14-4445(L)

and 14-4447(CON)

United States Court of Appeals for the Second Circuit

THE SHINNECOCK INDIAN NATION

Plaintiff-Appellant,

-v.-

STATE OF NEW YORK, ANDREW CUOMO, In his Individual Capacity and as Governor of the State of New York, COUNTY OF SUFFOLK, NEW YORK, TOWN OF SOUTHAMPTON, NEW YORK, TRUSTEES OF THE PROPRIETORS OF THE COMMON AND UNDIVIDED LANDS OF THE TOWN OF SOUTHAMPTON, AKA TRUSTEES OF THE PROPRIETORS OF THE COMMON AND UNDIVIDED LANDS AND MARSHES (OR MEADOWS), IN THE TOWN OF SOUTHAMPTON, TRUSTEES OF THE FREEHOLDERS AND COMMONALITY OF THE TOWN OF SOUTHAMPTON, AKA TRUSTEES OF THE COMMONALITY OF THE TOWN OF SOUTHAMPTON, SHINNECOCK HILLS GOLF CLUB, NATIONAL GOLF LINKS OF AMERICA, PARRISH POND ASSOCIATES, LLC, PARRISH POND CONSTRUCTION CORPORATION, PP DEVELOPMENT ASSOCIATES, LLC, SEBONAC NECK PROPERTY, LLC, SOUTHAMPTON GOLF CLUB INCORPORATED, 409 MONTAUK, LLC, SOUTHAMPTON MEADOWS CONSTRUCTION CORPORATION, LONG ISLAND RAILROAD COMPANY, AND LONG ISLAND UNIVERSITY,

Defendants-Appellees,

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR DEFENDANTS-APPELLEES

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Dated: June 3, 2015

CORPORATE DISCLOSURE STATEMENT

None of the following nongovernmental corporate defendants-appellees has a parent corporation, and there is no publicly traded corporation which owns any of the stock of any of the following corporate defendants-appellees: Shinnecock Hills Golf Club, National Golf Links of America, Parrish Pond Associates LLC, Parrish Pond Construction Corporation, PP Development Associates, LLC, Sebonac Neck Property, LLC, Southampton Golf Club Incorporated, 409 Montauk, LLC, Southampton Meadows Construction Corporation, and Long Island University.

Dated: June 3, 2015
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellant Procedure 26.1, the undersigned counsel of record for Defendant-Appellee Long Island Railroad Company ("LIRR"), certifies that LIRR is public benefit corporation and a wholly-owned subsidiary of the Metropolitan Transportation Authority ("MTA"). MTA is a public benefit corporation chartered by the State of New York.

Dated: June 3, 2015
New York, New York

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PRELIMINARY STATEMENT

Four times since 2005, this Court has rejected, as barred by the delay-based equitable doctrines of laches, impossibility and acquiescence, Indian land claims challenging the validity of ancient tribal land conveyances to New York, and the Supreme Court has denied review. In this case, the Shinnecock Indian Nation (the "Nation") raises a similar claim, arguing primarily that a recent Supreme Court decision, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, now requires a different outcome. But this Court rejected this very argument just last year in the fourth of these cases, *Stockbridge-Munsee Community v. N.Y.*, and that decision governs this case as well. The district court properly dismissed the Nation's claim on the basis of the foregoing delay-based equitable doctrines, and this Court should affirm.

The Nation commenced this action in the Eastern District of New York, claiming rights to a substantial tract of land on Long Island, New York that was allegedly taken from it more than 150 years ago. The Nation alleges that its predecessors in 1703 entered into a lease that gave it the right to use thousands of acres of land in the Town of Southampton, for a term of one thousand years. The Nation claims that

in 1859, the State of New York enacted legislation that authorized the conveyance of a portion of these lands to the Town of Southampton.

According to the Nation, under this authority, Trustees of the Nation conveyed the lands to the Town of Southampton in violation of the federal Indian Trade and Intercourse Act ("the Nonintercourse Act"), 25 U.S.C. § 177, which requires federal approval of such transfers. The Nation seeks a declaration of its unextinguished title and possessory rights to the subject lands and the ejectment of all defendants, who are State and local governments, private businesses and a university. The Nation also seeks money damages from each defendant for the period from 1859 to the present.

In 2006, the district court (Platt, J.) dismissed the Nation's claims on the ground that they are foreclosed by the equitable principles discussed in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), and applied by this Court in *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005), to dismiss the Cayugas' land claims. The Nation now appeals from the final judgment of the district court.

QUESTIONS PRESENTED

1. Whether the Nation's claims to a substantial tract of land in the Town of Southampton are properly barred by the equitable principles of laches, acquiescence and impossibility as articulated in *Sherrill* and applied by this Court in four subsequent Indian land claim cases, because the remedies arising out of them would disrupt and upset the justifiable expectations of individuals and entities far removed from the events that occurred more than 150 years ago.

2. Whether this Court's precedents applying *Sherrill's* equitable principles to bar ancient Indian land claims are consistent with the Supreme Court's holding in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), which held that traditional laches cannot defeat a claim brought within a statute of limitations enacted by Congress.

3. Whether a Federal Rule 12(b)(6) dismissal of the Nation's land claim, based in part on undisputed facts susceptible to judicial notice, is consistent with the Nation's Seventh Amendment right to a jury trial.

4. Whether the Nation's claims against the State defendants are barred by the Eleventh Amendment, and the claims against the other defendants must likewise be dismissed because the State is an indispensable party.

5. Whether the Nation's argument that the district court's dismissal of its land claim was a judicial taking or otherwise violated the Nation's Fifth Amendment rights is unpreserved and in any event without merit.

STATEMENT OF THE CASE

A. The Amended Complaint

The Nation commenced this action in the Eastern District of New York in 2005, seeking to vindicate its rights to a substantial tract of land in the Town of Southampton. In its amended complaint, the Tribe claims that the Trustees of the Freeholders of the Town of Southampton executed a lease in 1703 reserving to the Nation's predecessors certain lands in the Town for a term of one thousand years. (A.[1] 24.) The complaint alleges that in 1859, pursuant to 1859 N.Y. Laws chapter 46, the State of New York authorized the conveyance of "thousands of

[1] Parenthetical references to "A" are to the Appendix filed by the Nation.

acres" of the lands reserved in the 1703 lease. (A. 25.) One month later, Trustees of the Nation conveyed these lands to the Trustees of the Proprietors of the Common and Undivided Lands and Marshes of the Town of Southampton, allegedly without federal approval, in violation of the Nonintercourse Act. (A. 20, 25.) As a result, the Nation claims, the transaction was void *ab initio*. (A. 19, 26-27.)

