IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

CAYUGA INDIAN NATION OF NEW YORK,

Plaintiff,

No. 11-cv-6004-CJS

-v-

SENECA COUNTY, NEW YORK,

Defendant.

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The County's counterclaim is meritless and a distraction, and it should be dismissed. To begin, that counterclaim pertains to an issue—the status of the Nation's reservation—that this Court almost certainly will never decide. The Nation will receive the full measure of practical relief it seeks by virtue of this Court's sovereign immunity holding, which the Second Circuit affirmed. That holding has nothing to do with reservation status. All that remains is to enter a permanent injunction. The Court need not decide any issue concerning the Nation's reservation.

In any event, the County's counterclaim fails. *First*, a counterclaim must be dismissed if it does not present a justiciable issue that could stand independently of the plaintiff's claims. The County's counterclaim fails that test. *Second*, even if the County's counterclaim were justiciable, collateral estoppel would bar it. The County's privies raised the same claim in the New York Court of Appeals, and the Court of Appeals rejected it. *Cayuga Indian Nation of N.Y. v. Gould*, 13 N.Y.3d 614, 630 (2010). The County relies on cases holding that District Attorneys are not necessarily in privity with counties. But here, the County's official documents confirm that the County itself funded and controlled the *Gould* litigation. Thus, the County is bound by the result. *Third*, on the merits, the County fails to explain away the mountain of caselaw rejecting its position, including Judge Hurd's exhaustive opinion holding that the Nation's reservation has not been disestablished and the Second Circuit's similar holding as to the Oneida Nation's identically situated reservation.

ARGUMENT

I. THE COUNTY'S MEMORANDUM CONFIRMS THAT ITS COUNTERCLAIM IS DUPLICATIVE AND NONJUSTICIABLE, AND SHOULD BE DISMISSED.

The Nation has explained that a "mirror image" counterclaim is subject to dismissal unless it presents "an independent case or controversy that would survive a dismissal of the plaintiff's" claim. *Maverick Recording Co. v. Chowdhury*, No. CV07-640DGT, 2008 WL

3884350, at *2 (E.D.N.Y. Aug. 19, 2008); Nation Mem. 5. The County concedes that its counterclaim at best "mirrors" the Nation's claims, Mem. 1, and it self-evidently could not survive independently. For example, if the Nation tomorrow withdrew its affirmative claims to be exempt from taxation, the County—having already commenced foreclosure proceedings in state court, Answer ¶ 4—could not pursue a separate, federal-court action seeking a declaration that "the former Nation reservation has been disestablished." Answer at 7. Such an action would not present any justiciable case or controversy, because the County is not injured by the mere existence of the Nation's reservation in the abstract. Nation Mem. 6-7.[1]

The County fails to establish otherwise. Its principal response is to assert that the rule requiring counterclaims to present an independent case or controversy applies only to "intellectual property infringement actions." Mem. 6. But courts regularly apply this rule to *all* duplicative counterclaims, not only intellectual property counterclaims.[2] Nor is the County correct to suggest that its "mirror image" counterclaim (which it labels a claim for "recoupment") is permissible so long as it would not be barred by sovereign immunity. Mem. 6-7. The Article III case-or-controversy requirement is independent of any claim to sovereign immunity and must be satisfied in every case.

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[1] The Nation's affirmative claims present a justiciable case or controversy because the Nation faces a "realistic danger" of "direct injury" from the County's foreclosure action, *American Booksellers Foundation v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003), but the County faces no such danger from the continued existence of the Nation's reservation in the abstract. The only alleged injury the County identifies is that the Nation might raise reservation-related "arguments in the foreclosure proceeding." Mem. 8. The need to respond to arguments in litigation that the County *itself* initiated and controls is insufficient to create a case or controversy that would support an independent declaratory judgment action. *See Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 712 (7th Cir. 2002).

[2] *See, e.g., Five Star Dev. Resort Communities LLC v. iStar RC Paradise Valley LLC*, No. 09 CIV. 2085 LTS, 2012 WL 1003557, at *4 (S.D.N.Y. Mar. 26, 2012) (contract, fraud); *Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 954 F. Supp. 2d 127, 138 (E.D.N.Y. 2013) (First and Fourteenth Amendments); *Allstate Ins. Co. v. Martinez*, No. 3:11CV574 VLB, 2012 WL 1379666, at *4 (D. Conn. Apr. 20, 2012) (insurance coverage).

