UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil File No. 0:14-cv-01597 (MJD-FLN)

Sheldon Peters Wolfchild, et al.,

Plaintiffs,

vs.

Redwood County, et al.,

Defendants.

REPLY MEMORANDUM SUPPORTING MOTION BY DEFENDANT EPISCOPAL DIOCESE OF MINNESOTA TO DISMISS

SYNOPSIS

Defendant Episcopal Diocese of Minnesota (the "Diocese") moved to dismiss the First Amended Complaint, incorporating the briefs of its Co-Defendants and writing separately to stress the laches defense enunciated by the Supreme Court in *City of Sherrill, N.Y. v. Oneida Indian Nation of New York,* 544 U.S. 197, 217 (2005). There, the Court acknowledged the disruption of Native American land claims made in the face of two centuries of reliance and the impossibility of crafting a judicial remedy.

Plaintiffs respond with a lengthy factual recitation detailing the multiplicity of ways in which the federal government and other parties have responded to Sioux land claims over the past 150 years. This recitation is notable for its concession that until this litigation, not once has the finality of the 19th Century conveyances of lands to the Diocese or others been questioned by anyone. If anything, the brief reinforces the

complete impossibility of crafting a remedy and the wisdom of the laches defense adopted in *Sherrill*.

Turning to the legal contentions of Plaintiffs, they offer three arguments against the application of *Sherrill* to dismiss this case on the pleadings:

- Laches is a fact-bound inquiry into prejudice and the circumstances of each defendant, thereby raising triable issues of fact.
- The laches defense applies only to aboriginal title claims, not to a claim, as here, on a congressional grant of land rights.
- Laches cuts off equitable claims, not money damages claims.

Plaintiffs misread *Sherrill* and its broad application by the lower federal courts. The First Amended Complaint should be dismissed as a matter of law by reason of laches.

ANALYSIS

I. THE OBVIOUS DISRUPTION AND UNTIMELINESS OF THIS ACTION REQUIRES NO TRIAL.

The laches defense adopted in *Sherrill* does not focus on the elements of traditional laches, which, as noted by Plaintiffs, commonly requires a fact-bound investigation unsuited to disposition by a Rule 12 motion. Rather *Sherrill* laches considers simply (1) the length of time between the injustice and the present lawsuit; and (2) the lawsuit's disruption of societal expectations as a whole.

> The Supreme Court [in Sherrill] discussed laches not in its traditional application but as one of several preexisting equitable defenses, along with acquiescence and impossibility, illustrating fundamental principles of equity that precluded the plaintiffs "from rekindling embers of

> sovereignty that long ago grew cold." [*Sherrill,* 544 U.S.] at 214 …. Moreover, the Supreme Court made no mention of unreasonable delay by the New York Oneidas, as distinguished from delay alone, or prejudice to the particular defendants, as opposed to the disruption of broader societal expectations. *Sherrill,* then, did not involve the application of a traditional laches defense so much as an equitable defense that drew upon laches and other equitable doctrines but that derived from general principles of "federal Indian law and federal equity practice." *Id.* at 213….
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> This Court's analysis in *Cayuga* [*Indian Nation of New York v. Pataki,* 413 F.3d 266 (2d Cir. 2005)] was similar. Although the *Cayuga* court, like the district court in this case, employed the term "laches" to describe the defense upon which its decision rested, *see Cayuga,* 413 F.3d at 277, it also expressly indicated that it based its conclusion on the same reasoning that the Supreme Court had employed in *Sherrill, see id.* at 275 ("[W]e conclude that possessory land claims of this type are subject to the equitable considerations discussed in *Sherrill*."). Additionally, when the *Cayuga* court, after concluding that the claims asserted by the plaintiff in that case were subject to the *Sherrill* defense, addressed the subsidiary question whether those claims were thereby barred, it considered only factors equivalent to those addressed in *Sherrill, see id.* at 277, and, indeed, rejected the Cayugas' contention that their claims were barred only if the elements of a traditional laches defense were met, *see id.* at 279–80 (concluding that a finding of no unreasonable delay did not preclude the conclusion that plaintiffs' claims were nevertheless barred in light of, *inter alia,* "the Supreme Court's ruling in *Sherrill*," *id.* at 280).

Oneida Indian Nation of New York v. County of Oneida, 617 F.3d 114, 128.