As defendants, the Nation named the State of New York and former Governor Pataki ("State defendants"); the County of Suffolk; the Town of Southampton, the Trustees of the Proprietors of the Common and Undivided Lands and Marshes of the Town of Southampton; the Trustees of the Commonality of the Town of Southampton ("Town defendants"); and various non-residential private entities, including the Long Island Railroad Company, Long Island University, several golf courses and other corporate landowners ("private defendants"). (A. 28-32.) The complaint asserts claims against defendants directly under the Nonintercourse Act and for trespass and waste on the lands in which the Nation claims an interest under the 1703 lease. (A. 32-36.)

Against all defendants,[2] the Nation seeks damages for the period 1859 to the present time, including prejudgment interest, in an amount equal to the subject lands' fair market value, lost profits and consequential damages, and an amount equal to the diminished value of the lands due to extraction of or damage to resources. It also seeks ejectment and declaratory and injunctive relief "as necessary to restore the Nation to possession" of the subject lands. Against the Town defendants, the Nation also seeks an accounting and disgorgement of the value of the benefits received from the sale and resale of the lands. (A. 37-40.)

B. Defendants' Motions to Dismiss

By pre-answer motions, defendants moved to dismiss pursuant to Federal Rule 12(b)(6) for failure to state a claim. Among other things, defendants argued that the Nation's claims are barred by the equitable principles discussed in *Sherrill*, which this Court applied to dismiss the nearly identical land claims in *Cayuga*. They also argued that the claims against State defendants must be dismissed on the ground of Eleventh Amendment immunity and against the other defendants

[2] The amended complaint, while asserting clams against the Long Island Railroad and Long Island University, does not specifically reference them in its prayer for relief.

because the State is an indispensable party. Finally, defendants argued that the Nonintercourse Act does not apply to leasehold interests granted in the 1859 transaction, and that any aboriginal title previously held by the Nation's predecessors had been extinguished in the 1700s. While defendants preserve their rights with respect to these issues, they do not raise them at this juncture because the district court did not reach them and it is unnecessary for this Court to do so in order to affirm.

C. The District Court's Decision

The district court dismissed all the Nation's claims, concluding that this Court's decision in *Cayuga* was controlling. The court found that, as in *Cayuga*, the Nation's claims are inherently disruptive given the generations that have passed during which non-Indians have owned and developed the subject lands and the changes in the demographics of the area and the character of the property. (A. 133.) The court also found that the relief Nation seeks is indistinguishable from the relief sought in *Cayuga*: "a declaration of their possessory interest in the subject land and immediate ejection of defendants from the subject land, damages equal to the fair market value of the land for the entire

period of plaintiffs' dispossession, as well as an accounting and disgorgement of all benefits received by the defendant municipalities, such as tax revenue." (A. 133.) The district court therefore dismissed all claims under the equitable principles applied in *Sherrill* and *Cayuga*.

D. Post-Dismissal Proceedings

After the district court's issuance of its Memorandum and Order of dismissal (A. 124) and the subsequent entry of Judgment (A. 137), the Nation filed two motions in the district court: a motion for reconsideration (Dkt. No.36), and a motion to amend the Amended Complaint (Dkt. No. 35). The motion for reconsideration included a reference to a purported Fifth Amendment challenge to the district court's dismissal of the Nation's claim. The Nation also filed a Notice of Appeal dated December 28, 2006. (A. 138-39.)

Over the ensuing eight years the district court granted the Nation's serial applications to adjourn its motions and continue the stay of all district court proceedings, initially pending the outcome of the appeal and subsequent petition for hearing *en banc* and petition for certiorari in *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 137 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 452 (2011), and

thereafter while the Nation pursued a decision by the United States on the Nation's request that the United States intervene in this action on the Nation's behalf. Eventually, in October 2011, the Nation withdrew its motion for reconsideration (Dkt. No. 70), and in October 2014, the motion for leave to amend was withdrawn (Dkt. No. 104). Thereafter, the Nation filed another Notice of Appeal on November 26, 2014 (A. 140-141), and this appeal ensued.

STANDARD OF APPELLATE REVIEW

A district court's dismissal of a complaint for failure to state a claim on which relief may be granted is reviewed *de novo*. *Stockbridge-Munsee Community v. N.Y.*, 756 F.3d 163, 165 (2d Cir. 2014).

SUMMARY OF ARGUMENT

Following the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), this Court has firmly established that claims that Indian tribes were unlawfully dispossessed of their lands centuries ago are barred by the equitable principles of laches, acquiescence, and impossibility. *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*,

547 U.S. 1128 (2006), *and cert. denied sub nom.*, *United States v. Pataki*, 547 U.S. 1128 (2006). Since the district court's decision, this Court has disposed of land claims premised on ancient dispossession in three subsequent cases. *See Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 137 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 452 (2011), *and cert. denied sub nom.*, *United States v. N.Y.*, 132 S. Ct. 452 (2011); *Onondaga Nation v. N.Y.*, 500 Fed Appx. 87 (2d Cir. 2012) (summary order), *cert. denied,* 134 S. Ct. 419 (2013); *Stockbridge-Munsee Community v. N.Y.*, 756 F.3d 163 (2d Cir. 2014) (per curiam), *cert. denied*, 135 S. Ct. 1492 (2015).

In each of these cases, the Court dismissed the ancient land claims because they inherently disrupt long-settled and justifiable expectations of state sovereigns, local governments, private businesses, and individual citizens. Likewise here, *Sherrill* and this Court's decisions compel dismissal. Nor does pre-trial dismissal of the claims deprive the Nation of its Seventh Amendment right to a jury trial; *Oneida*, *Onondaga* and *Stockbridge-Munsee* also involved pre-trial dismissals based on judicially-noticed facts.