None of the County's cases holds otherwise. In *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 500 F. Supp. 2d 1143 (E.D. Wis. 2007), for instance, the tribe did not argue that the counterclaim failed to present an independent controversy, and the court allowed the counterclaim to proceed because it was "difficult to determine whether a declaratory judgment counterclaim really is redundant prior to trial." *Id.* at 1150 n.3. There is no such difficulty here, where the County does not even try to explain why its claim is not redundant. The County also cites *Cayuga Indian Nation of New York v. Village of Union Springs*, 293 F. Supp. 2d 183, 195 (N.D.N.Y. 2003), and *Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104, 138 (N.D.N.Y. 2002), but there the Nation moved to dismiss based *only* on sovereign immunity and did not invoke the "independent case or controversy" rule that controls here. Those cases thus do not address, let alone decide, the issue presented here.

II. COLLATERAL ESTOPPEL FORECLOSES THE COUNTY'S COUNTERCLAIM

As the Nation has explained, the New York Court of Appeals has found—in a case involving the County's officials—that the Nation's reservation remains intact. *Gould*, 930 N.Y.3d at 630; Nation Mem. 8-11. There is no merit to either of the County's arguments for why that finding should not preclude its counterclaim under the doctrine of collateral estoppel.

A. The County Funded And Supervised The *Gould* Litigation, And It Is In Privity With The County Officials Who Lost In *Gould*.

The County stakes its privity argument on the proposition that in New York, District Attorneys and sheriffs are not necessarily in privity with counties. That may be true in some cases, but there is no blanket rule to that effect. The County ignores New York's basic test for privity: whether "the connection between the parties [was] such that the interests of the nonparty can be said to have been represented." *Green v. Santa Fe Indus., Inc.*, 70 N.Y.2d 244, 253 (1987). Applying that test, courts have found privity between a variety of government entities

and officials based on shared interests—including the New York Corporation Counsel and the New York District Attorney, as well as other independently elected officials. *See 37-01 31st Ave. Realty Corp. v. Safed*, 861 N.Y.S.2d 561, 565 (Civ. Ct. 2008), *aff'd*, 906 N.Y.S.2d 679 (Sup. Ct. App. Term 2010).[3]

With the County's nonexistent blanket rule set aside, privity will seldom be clearer than it is here—for the public record confirms that the County funded and controlled the *Gould* litigation.[4] That is especially clear from Resolution No. 37-10 of the County's Board, dated February 22, 2010, which recounts that the cigarette raids giving rise to *Gould* were undertaken by "Seneca County . . . Officials"; that as a result of the Nation's declaratory judgment action, "Seneca County was thereby obligated and compelled to retain legal counsel to defend this action and the right[s] of duly elected Law Enforcement Officials"; and that the County's defense turned on whether the "lands are a reservation."[5] Other minutes reflect that the attorneys the County hired in *Gould* were the *same* ones who until recently represented the County here, and that their work was overseen by the County Attorney.[6] Indeed, the County's official website

[3] *See also State v. Seaport Manor A.C.F.*, 19 A.D.3d 609, 609-10 (2d Dep't 2005) (New York's independently elected Attorney General and Department of Health); *In re Stephiana UU.*, 66 A.D.3d 1160, 1163 (3d Dep't 2009) (child-neglect petitioner and County Department of Social Services); *Covanta Niagara, L.P. v. Town of Amherst*, 70 A.D.3d 1440, 1441-42 (4th Dep't 2010) (town and local refuse district).

[4] The minutes described below are "matters of public record and therefore are the types of materials of which a court may take judicial notice," including on a motion to dismiss. *Schubert v. City of Rye*, 775 F. Supp. 2d 689, 695 n.3 (S.D.N.Y. 2011) (collecting cases). The Nation respectfully requests that the Court take such notice. For the Court's convenience, the relevant documents are attached as exhibits to the Supplemental Declaration of Lee Alcott.

[5] Feb. 23, 2010 Meeting Minutes, Seneca Cnty. Bd. of Supervisors, http://www.co.seneca.ny.us/wp-content/uploads/2014/11/Min-2010-02-23-Regular-Meeting-APPROVED.pdf (Ex. A).

