stockbridge did not.[6]

This is brought sharply into focus by OIN's opposition to the State and County defendants' motion to dismiss in 1991. *See* OIN's Mem. in Opp. (12-03-91), A76. If OIN had intervened solely to obtain a dismissal, it would not have opposed the other defendants' 1991 dismissal motion. By so doing, OIN waived its argument that its intervention was limited to seeking the dismissal of particular

[6] Indeed, notwithstanding the District Court's judgment that the case be dismissed on the bars of the *Sherrill* equitable defense and tribal sovereign immunity, OIN persists in its attempt to obtain a ruling on the merits of its own claim to ownership and possessory rights. Br. 31-36 (Argument No. III, urging affirmance on the ground that "the Stockbridge claim to have received title in the late 1700s that was superior to the Oneidas' title fails as a matter of law.").

claims to specified State and County/Municipal lands. By insisting on dismissal based only upon a ruling that OIN possessed the superior Indian title, OIN made it plain that it had intervened to resolve the issue of which Tribe possesses the superior Indian title to the New Stockbridge tract.

If OIN's intervention as a defendant for "all purposes" to obtain a ruling that "[o]wnership and the right to possession of [the tract later known as New Stockbridge] remains in [OIN]" did not constitute a waiver of its immunity for the full adjudication of the Indian title issue, it opposition to defendants' 1991 motion to dismiss did. OIN's limited-purpose-intervention arguments are inherently flawed and are asserted in a transparent effort to escape the consequences of its own litigation-strategy decisions.

C. The Amended Complaint States Meritorious Claims for Relief: For Purposes of a Rule 12(b)(6) Motion to Dismiss, the Truth Of the Facts Alleged Must be Assumed and Affirmance for Failure to State a Claim Would be Improper.

Because this case comes before the Court on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the truth of the facts as alleged in Stockbridge's complaint must be assumed. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 249 (U.S. 2009); *Freidus v. Barclays Bank PLC*, 734 F.3d 132, 135 (2d Cir. 2013). The District Court did not reach OIN's Rule 12(b)(6) motion and dismissed based on the bar imposed by OIN's sovereign immunity, opining that even if tribal immunity did not bar the action, the *Sherrill* equitable defense would.

SPA6-8. Should this Court determine that the equitable and immunity defenses do not bar this action against OIN, it should remand to the District Court for an initial determination of the failure-to-state-a-claim motion. In the event, however, that this Court deems it appropriate to address the 12(b)(6) motion, OIN has failed to meet its burden of showing that Stockbridge's Amended Complaint fails to state a legal claim for the following reasons, as set forth more fully below in Stockbridge's Opposition to OIN dismissal motion. (A232-258).

The 1788 Treaty (A151) and its 1789 implementing act (A341) extinguished Oneida aboriginal title and created permanent occupancy rights in Stockbridge. AC,¶¶17 & 18; *see* Starna Affidavit at 3,¶¶5b & 5c (A278) (hereinafter "Aff.").[7] Article first 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." Article second, as judicially construed, provided that the Oneidas reserved for their own use a described portion of the lands ceded in Article first. Article second's last clause expressly excluded the six-mile-square tract from the lands reserved by the Oneidas, designating it as a permanent reservation for "the Stockbridge … and their posterity forever." AC,¶17 (A151). This provision made plain that the area reserved by Oneidas in the first part of Article second did not include the

[7] OIN mistakenly asserts that the Starna Affidavit (dated 12-5-2011) cannot play any role in a motion to dismiss. Br.35. But OIN and Stockbridge both have submitted and relied on extrinsic evidence. *See, e.g.*, OIN Br.8 & n.2 (A169-226) (Exhibits to Smith Declaration). *See* Fed. R. Civ. P. 12(d).

Stockbridge lands, which were to be separately and permanently reserved to Stockbridge by the State. *Id*.; Aff.3,¶5c (A278).

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." (A341), AC,¶18 (A112); Aff.4-5,¶5e (A279-80).

The Oneidas did not retain their 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 that the declaration of permanent possessory rights creates recognized Indian title.[8] And the Oneidas' own demands

[8] *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."). OIN asserts that the Treaty's guarantee of a right to "enjoy" the six-mile-square is different than the Oneidas' right to "hold" land and establishes the Oneidas' intent to reserve a reversionary interest. Br.33. This argument is meritless and is contradicted by the fact that Articles II, III and IV of the 1794 Treaty of Canandaigua use the words "free use and *enjoyment* thereof" to describe the right of use and occupancy, *i.e.*, Indian title, that was acknowledged as the Oneidas' and other tribes' property. (Emphasis added). "Enjoy" and "enjoyment" describe full-fledged Indian title, not some lesser estate. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746-47, 749 (1835) (aboriginal title is a "right to the *enjoyment* of lands and hunting grounds" and recognized title is "a right to the full *enjoyment* of such rights of property as the king might ... impart to them."); *Marsh v. Brooks*, 49 U.S. 223, 232 (1850) (Indian title is "the usufruct and right of

at the treaty negotiations show conclusively that they did not intend to retain any reversionary interest. (A157); Aff.3,¶¶5c & d (A278). 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." (A157); Aff.8-9,¶11 (A283-84).