Moreover, in its most recent land claim decision, this Court expressly rejected the principal argument that the Nation raises here—that *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), which holds that laches cannot defeat a claim brought within a statute of limitations enacted by Congress, undermines the Court's conclusion that *Sherrill's* equitable principles bar these ancient Indian land claims. This Court rejected that argument because Congress had not fixed a statute of limitations for Indian land claims, and because *Sherrill's* equitable defense does not focus on traditional laches in any event. Thus, this Court held, *Petrella* does not overturn this Court's now well-settled precedent. *Stockbridge-Munsee,* 756 F.3d at 165. A panel of this Court is bound by this decision, and in any event, the Nation's argument that *Stockbridge-Munsee* failed to apply *Petrella* is without merit.

Although the district court did not reach this argument, this Court may affirm on the alternative basis that the Nation's claims against State defendants are barred by the Eleventh Amendment. The United States has declined to intervene on the Nation's behalf, although it had done so in *Cayuga* and *Oneida* to overcome the State's immunity from

suit. And because the State is an indispensable party, the claims must be dismissed as against all other defendants. Finally, the Nation's assertion of a Fifth Amendment violation is unpreserved for review and otherwise meritless. Accordingly, this Court should affirm the district court's final judgment dismissing the amended complaint as against all defendants.

ARGUMENT

POINT I

THIS COURT'S DECISIONS APPLYING *SHERRILL* BAR THE NATION'S CLAIMS TO LANDS LONG HELD AND REGULATED BY NON-TRIBAL ENTITIES

The district court properly relied on the Supreme Court's decision in *Sherrill* and this Court's decision in *Cayuga* to hold that the doctrines of laches, acquiescence, and impossibility bar the Nation's claims to title and possessory rights in lands conveyed long ago because of the substantial disruption that such belated claims would cause. The three land claim cases decided by this Court after the district court's decision further confirm its correctness.

In 2005, the Supreme Court held in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), that "standards of Indian law and federal equity practice" barred the Oneida Indian Nation's assertion of sovereignty over lands that were allegedly part of its ancient reservation and that the tribe had recently repurchased on the open market. 544 U.S. at 202, 211. As in this case, the tribe claimed that the transactions that purported to extinguish the tribe's title violated the Nonintercourse Act. The Court held that an adjudication of "present and future" sovereignty would be a "disruptive remedy" that is precluded by equitable principles underlying the doctrines of laches, acquiescence, and impossibility. *Id.* at 216-17, 221.

Invoking these principles, the Court noted "the attendant dramatic changes in the character of the properties," *id.* at 216-17, and the "justifiable expectations" of the residents of the area, "grounded in two centuries of New York's exercise of regulatory jurisdiction." *Id.* at 215-16, 218. The Court explained that "given the extraordinary passage of time," granting the relief sought by the tribe "would dishonor the historic wisdom in the value of repose." *Id.* at 218-19 (internal quotation marks omitted). And it observed that "[f]rom the early 1800s into the

1970s, the United States largely accepted, or was indifferent to, New York's governance of the land in question and the validity *vel non* of the Oneidas' sales to the State." *Id.* at 214. As a result of the passage of time and subsequent development of the land, "returning to Indian control land that generations earlier passed into numerous private hands" is fundamentally impracticable, even when the tribe has acquired fee simple title, because it would "seriously burden the administration of state and local governments" and "adversely affect" neighboring landowners. *Id.* at 219-20. For all these reasons, the Court held that the tribe was barred from "rekindling embers of sovereignty that long ago grew cold." *Id.* at 214.

Shortly after *Sherrill* was decided, this Court applied these equitable principles to bar a 64,000-acre land claim brought by the Cayuga Indian Nation. *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006). There, the tribe asserted claims to its alleged historic lands and sought ejectment of the current occupants of those lands. *Id.* at 274-75. The district court ruled that the tribe's desired remedy of ejectment was inappropriate given the impact it would have on many innocent

landowners far removed from the alleged acts of dispossession, but nonetheless awarded the tribe money damages. *Id.* at 275. This Court reversed, holding that the equitable principles recognized in *Sherrill* bar all remedies, including damages, flowing from ancestral land claims because such claims themselves, when raised long after the events which gave rise to them, are inherently disruptive.[3] *Id.* at 275, 277. In so holding, this Court cited the same factors relied on in *Sherrill*, such as the time during which non-Indians have owned and developed the land, the residence of the tribe elsewhere, and the tribe's delay in seeking relief. *Id.* at 277.

This Court applied the principles underlying *Sherrill* to dismiss a second tribal land claim involving 250,000 acres in *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 137 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 452 (2011). This Court reiterated its holding in *Cayuga* that any claims "premised on the assertion of a current, continuing right to possession as a result of a flaw in the original termination of Indian title – are by their nature disruptive." 617 F.3d at

[3] This Court rejected the Cayugas' claim for trespass damages because possession is an element of trespass, and therefore, the trespass claim "is predicated entirely upon plaintiffs' possessory land claim." 413 F.3d at 278. As the possessory claim was barred by laches, the plaintiffs' trespass claim failed as well. *Id.*

125. This Court also explained that while in *Cayuga* it had used the term "laches" as a "convenient shorthand for the equitable principles" at issue in these cases, the equitable doctrines underlying *Sherrill* and *Cayuga* did not require a defendant to establish the elements of traditional laches. *Id.* at 127. "Rather," this Court recognized, the proper equitable analysis focuses "more generally on the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to plaintiff's injury." *Id.* at 127. Under this analysis, whether the tribe unreasonably delayed in commencing litigation was "not ultimately important." *Id.* Accordingly, this Court dismissed the claims.