[6] *See* Nov. 10, 2009 Meeting Minutes at 2, http://www.co.seneca.ny.us/wp-content/uploads/2014/11/Min-2009-11-10-Regular-Meeting-APPROVED.pdf (recounting report of Indian Affairs Committee regarding "payment of bills for legal fees to Harris Beach, which were approved pending a report from the County Attorney") (Ex. B); May 25, 2010 Meeting Minutes at 1, http://www.co.seneca.ny.us/wp-content/uploads/2014/11/Min-2010-05-25-

describes *Gould* as involving the County *itself*, and specifies that the briefs were "filed on behalf of . . . Seneca Count[y]."[7]

There can be no doubt that the County's interests were "represented in" *Gould*. *Green*, 70 N.Y.2d at 253. If anything, *Gould* and this case are part of a coordinated effort—overseen, funded, and controlled by the County—to boost tax revenues by arguing that the Nation's reservation no longer exists. Collateral estoppel precludes the County from getting a second bite at the apple by relitigating arguments already rejected in litigation it funded and controlled: That doctrine ensures that "once fairly tried, an issue resolved should not be [retried]," *Conn. Gen. Life Ins. Co. of N.Y. v. Cole*, 821 F. Supp. 193, 200 (S.D.N.Y. 1993) (quotation marks omitted) (brackets in original), and it protects judicial "economy . . . , finality, consistency and fairness." *Angstrohm Precision, Inc. v. Vishay Intertech., Inc.*, 567 F. Supp. 537, 539 (E.D.N.Y. 1982).

The New York cases on which the County relies are far off point. Several involve attempts to accord collateral estoppel effect to the dismissal of a criminal indictment in later civil proceedings. *See Saccoccio v. Lange*, 194 A.D.2d 794, 794-95 (2d Dep't 1993) (County Attorney revoked "pistol permit based on the same incident" in dismissed indictment); *Brown v. City of New York*, 60 N.Y.2d 897, 898-99 (1983) (similar). There, unlike here, the District Attorneys were truly independent, not County proxies. As for the County's observation that

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Regular-Meeting.pdf (recounting vote on "payment to Harris Beach LLC of attorney's fees for defense of the County's District Attorney and Sheriff in" *Gould*) (Ex. C); *see also* Dec. 23, 2008 Meeting Minutes at 10, http://www.co.seneca.ny.us/wp-content/uploads/2014/11/Min-122308-Regular-Meeting-Approved.pdf (describing *Gould* litigation as concerning whether "Seneca County" could "ensur[e] taxes were collected on untaxed cigarettes") (Ex. D).

[7] Seneca County, Cayuga Nation Land Claim, http://www.co.seneca.ny.us/cayuga-nation-land-claim/relevant-information/ (last visited Nov. 2, 2015) (describing that the "Counties argued" that the cigarette raids "w[ere] legal"; that "Seneca County. . . handed up sealed indictments" regarding untaxed cigarettes; that injunctions "enjoined the Counties from" action; that "the Counties submitted a motion for leave to appeal to the Court of Appeals"; and that briefs were "filed on behalf of Cayuga and Seneca Counties") (Ex. E).

preclusion should not be applied where it would "interfere with the proper allocation of authority between" different government officials, *Juan C. v. Cortines*, 89 N.Y.2d 659, 669 (1997), that plainly is irrelevant where the County itself funded and oversaw the prior litigation.

B. The County's Other Arguments Are Meritless.

The County's remaining collateral estoppel arguments are meritless. First, the County contends that the reservation question in *Gould* was a "pure question of law to which collateral estoppel does not apply." Mem. 11. Not so. A "pure question of law" is an issue like "the validity of an administrative regulation." *Dep't of Pers. of City of N.Y. v. City Civil Serv. Comm'n*, 94 A.D.2d 5, 7 (1st Dep't 1983). Whether the Nation's reservation has been disestablished is not such a question; it turns on the application of disestablishment principles to the facts and history of the Nation's reservation—as the County's answer testifies. Answer ¶¶ 30-43 (raising issues regarding treaties in 1789, 1795, and 1838; "purchase[s]" and "transfer[s]" by the "state of New York" in 1807 and "[t]hereafter"; and the "subsequent history and treatment of" the Nation's lands). Collateral estoppel applies to such "mixed question[s]." *People v. Plevy*, 67 A.D.2d 591, 595 n.3 (1979). For that reason, courts nationwide—which also recognize the exception for pure legal questions—have accorded preclusive effect to decisions on Indian-lands issues. *See, e.g.*, *Ute Indian Tribe v. Utah*, 935 F. Supp. 1473, 1515 (D. Utah 1996) (Collateral estoppel may "preclude relitigation of an Indian reservation boundary issue by state and local governments where a court has already determined the issue 'in its particular historical and factual setting'").[8]