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 the 1785 Oneidas grant to Stockbridge was void and unenforceable under state and federal law.[9] 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. If the Oneidas' goal at the 1788 Treaty was to continue 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

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occupancy and *enjoyment."*). (Emphasis added). The railroad-right-of-way cases relied on by OIN to support its retention of a reversionary interest, Br.33, are inapposite, as they involve grants to railroads under particular federal statutes of public lands for public purposes and do not concern Indian title or treaty rights.

[9] *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.").

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, Br.8, do not show that the State and the Oneidas understood that the Oneidas had retained a reversionary interest in the six-mile square. Aff.3,¶5d (A278). 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. 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, (A173), was in fact a claim, not to the legislatively defined "New Stockbridge" reservation, *see* (A251-52), but to the tract described in the Oneidas' 1774 Brothertown grant, Aff.3-4,¶5d(1) (A278-79), 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 (A170) is identical to the metes-and-bounds description in the Oneidas' 1774 deed to the New England Indians, *compare* (A348-49) and (A278); Aff.3-4,¶5d(1). 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 (A169) likely referred to the same Oneida claim. Aff.4,¶5d(2) (A279); 13-14,¶15 (A285-86).

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. Because the Oneidas retained title only to the particular lands described in the Treaty as their reservation, OIN's reliance on the Second Circuit's 2003 ruling in *City of Sherrill* is misplaced. Contrary to OIN's assertion, Br.32, Stockbridge does not argue that the Oneidas ceded their reservation to the State. 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." *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).

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, only clear and unambiguous Congressional action after that date could extinguish Stockbridge title and resurrect Oneida title. No such action was ever attempted. AC,¶¶19, 24.

OIN's argument that Article II of the 1794 Treaty acknowledged the New Stockbridge as Oneida reservation land because the Indian friends could not be "residing thereon" if the lands on which they lived were not on the Oneida reservation, Br.36, is contradicted by the evidence, including the ICC findings (A291-292) and Dr. Starna's Affidavit. Moreover, the Supreme Court has recognized that Article II acknowledged an Oneida reservation comprised of only

those lands reserved to the Oneida in its treaty with New York.[10] This could not have included New Stockbridge because the 1788 Treaty had extinguished any 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.5,¶¶5h & 11,¶13 (A280 & 286).

OIN's implicit argument that the 1794 Treaty extinguished Stockbridge title to New Stockbridge and returned it to the Oneidas is incompatible with the Treaty's central purpose, which was to "remove from [the Indians'] minds all causes of complaint, and establish a firm and permanent friendship with them." *Id*., 7 Stat. 44 (A160). Congress plainly did not intend to extinguish or diminish, without mention, property rights secured to a signatory tribe. *Id.*

OIN mistakenly argues 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. Br.15, 34. But Stockbridge possessed permanent property rights guaranteed by the 1788 Treaty, whereas the Tuscaroras had no reservation under the 1788 treaty and possessed no recognized title to any former Oneida or

[10] *Sherrill*, 544 U.S. at 204-05 ("1794 treaty 'acknowledged' the Oneida reservation as established by the Treaty of Fort Schuyler . . . .") (*quoting* 1794 Treaty). OIN's speculation that Stockbridge was signatory to the 1794 Treaty only because it contained a provision increasing the amount of Revolutionary War compensation, Br.34, is unsupported and contrary to the evidence.

Seneca lands. Aff.5,¶5f (A280)[11] Therefore, OIN's assertion, Br.34, 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 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.[12] 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 in *Seneca Nation of Indians v. New*

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[11] *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."). Two pre-constitutional federal treaties that secured the Tuscarora in the lands they then occupied 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).

[12] 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, Article 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 ...." (A160) (Emphasis added).

York, 382 F.3d 245 (2d Cir. 2004). There, this Court 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 Revolution. This Court 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, Br.34, 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. 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, it may not be construed to extinguish pre-existing Stockbridge treaty rights.