Based on the *Sherrill-Cayuga-Oneida* trilogy of precedent, the Court affirmed in a summary order the dismissal of a third land claim, this time on the pleadings. *Onondaga Nation v. N.Y.*, 500 Fed. Appx. 87 (2d Cir. 2012), *cert. denied*, 132 S.Ct. 419 (2013). In *Onondaga*, the district court had dismissed the tribe's land claim for failure to state a claim under Federal Rule 12(b)(6), despite the tribe's argument that its

factual allegations rendered *Sherrill's* equitable doctrines inapplicable. This Court affirmed the dismissal, rejecting the tribe's argument that the district court could not take judicial notice of changes in the population and development of the tribe's ancestral lands. *Id.* at 89. This Court also rejected the tribe's argument that it was entitled to discovery to establish that it had "strongly and persistently protested" these changes because, regardless, "the standards of federal Indian law and federal equity practice" would bar the claim. *Id.* at 90.

And most recently, in *Stockbridge-Munsee Community v. State of N.Y.*, 756 F.3d 163, 165 (2d Cir. 2014), *cert. denied*, 135 S.Ct. 1492 (2015), this Court affirmed dismissal of yet a fourth ancient land claim, stating, in a per curiam opinion, that "it is now well-established that Indian land claims asserted generations after an alleged dispossession are inherently disruptive of state and local governance and the settled expectations of current landowners, and are subject to dismissal on the basis of laches, acquiescence and impossibility." *Id.* at 165. Although a smaller area of land was at issue in *Stockbridge-Munsee* than in the previous cases—3,840 acres—that distinction was of no legal moment. This Court held that the tribe's claims of nineteenth century land

transfers in violation of the Nonintercourse Act were barred by *Sherrill's* equitable principles and subject to dismissal on the pleadings. *Id.* at 165-66. This Court also rejected the tribe's argument, raised by the Nation here, that this Court's precedents are inconsistent with the Supreme Court's recent decision in *Petrella v. Metro-Goldwyn Mayer, Inc.*, 134 S. Ct. 1962 (2014).

A. This Court's Precedents Are Dispositive and Require Affirmance

The decisions of this Court, discussed above, control this case. Like the land claims considered in the other cases, the Nation's claims are inherently disruptive given the generations that have passed during which non-Indians have owned and developed the lands. As the district court stated:

> The Shinnecocks have not occupied the Subject Lands since 1859; since 1859 the Lands have been the subject of occupation and development by non-Indians (according to the 2005 U.S. Census Bureau Fact Sheet, Suffolk County, N.Y., only 0.2 % of Suffolk County residents are of American Indian descent); over 140 years passed between the alleged wrongful dispossession and the attempt to regain possession; and there has been a dramatic change in the demographics of the area and the character of the property.

(A133.) And the relief sought by the Nation is no different from that sought in *Cayuga, Oneida, Onondaga,* and *Stockbridge-Munsee*: "a declaration of their possessory interest in the subject land and immediate ejection of defendants from the subject land, damages equal to the fair market value of the land for the entire period of plaintiffs' dispossession, as well as an accounting and disgorgement of all benefits received by the defendant municipalities, such as tax revenue." (A.133.) Just as in the other cases, the Nation's entitlement to this relief rests entirely on its claim that its predecessors were unlawfully dispossessed of these lands in 1859, regardless of the successive, good-faith transfers since that time.

As a result, if the Nation's request were granted, it would have drastic consequences for State sovereignty and property owners throughout the thousands of acres at issue. Among other things, the Nation seeks the ejectment of defendants Shinnecock Hills Golf Club, National Golf Links of America, Parrish Pond Associates, Parrish Pond Construction, PP Development Associates, Southampton Golf Club, 409 Montauk, Southampton Meadows Construction (A. 38-39) and apparently Long Island University and the Long Island Railroad

Company, the last of which, as the district court noted, "would have devastating consequences to the region's economy and a drastic impact on thousands of commuters." (A. 134 and n. 9.) The Nation also claims the area now occupied by State Route 27. (A. 28.) And a money judgment covering over 150 years of fair rental value and interest, among other items, would equally disrupt the justifiable expectations of defendants and others concerning their property rights. Given the dramatically changed character of the land since 1859, the equitable doctrines invoked in *Sherrill* bar relief here.

Finally, although the Nation argues that it diligently pursued redress but was historically denied access to the courts (Br. at 5), this Court has said that the reasonableness of a tribe's delay in bringing suit is not relevant to the analysis. *See Oneida*, 617 F.3d at 125. Similarly, the Court in *Onondaga* denied that the tribe there was entitled to discovery to establish its opposition to the development of its ancestral lands. 500 Fed. Appx. at 90. In short, the disruptive nature of the Nation's claims is apparent from the face of the amended complaint and merits dismissal on the pleadings. *See Cayuga*, 413 F.3d at 277-78 (land claim was subject to dismissal "*ab initio*").

B. *Petrella* Does Not Require a Contrary Result

The Nation argues that the Supreme Court's recent decision in *Petrella v. Metro-Goldwyn Mayer, Inc.*, 134 S. Ct. 1962 (2014), invalidates this Court's consistent and correct application of *Sherrill* to bar ancient land claims. In *Stockbridge-Munsee*, this Court rejected that precise argument.[4] Noting that *Petrella* concerned whether laches could be used to defeat a claim filed within the Copyright Act's explicit three-year statute of limitations, this Court concluded that it stood only for the proposition that "in the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief." 756 F.3d at 166 (quoting *Petrella*, 134 S.Ct. at 1974). Because Congress has not fixed a statute of limitations for Indian land claims, this Court held *Petrella* to be inapplicable. *Stockbridge-Munsee*, 756 F.3d at 166 (citing *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 253 (1985) ("*Oneida II*")).

[4] The Supreme Court decided *Petrella* after the briefing in this Court in *Stockbridge-Munsee* was complete, but before oral argument. The Stockbridge-Munsee filed a Rule 28(j) letter concerning *Petrella*, to which State and municipal appellees responded, and the parties addressed *Petrella* at argument in this Court.

This Court also noted that *Petrella* did not apply because it involved a traditional laches defenses, whereas *Sherrill*'s equitable defense derived more generally from "fundamental principles of equity" that encompassed notions of laches, acquiescence and impossibility and that "precluded plaintiffs from rekindling embers of sovereignty that long ago grew cold." *Id.* at 166 (quoting *Sherrill*, 544 U.S. at 214). This Court concluded that, for both of these reasons, *Petrella* did not overturn this Court's Indian land claim precedents.