Accordingly, Plaintiffs' citation to the reluctance of courts to apply the traditional laches doctrine at the Rule 12 stage is inapposite. Whether or not the delay here is unreasonable with respect to the particular facts and circumstances of a particular Plaintiff and Defendant is not at issue – though a centuries-long delay would seem to be resolvable as a matter of law even applying the traditional criteria of laches. Rather, the issue here is whether an action to dispossess landowners after the

passage of so much time and to collect enormous monetary damages for trespass are disruptive of settled societal expectations as a whole. The answer to that is obvious and requires no further factual development via discovery, motion practice, and trial.

Indeed, in direct contradiction to Plaintiffs' argument here, the Second Circuit has recognized that *Sherrill* laches should be applied to dismiss claims of this sort at the pleadings stage. *Onondaga Nation v. State of New York,* 2010 WL 3806492 at * 8 (N.D.N.Y. Sept. 22, 2010):

> The Nation's Complaint asserts claims which are equitably barred on their face. *Cayuga* states that, were the Tribe in that case to file "its complaint today, exactly as worded," it would be subject to dismissal *"ab initio,"* on the basis of laches. *Cayuga,* 413 F.3d at 278. The Onondagas' action cannot be different, as it evidences the same essential qualities which the Second Circuit found barred the claims in *Cayuga* and *Oneida.* According to Plaintiff's Amended Complaint, the last allegedly invalid treaty conveying a portion of the subject land was effected in 1822. Thus, approximately 183 years separate the Onondagas' filing of this action from the most recent occurrence giving rise to their claims. In other words "a tremendous expanse of time separates the events forming the predicate of the ... claims and their eventual assertion." *Oneida,* 2010 U.S.App. LEXIS 16426, at *37. It follows that throughout the subject land in central New York, " 'generations have passed during which non-Indians have owned and developed the area.' " *Cayuga,* 413 F.3d at 277 (quoting *Sherrill,* 544 U.S. at 202). The Court takes judicial notice that the contested land has been extensively populated by non-Indians, such that the land is predominantly non-Indian today, and has experienced significant material development by private persons and enterprises as well as by public entities. *Cayuga,* 413 F.3d at 277; *see* FED.R.EVID. 201.

See also Stockbridge-Munsee Community v. State of New York, 756 F.3d 163 (2d Cir. 2014) (applying *Sherrill* laches to dismiss complaint for failure to state a claim).

Commentators have recognized the sweeping effect of the *Sherrill* laches doctrine, and its use to dismiss the present type of land claim at the earliest stages of the litigation. Fort, *The New Laches: Creating Title Where None Existed,* 16 GEO. MASON L. REV. 357, 384, 400 (2009); Fort, *Disruption and Impossibility,* 11 WYO. L. REV. 375, 395, 397 (2011); Wandres, *Indian Land Claims: Sherrill and the Impending Legacy of the Doctrine of Laches,* 31 AM. INDIAN L. REV. 131, 140-41 (2006).

While these same commentators criticize the broad and fatal effect of *Sherrill* on the present type of claims, the logic and wisdom of the doctrine are inescapable. Courts and common law doctrines are subject to practical limitations, and Plaintiffs seek to invest this Court with a power to effect a sea change in our current society and economy that is beyond that conferred by Article III. Citing a 1982 analysis, one commentator conceded that the total value of lands improperly taken from Native Americans approximated $560,000,000,000. Wondres, *supra*, 31 AM. INDIAN L. REV. at 131 & n.1. Adding in centuries of prejudgment interest would push such claims into the many trillions of dollars. *Cf. Cayuga,* 413 F.3d at 271-73 (reversing trial court verdict of $36.9 million in compensatory damages and $211,000,326.80 in prejudgment interest). Carrying Plaintiffs' contentions to their logical conclusion, and accepting the broad rights of recovery asserted by Plaintiffs, would open the courts to a flood of litigation involving many trillions of dollars of damages.

In sum, *Sherrill* adopted a broad laches defense that is dispositive, at the pleadings stage, of the very type of claim asserted here. However wrongful the

government's conduct in the 1860's is shown to be, the claims are inherently disruptive of societal expectations formed after 150 years of reliance. If there is to be a reconciliation and a remedy after the passage of so much time and after so much has changed, it will have to be done not by the Courts, but through the political, social, and constitutional process.