D. The Eleventh Amendment does not Bar Stockbridge's Claims against the State Defendants.[13]

The State defendants mistakenly assert that Stockbridge's claim to possession of .91 acres of vacant, unused, unmaintained and abandoned farmland is not more limited than, and is therefore indistinguishable from, the claims in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) and *Western Mohegan*. Br.13, 26-29. Arguing that Indian title is inherently inconsistent with

[13] The State defendants correctly note that a State's assertion of Eleventh Amendment immunity is a threshold issue. *See Smith v. Reagan,* 841 F.2d 28, 30 (2d Cir. 1988) ("a state has a right to an early determination of the [Eleventh Amendment immunity defense."); *Western Mohegan Tribe and Nation v. Orange County*, 395 F.3d 18, 20 (2d Cir. 2004).

State regulatory jurisdiction over the lands, they claim that, even though Stockbridge seeks no relief concerning State regulatory authority, "nothing would prevent [it] from leveraging a judicial recognition of its Indian title … in future applications or proceedings in order to obtain such relief." Br. 28. This argument fails, however, because it does not distinguish between a continuing property right – which Stockbridge asserts – and governmental-regulatory authority, which Stockbridge does not claim.

The State defendants' attempt to equate Stockbridge's limitation of its claims with the Western Mohegans' unsuccessful effort to limit theirs does not succeed, however, because the limitation relied on and rejected by this Court in *Western Mohegan* was the plaintiff's attempt to distinguish *Coeur d'Alene* by noting that it claimed only Indian possessory title, not the State's underlying sovereign fee title. 395 F.3d at 22. But because the Western Mohegans asserted use and possessory rights extending over several New York counties containing state parks, state wildlife management areas, state-managed lakes and wetlands, state historic sites, and Empire State Plaza – where the state capitol is located, *id.* at 20, 22-23, this Court concluded that the claims nonetheless raised the core issues of state-regulatory authority and sovereignty. They were, therefore, just as in *Coeur d'Alene*, the functional equivalent of a claim to quiet title to important state lands and clearly implicated important state sovereign interests.

In contrast, Stockbridge does not base the assertion that its claim is more limited upon the fact that it does not challenge the State's underlying sovereign fee title. Rather, Stockbridge's claim is more limited because it claims only possession of isolated, vacant land which does not, as a practical matter, implicate any State sovereign interest. Moreover, it does not challenge the State's title and seeks neither money damages nor declaratory or injunctive relief regarding the State's exercise of regulatory authority over the land. Stockbridge's claim simply does not involve "the unique divestiture of the state's broad range of controls over its own lands" that was at issue in *Coeur d'Alene* and *Western Mohegan*. 395 F.3d at 23, n.4, *quoting Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045-49 (9th Cir. 2000).

The State defendants' are wrong when they contend that Stockbridge's claim to mere possession must fail because the asserted property right cannot be divorced from the sovereign governmental authority that generally attends land held pursuant to Indian title. The State defendants' reliance on *Coeur d'Alene* and *Western Mohegan* as support for this supposedly unbreakable linkage is misplaced for two reasons. First, a fair reading of those rulings does not support such a proposition. Indeed, in *Western Mohegan*, after implicitly acknowledging that the *Ex Parte Young* doctrine might be applicable in other circumstances not involving a "divestiture of the state's broad range of controls over its own lands" that was

"virtually identical" to that at issue in *Coeur d'Alene*, 395 F.3d at 23, n.4, this Court "express[ed] no opinion on the *limits* of *Coeur d'Alene's* applicability," *Id.* at 23. (emphasis in original). *See Coeur d'Alene*, 521 U.S. at 287 (*Young* exception inapplicable "[u]nder these particular and special circumstances.").

More importantly, to the extent that it can be argued that *Coeur d'Alene* and *Western Mohegan* implicitly relied on a perceived inherent inconsistency between Indian title and state regulatory authority, the Supreme Court's subsequent decision in *City of Sherrill, supra*, established conclusively that, in cases such as this, the property right is severable from tribal regulatory jurisdiction. In *Sherrill*, the Court held that the Oneida's governmental interest in property had been relinquished long ago and could not be revived by OIN's re-acquisition of its Indian-title possessory interest.[14] Thus, the *Sherrill* decision would control any future assertion of Stockbridge governmental jurisdiction over the subject vacant farmland, and the State defendants' assertion that nothing would prevent Stockbridge from a future assertion that state regulatory jurisdiction is limited by the land's Indian-title status is inaccurate.

[14] The Oneida lands at issue in *City of Sherrill* were reserved in the same 1788 and 1794 Treaties as the .91-acre tract at issue here.

CONCLUSION

The Order and Judgment dismissing Stockbridge's amended complaint against Defendants and Defendant-Intervenor should be reversed.

Respectfully submitted,

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