Stockbridge-Munsee's rejection of the argument concerning *Petrella* raised in identical form by the Nation controls here. Contrary to the Nation's assertion (Br. at 41-44), *Petrella* is not intervening authority because it was decided before *Stockbridge-Munsee* and indeed was addressed in that case. Because no subsequent decision of the Supreme Court or an *en banc* panel of this Court has called *Stockbridge-Munsee* into question, a panel of this Court is bound to follow it. *See Oneida*, 617 F.3d at 122. In any event, as demonstrated below, *Stockbridge-Munsee* correctly resolved this issue. The rationale for precluding laches in the face of a fixed statute of limitations is that such a defined period "itself already takes account of delay," *Petrella,*

134 S.Ct. at 1983; indeed, laches "originally served as a guide *when no statute of limitations controlled the claim*," *id.* at 1975 (emphasis added). That is precisely the circumstance here.

1. Congress Has Not Fixed A Statute of Limitations for Indian Land Claims

The Nation erroneously contends that Congress established a limitations period for Indian land claims. (Br. at 30-39.) Congress expressly left open the time limit for bringing Indian land claims, however. Reviewing the federal limitations scheme set forth in 28 U.S.C. § 2415, the Supreme Court in *Oneida II* so concluded, stating "[t]here is no federal statute of limitations governing federal common-law actions to enforce property rights." 470 U.S. at 240; *see also United States v. Mottaz*, 476 U.S. 834, 848 n. 10 (1986) (same). As originally enacted in 1966, section 2415 addressed only claims brought by the United States on behalf of Indians. It subjected contract and tort claims for damages to an express limitations period of six years and 90 days under sections (a) and (b), but section 2415(c) excluded from these periods actions to establish title to real property, providing that "[n]othing herein shall be deemed to limit the time for bringing an

action to establish the title to, or right of possession of, real or personal property."

The 1982 amendments to section 2415, enacted as the Indian Claims Limitation Act of 1982 ("ICLA"), Pub. L. 97-394, 96 Stat. 1976, note following 28 U.S.C. § 2415, addressed for the first time claims brought directly by tribes and not just through the United States. *Oneida II*, 470 U.S. at 243. The ICLA directed the Secretary of the Interior to compile and publish a list in the Federal Register of all such claims identified by or submitted to the Secretary that would otherwise be time-barred. *See Oneida II*, 470 U.S. at 243. Absent action by the Secretary, listed claims are not subject to a statute of limitations bar. 28 U.S.C. §§ 2415(a), (b). The 1982 amendments still did not impose a statute of limitations on land claims, however, and instead carried forward the exclusion from the limitations period set forth in section 2415(c). *Id.* at 242. The 1982 amendments thus retained the status quo ante, whereby Indian claims relating to aboriginal title and possession fell outside any state or federal statute of limitations. *Id.* at 242-43.

The Nation's claims seek to establish its unextinguished title to, and right of possession of, real property, and thus fall within section 2415(c). In a footnote in *Oneida II*, the Supreme Court said that if claims like the Oneidas' "*i.e.*, damages actions that involve litigating the continued vitality of aboriginal title, are construed to be suits 'to establish the title to, or right of possession of, real or personal property,' they would be exempt from the statute of limitations of the Indian Claims Limitations Act of 1982." 470 U.S. at 243 n.15. The Nation's claims must be so construed.

Although the Nation contends that its request for monetary relief brings its claims within sections 2415(a) or (b) (Br. at 35-37), in order to obtain any of its requested remedies for trespass and waste, the Nation would first have to establish rights of possession of real property superior to the alleged trespasser during the period of the alleged harm, *i.e.*, from 1859 to the present. *See* 28 U.S.C. § 2415(c). Indeed, the Nation's primary request is for a declaration of its right to possess the subject lands, from which the rest of its requested relief flows.

This Court's decision in *Westnau Land Corp. v. U.S. Small Business Admin.*, 1 F.3d 112, 115 (2d Cir. 1993) (Br. at 36), is not to the contrary; it merely held that a foreclosure action brought by the federal government falls under section 2415(c), even if the right to foreclose itself arises from a contractual debt obligation. Just like a plaintiff seeking to foreclose, the Nation here is attempting to establish an interest in real property, and its claim likewise falls under section 2415(c).

The Nation also erroneously contends (Br. at 37-38) that, by listing its claims among the Eastern Area Claims in the Federal Register as directed by the ICLA, the Secretary of the Interior made a determination—to which *Chevron* deference is owed and which designation had to be challenged within six years under the Administrative Procedures Act—that its claims are subject to sections 2415(a) and (b). *See* Addendum at 141. The mere act of listing the claims did not represent an official determination as to their nature or merit, however; the notice simply listed all "potential pre-1968 Indian damage claims" identified by or presented to the Secretary, and expressly advised that the listing of a claim "does not signify that the

Department believes the claim has legal merit." *Id.* at 139. Indeed, the Secretary noted that the listing of the Nation's claim was not even an acknowledgement that the Nation was an Indian tribe (the Nation was not a federally recognized tribe at the time of the notice). Addendum at 141. In any event, the Stockbridge-Munsee's claim was also listed among the Eastern Area Claims, *id.* at 141, but the listing did not change the disposition in that case.

But even if the Nation were correct that its claims come within sections 2415(a) or (b) rather than (c) just because they also seek trespass damages, that would not help its cause. By listing the Nation's claims in the Federal Register, the Secretary of the Interior has exempted them from the six-year, 90-day statute of limitations otherwise applicable to claims subject to 28 U.S.C. § 2415(a), (b). As a result, they are free from a limitations bar unless the Secretary takes further action. In the absence of a Congressionally-prescribed fixed statutory bar date, therefore, courts are free to apply the equitable principles invoked in *Sherrill,* which are designed to address situations, as here, where a tribe's claims to lands ceded over 150 years ago are not barred by a statute of limitations.