II. THE *SHERRILL* DEFENSE APPLIES TO STATUTORY AS WELL AS ABORIGINAL TITLE CLAIMS.

In the *Sherrill,* the ultimate source of the plaintiffs' land claim was their ancestral use of the property. The lands at issue here were not ancestral, but were, in the plaintiffs' view, promised them by an 1863 statute. Whether the root source of the Plaintiffs' claim is statutory or ancestral use, the disruptive effect of the remedy is that same, as is the long passage of time. Whether the claims of sovereignty are based in ancestral use or statutory grant, they grow just as cold after 150 years. *See Sherrill,* 544 U.S. at 214.

III. *SHERRILL* LACHES APPLIES TO MONETARY CLAIMS.

Plaintiffs seek to limit the application of *Sherrill* to their equitable claims for possession, as opposed to their monetary claims for trespass – reasoning that *Sherrill* laches is an equitable doctrine that does not cut off damages claims. Given that the source of the monetary claims is the extraordinary possessory rights asserted by Plaintiffs, such a distinction is artificial at best. *See Oneida Indian Nation v. County of Oneida,* 617 F.3d at 129-31.

Indeed, the First Amended Complaint expressly ties the money damages claim to the extraordinary right of possession. Count I alleges declaratory relief and damages by reason of "wrongful possession and trespass in an amount exceeding $75,000." First Amended Complaint ¶ 95. Count III pleads damages by reason of common law trespass. First Amended Complaint ¶ 150.

In short, the Plaintiffs' appear to concede the applicability of *Sherrill* laches to Counts declaring or awarding possession of the land, but deny its applicability to money damages Counts that are conceptually indistinguishable. All of the Counts are premised on the extraordinary finding that the landowners have no right to possess land they have owned for over a century. Whether the remedy is to award Plaintiffs possession of the land, or to award millions of dollars of damages and prejudgment interest, or to award both, the clams are equally disruptive under *Sherrill.* Confronted with this precise circumstance, the Second Circuit in *Cayuga* found that *Sherrill* laches barred monetary and nonmonetary claims alike.

> To summarize: the import of *Sherrill* is that "disruptive," forward-looking claims, a category exemplified by possessory land claims, are subject to equitable defenses, including laches. Insofar as the Cayugas' claim in the instant case is unquestionably a possessory land claim, it is subject to laches. The District Court found that laches barred the possessory land claim, and the considerations identified by the Supreme Court in *Sherrill* mandate that we affirm the District Court's finding that the possessory land claim is barred by laches. The fact that, nineteen years into the case, at the damages stage, the District Court substituted a monetary remedy for plaintiffs' preferred remedy of ejectment cannot salvage the claim, which was subject to dismissal *ab initio.* To frame this point a different way: if the Cayugas filed this complaint today, exactly as

> worded, a District Court would be required to find the claim subject to the defense of laches under *Sherrill* and could dismiss on that basis.
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> Although we conclude that plaintiffs' ejectment claim is barred by laches, we must also consider whether their other claims, especially their request for trespass damages in the amount of the fair rental value of the land for the entire period of plaintiffs' dispossession, are likewise subject to dismissal. In assessing these claims, we must recognize that the trespass claim, like all of plaintiffs' claims in this action, is predicated entirely upon plaintiffs' possessory land claim, for the simple reason that there can be no trespass unless the Cayugas possessed the land in question. *See, e.g., West 14th Street Commercial Corp. v. 5 West 14th Owners Corp.,* 815 F.2d 188, 195 (2d Cir.1987) (holding that a trespass cause of action must allege possession). Inasmuch as plaintiffs' trespass claim is based on a violation of their constructive possession, it follows that plaintiffs' inability to secure relief on their ejectment claim alleging constructive possession forecloses plaintiffs' trespass claim. In other words, because plaintiffs are barred by laches from obtaining an order conferring possession in ejectment, no basis remains for finding such constructive possession or immediate right of possession as could support the damages claimed. Because the trespass claim, like plaintiffs' other requests for relief, depends on the possessory land claim, a claim we have found subject to laches, we dismiss plaintiffs' trespass claim, and plaintiffs' other remaining claims, along with the plaintiffs' action in ejectment.

Cayuga v. Pataki, 413 F.3d at 277-78.

CONCLUSION

For the reasons noted above, as well as for those cited by the Diocese's Co-Defendants, the First Amended Complaint should be dismissed.

Dated: October 31, 2014.

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