Having argued at length that its claims *are* subject to a fixed statute of limitations and that *Petrella* therefore compels reversal, the Nation then does an about-face, attempting to infer from the *absence* of a statute of limitations a Congressional intent to preclude a laches defense as well. (Br. at 39.) This argument is foreclosed by this Court's precedents and is without merit. Where Congress has intended to bar laches as a defense to Indian claims, it has said so. *See* Indian Claims Commission Act, ch. 959 § 2, 60 Stat. 1049, 1050 (1946) (the ICC may hear and determine specified claims against the United States "notwithstanding any statute of limitations or laches"); 25 U.S.C. § 640d-17(b) (act settling certain Indian land claims provides that "[n]either laches nor the statute of limitations shall constitute a defense to any action authorized by this subchapter for existing claims if commenced within" specified periods). Nor is there any indication that in enacting or amending section 2415, Congress intended to revive ancient Indian claims seeking possession of or title to land that were barred by laches over a century before. *See Oneida* II, 470 U.S. at 271-72 (Stevens, J., dissenting) (§ 2415(c) merely reflects an intent to preserve the law as it existed on the date of enactment). Thus, the

absence of a statute of limitations in section 2415(c) does not support a finding that Congress intended to disallow delay-based equitable defenses to ancient land claims.

2. The Holding and Reasoning in *Petrella* Is Limited to Traditional Laches And Does Not Apply To *Sherrill's* Broader Equitable Defense

Aside from the fact that Congress did not establish a statute of limitations for Indian land claims, *Petrella* is inapposite for an additional reason: it concerned only the traditional laches defense, whereas the *Sherrill* defense reflects "standards of federal Indian law and federal equity practice" and draws from several equitable doctrines – laches, acquiescence, and impossibility. As this Court correctly explained in *Oneida*:

> the equitable defense recognized in *Sherrill* and applied in *Cayuga* does not focus on the elements of traditional laches but rather more generally on the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiff's injury…. 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.'

617 F.3d at 127-28 (citations omitted). *Petrella* did not address the unique panoply of equitable principles that pertain to these types of Indian land claims. Thus, as this Court held in *Stockbridge-Munsee*, *Petrella* does not apply to the *Sherrill* defense and is not inconsistent with this Court's precedents.

C. The District Court's Judicial Notice of Certain Uncontested Facts In No Way Implicates Or Contravenes The Seventh Amendment

The Nation's Seventh Amendment argument is equally misplaced. The Nation never raised this argument in the district court, and therefore this Court should "decline to consider [it] in light of the well-established general rule that a court of appeals will not consider an issue raised for the first time on appeal." *Otal Investments Ltd. v. M/V CLARY*, 673 F.3d 108, 120 (2d Cir. 2012).

This argument is meritless in any event. The Seventh Amendment is not violated when a court takes judicial notice of facts that are not subject to dispute. The Seventh Amendment—which provides that "[i]n Suits at common law . . . the right of trial by jury shall be preserved,"

U.S. Const. Amend. VII—applies only to contested facts. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979) (quoting *Ex parte Peterson*, 253 U.S. 300, 310 (1920)) ("No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined.") For that reason, procedural devices that permit the disposition of cases where the material facts are not subject to genuine dispute do not violate the Seventh Amendment right to a jury trial. *Id*; *see Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319–21 (1902) (summary judgment); *Galloway v. United States*, 319 U.S. 372 (1943) (directed verdict); *Raul v. Am. Stock Exch., Inc.*, No. 95-3154 (SAS), 1996 WL 627574, at *2 (S.D.N.Y. Oct. 29, 1996) ("Rule 12(b)(6) is intended to prevent litigants from bringing claims before a jury that provide no legal basis upon which to grant relief. Thus plaintiff never fell within the aegis of the Seventh Amendment, and was never entitled to a jury trial.")

By definition—indeed, by their very nature—facts subject to judicial notice are "not subject to reasonable dispute because [they] (1) [are] generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose

accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Therefore, "[w]hen there is no dispute as to the authenticity of. . . materials and judicial notice is limited to law, legislative facts, or factual matters that are incontrovertible, such notice is admissible." *Oneida Indian Nation v. N.Y.*, 691 F.2d 1070, 1086 (2d Cir. 1982).

Here, the district court followed established practice in relying on census data and the Nation's factual allegations (*e.g.*, the types of defendants named) to determine the applicability of the equitable defense recognized by *Sherrill* and its progeny. In *Sherrill*, the Supreme Court relied on census data to conclusively determine the non-Indian character of the city and county. *See* 544 U.S. at 211. Following *Sherrill*, this Court in *Cayuga* concluded from the nature of the Cayuga's asserted claims and the facts alleged that "[g]enerations have passed during which non-Indians have owned and developed the area[.]" *Cayuga*, 413 F.3d at 277; *accord Oneida*, 617 F.3d at 125 ("[A]ny claims premised on the assertion of a current, continuing right to possession as a result of a flaw in the original termination of Indian title. . . are by their nature disruptive[;] accordingly, the equitable defenses recognized in *Sherrill* apply to such claims."). And finally, in

Onondaga Nation v. N.Y., 500 Fed Appx. 87, 89 (2d Cir. 2012), this Court rejected by summary order the argument that it was inappropriate for the district court to take judicial notice of population and development at the pleadings stage, explaining that "[d]iscovery is not needed to ascertain whether the [land at issue] has been extensively developed and populated over the past 200 years." 500 Fed Appx. at 89-90.

Sherrill and this Court's precedents thus demonstrate both that the facts of the population and development of the lands at issue were a proper subject of judicial notice and that the district court relied on proper evidence to take judicial notice of those facts in dismissing the claims. *See Cayuga*, 413 F.3d at 277-78 (land claim was subject to dismissal "*ab initio*"). Accordingly, the Seventh Amendment was not implicated—much less violated—by the district court's ruling.

POINT II

THE NATION'S CLAIMS ARE BARRED BY THE STATE'S SOVEREIGN IMMUNITY

This case would in any event have to be dismissed on alternative grounds: as to State defendants, sovereign immunity mandates

dismissal; as to the other defendants, dismissal is required by the consequent absence of the State, a required party.

The Eleventh Amendment bars suit in federal court by an Indian tribe against a State. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). When the United States intervenes, as it did in the land claims of the Cayugas and the Oneidas, the State is not immune to the claims raised by the United States. But the United States has chosen not to intervene in this case despite the Nation's request. Nor did Congress abrogate New York's sovereign immunity through the Nonintercourse Act. *See Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that Congress lacked the power to abrogate the States' Eleventh Amendment immunity under its Indian Commerce Clause or other Article I powers). And the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), does not defeat New York's sovereign immunity here because Indian land claims are essentially actions to "quiet title" implicating the State's sovereignty interests. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296-97 (1997); *accord Western Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18, 20-23 (2d Cir. 2004).

Thus, the claims as to State defendants must be dismissed on the ground of Eleventh Amendment immunity.

Moreover, because the State is a required party in whose absence the action cannot proceed, the amended complaint must be dismissed against all remaining defendants. *See* Fed. Rs. Civ. P. 12(b)(7), 19. Indeed, "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008); *see also Seneca Nation of Indians v. N.Y.*, 383 F.3d 45 (2d Cir. 2004) (claims against non-State defendants dismissed under Rule 19 where Indian land claims against the State were barred by sovereign immunity), *cert. denied*, 547 U.S. 1178 (2006).

Specifically, the Nation would be unable to obtain complete relief without the State as a party. The Nation's claims are premised on allegations that the State was the original wrongdoer by passing legislation authorizing the 1859 conveyance, but the State would not be bound by any ruling that it acted unlawfully or that its current regulation of the subject lands as well as its possession of portions of the

lands are invalid. *See* A. 28 ("the State of New York illegally claims rights to possess portions of the Subject Lands, including without limitation, the right-of-way of State Highway 27, now known as the "Sunrise Highway"). And a judgment rendered in the State's absence declaring that the Nation has possessory rights in these lands would necessarily implicate the State's sovereignty interests. *Coeur d'Alene*, 521 U.S. at 281. Having allegedly authorized the 1859 transfer, the State has a sovereign interest in protecting the rights of all landowners whose title ultimately derives from it. *See* New York State Law § 10 (governor is obligated to provide for the legal defense of any action to recover lands instituted against any person deriving title from the State).

In light of the State's sovereign immunity, this case cannot proceed against either State defendants or any of the remaining defendants. Accordingly, the dismissal of the Nation's claims may also be affirmed on this alternative ground. *See Adirondack Transit Lines, Inc. v. United Transp. Union, Local 1582*, 305 F.3d 82, 88 (2d Cir. 2002) (court may affirm on any ground supported by the record).

POINT III

THE DISTRICT COURT'S APPLICATION OF SETTLED LAW TO DISMISS THE NATION'S LAND CLAIM DID NOT VIOLATE ITS FIFTH AMENDMENT RIGHTS

Although the Nation declines to identify the precise clause of the Fifth Amendment on which it premises its constitutional argument, the core of the argument is that in dismissing its land claim pursuant to *Cayuga,* the district court retroactively applied a "new rule of limitations" to extinguish a property right, *i.e.*, its land claim, in violation of due process. (Br. at 46, 47 n.14, 48.) Alternatively, the Nation argues, the district court's decision amounted to a "judicial taking" of the subject lands without just compensation. (Br. at 46.) These arguments are both unpreserved and meritless. The determination by the district court, made after full briefing and argument, that under *Sherrill* and *Cayuga* the Nation's land claim was barred by longstanding equitable principles did not deprive the Nation of any property right without due process of law. And even if the case law recognized the existence of a "judicial taking," which it does not, the dismissal of a claim based on existing legal principles did not take private property without just compensation.

As a threshold matter, the Nation's argument that application of the equitable defense of *Sherrill* to bar its land claim violates its Fifth Amendment rights should be rejected as unpreserved. It does not appear anywhere in the Nation's opposition to defendants' motions to dismiss, nor was it raised at oral argument on the motions. Although the Nation did reference a Fifth Amendment challenge to the district court's decision in its motion for reconsideration of the district court's dismissal, *see* Motion for Reconsideration (Dkt. No. 36), it voluntarily withdrew this motion in its entirety before it was fully briefed and submitted to the district court (Dkt. No. 70 at 1).

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). The rule applies with particular force where a party knowingly and deliberately elects not to pursue an argument or remedy. *See Gilmore v. Shearson/Am. Exp. Inc.*, 811 F.2d 108, 112 (2d Cir. 1987) (withdrawal of motion to compel waived right to compel arbitration). The Nation's strategic decision to unconditionally withdraw the motion for reconsideration represents a "true waiver" that forecloses review and consideration of its Fifth Amendment argument

on this appeal. *See United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995).

Even if there were no waiver, however, the Nation's Fifth Amendment argument would be meritless. First, as to due process, the argument fails because the equitable defense articulated by the Supreme Court in *Sherrill* and applied by this Court in subsequent cases is not, as the Nation argues, a "rule of limitations," *i.e.*, a rule based solely on the passage of time. (Br. at 46.) Rather, it is an equitable defense based on "general principles of 'federal Indian law and federal equity practice'" such as laches, acquiescence and impossibility. *See Oneida*, 617 F.3d at 128 (2d Cir. 2010) (quoting *Sherrill*, 544 U.S. at 214); *accord Stockbridge-Munsee*, 756 F.3d at 166. Unlike a rule of limitations, the *Sherrill* defense considers not only the passage of time,[5] but also such "specific factors" as the disruptive nature of the claims and the degree to which long-delayed claims upset the justifiable expectations of current landowners. *Onondaga*, 500 Fed

[5] Even if the principle followed in *Sherrill* was deemed to be a traditional laches defense, the Nation's argument would fail because "laches is not . . . a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." *Sherrill*, 544 U.S. at 217–18 (quoting *Galliher v. Caldwell*, 145 U.S. 368, 373 (1892)).

Appx. at 89. Accordingly, the rule of *Sherrill* did not implicate due process by "extinguishing existing claims immediately." (Br. at 45) (quoting *Ross v. Artuz*, 150 F.3d 97, 100 (2d Cir. 1998)). Therefore, the district court did not violate the Fifth Amendment in applying this precedent to dismiss the Nation's claim.

The Nation's due process argument also fails because *Sherrill* was not a "new" rule but one firmly rooted in existing case law. As this Court explained in *Oneida* and again in *Stockbridge-Munsee*, the equitable defense recognized in *Sherrill* is the embodiment of "several *preexisting* equitable defenses" and longstanding principles of "'federal Indian law and federal equity practice.'" *Oneida*, 617 F.3d at 128 (quoting *Sherrill*, 544 U.S. at 214) (emphasis added); *accord Stockbridge-Munsee*, 756 F.3d at 166. This is reflected in the authority cited by the Supreme Court in *Sherrill* dating back to the late nineteenth century. *See, e.g., Sherrill*, 544 U.S. at 217.

Second, the Nation, citing *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tal Resources*, 560 U.S. 702 (2010), appears to argue that the district court's decision dismissing its land claim effected a "judicial taking" without just compensation under the Takings Clause

of the Fifth Amendment. (Br. at 47 n.14.) No court has ever adopted or applied such a theory. In *Stop the Beach*, only a plurality of the Court held that there could be a judicial taking, and therefore that conclusion is not binding precedent. *See Burton v. Am. Cyanamid Co.*, 775 F. Supp. 2d 1093, 1099 (E.D. Wis. 2011) ("In [*Stop the Beach*], four justices supported [the idea that there can be a judicial taking], not enough to establish a binding precedent[.]"); *see also DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 418 (2d Cir. 2001) ("[T]he discussion of a contested issue in a plurality opinion is not a binding precedent if it has never been expressly adopted by a majority of [the Supreme Court]") (citation omitted).

Even if such a claim could be maintained, it would only apply to the extinguishment of an established property right rather than one that has yet to be adjudicated. As the plurality opinion in *Stop the Beach* recognized, the "Takings Clause only protects property rights as they are established. . . not as they might have been established or ought to have been established." *Id.* at 732. Because a party does not have an "established property right" in a claim until it is adjudicated, the "adjudication of disputed and competing claims cannot be a taking."

In re Lazy Days' RV Ctr. Inc., 724 F.3d 418, 425 (3d Cir. 2013); *see also id.* ("The Bankruptcy Court did not take any of [plaintiff]'s established property rights, but rather adjudicated the parties' bona fide dispute regarding their rights under the Settlement Agreement."). The district court's application of binding precedent to dismiss the Nation's land claim is not a taking because it did not deprive the Nation of an established property right.

Moreover, even if the district court's judgment effected a taking (and it did not), the Nation's remedy would be compensation by the federal government rather than relief from any of the defendants in this case. Indeed, the Nation appears to concede as much. *See* Br. at 47 n. 14 (if the government has not provided adequate process, a property owner has a claim "against the government"). Accordingly, the proper forum to pursue this claim is the Court of Federal Claims and the Federal Circuit. *See* 28 U.S.C. § 1491(a)(1).[6]

[6] Indeed, the Nation attempted to raise judicial takings and other claims against the United States in *Shinnecock Indian Nation v. United States*, 112 Fed. Cl. 369, 385 (2013), *aff'd in part, vacated in part*, No. 214-cv-5015, 2015 WL 1529231 (Fed. Cir. Apr. 7, 2015). In that case, the Court of Federal Claims denied the Nation's motion to amend its complaint to add a judicial takings claim, concluding that such an amendment would be "futile." *Id.* at 387. According to the Court of Federal Claims, because the Nation had not yet "secured a final unreviewable judgment in its favor on its [Nonintercourse] Act claim," its interest in that claim

In sum, the district court's ruling did not violate the Fifth Amendment. Rather, the district court properly applied binding Supreme Court and Second Circuit precedent, which conclusively establishes that possessory land claims brought by Indian tribes based on century-old acts are precluded by equitable considerations. Thus, this Court should affirm the judgment of the district court.

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had not vested and was therefore "not protected by the Takings Clause." *Id.* at 384–85. The court further noted that the Nation had been unable to cite to any "case in which a property owner prevailed on a judicial takings claim . . . ." *Id.* at 386. The Federal Circuit affirmed this aspect of the ruling on a different ground, holding that the district court did not abuse its discretion in declining to allow the Nation to amend its complaint to add this claim because such a claim would represent an improper collateral attack on the judgment in this case and the Circuit would thus lack jurisdiction to reach the issue. 2015 WL 1529231, at *5-6.

CONCLUSION

The judgment should be affirmed.

Dated: Albany, New York
June 3, 2015

Respectfully submitted,

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14-4445(L)

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United States Court of Appeals for the Second Circuit

THE SHINNECOCK INDIAN NATION

Plaintiff-Appellant,

-v.-

STATE OF NEW YORK, ANDREW CUOMO, In his Individual Capacity and as Governor of the State of New York, COUNTY OF SUFFOLK, NEW YORK, TOWN OF SOUTHAMPTON, NEW YORK, TRUSTEES OF THE PROPRIETORS OF THE COMMON AND UNDIVIDED LANDS OF THE TOWN OF SOUTHAMPTON, AKA TRUSTEES OF THE PROPRIETORS OF THE COMMON AND UNDIVIDED LANDS AND MARSHES (OR MEADOWS), IN THE TOWN OF SOUTHAMPTON, TRUSTEES OF THE FREEHOLDERS AND COMMONALITY OF THE TOWN OF SOUTHAMPTON, AKA TRUSTEES OF THE COMMONALITY OF THE TOWN OF SOUTHAMPTON, SHINNECOCK HILLS GOLF CLUB, NATIONAL GOLF LINKS OF AMERICA, PARRISH POND ASSOCIATES, LLC, PARRISH POND CONSTRUCTION CORPORATION, PP DEVELOPMENT ASSOCIATES, LLC, SEBONAC NECK PROPERTY, LLC, SOUTHAMPTON GOLF CLUB INCORPORATED, 409 MONTAUK, LLC, SOUTHAMPTON MEADOWS CONSTRUCTION CORPORATION, LONG ISLAND RAILROAD COMPANY, AND LONG ISLAND UNIVERSITY,

Defendants-Appellees,

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR DEFENDANTS-APPELLEES

The undersigned attorney, Jeffrey W. Lang hereby certifies that this brief complies with the type-volume limitations of FRAP 32(a)(7). According to the word processing system used by this office, this brief, exclusive of the title page, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel, contains 8,581 words.

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