[8] *See also Canadian St. Regis Band of Mohawk Indians v. New York*, 146 F. Supp. 2d 170, 192 (N.D.N.Y. 2001); *Mashpee Tribe v. Watt*, 707 F.2d 23, 24 (1st Cir. 1983) (per curiam, joined by Breyer, J.); *Bear v. United States*, 810 F.2d 153, 157 (8th Cir. 1987); *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129, 1134 (8th Cir. 1982); *Felter v. Salazar*, 679 F. Supp. 2d 1, 11 (D.D.C. 2010); *United States v. Oregon*, 787 F. Supp. 1557, 1561 (D. Or. 1992),

Second, the County claims that *Gould* did not make "a *finding*" regarding the Nation's reservation but "simply felt bound by federal district court precedent that had held that Congress had not disestablished or diminished the Nation's reservation," which the Court of Appeals followed based on "*stare decisis*." Mem. 12, 14 (emphasis in original). But federal district court precedent "does not bind" the Court of Appeals, *People v. Pignataro*, 22 N.Y.3d 381, 386 n.3 (2013), and that Court nowhere suggested it felt bound in *Gould*. Rather, in holding that the Nation's reservation remained intact as a matter of federal law, *see* Nation Mem. 9-10, the Court of Appeals necessarily examined *and endorsed* the "explicit factual findings" concerning the Nation's reservation that the County concedes supported the federal decisions. Mem. 14.

Third, the County contends that "*Gould* did not 'decide[]' the disestablishment issue," but only addressed "the meaning of 'qualified reservation' under N.Y. Tax Law § 470(16)(a)." Mem. 13. That is simply wrong. The Court of Appeals held that whether the Nation had a "qualified reservation" turned on whether its reservation remained intact under federal law—and then, for this purpose, unequivocally determined that the Nation's reservation still exists as a matter of federal law. Thus, the County's own petition for certiorari in *Gould*, which the County's memorandum ignores, sought review of "[w]hether . . . [the] Court of Appeals properly held . . . that . . . the United States did not subsequently disestablish any purported federal reservation." Pet. for Cert. at i, *Gould v. Cayuga Indian Nation of N.Y.*, 562 U.S. 953 (2010) (No. 10-206), 2010 WL 3256353, at *i (attached as Ex. C to the Decl. of Lee Alcott). The County could hardly have sought review of a question the Court of Appeals did not decide. To be sure, the Court of Appeals' finding that the Nation retained a federal reservation was *subsidiary* to its Tax Law holding—but it was still essential to that holding and therefore has

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aff'd, 43 F.3d 1284 (9th Cir. 1994); *Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768, 777 (1993).

preclusive effect. *E.g.*, *Ginezra Assocs. LLC v. Ifantopoulos*, 70 A.D.3d 427, 429 (1st Dep't 2010) (All "issues of law and questions of fact necessarily decided . . . remain binding"); *see also* Nation Mem. at 9-10.[9]

III. PRECEDENT FORECLOSES THE COUNTY'S COUNTERCLAIM

Finally—and remarkably—the County mounts no substantial argument for how the Nation's reservation could have been disestablished given the precedent that has analyzed that claim in great detail and rejected it. The law, again, is that "only Congress can . . . diminish[] a reservation." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Disestablishment "will not be lightly inferred," moreover, but requires a mandate that is "clear" and "explicit[]," and that "clearly evince[s] an intent" to disestablish. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Applying this standard, the Court of Appeals and "every federal court" to consider the question have found the Nation's reservation remains intact. *Gould*, 14 N.Y.3d at 326.[10] In particular, Judge Hurd has authored a meticulous opinion rejecting the same disestablishment claim brought by the County. *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 317 F.

[9] The County raises a red herring when it argues, yet again, that *Gould* construed "'the language in a statute,'" which is "a question of law." Mem. 14 (quoting *Gould*, 14 N.Y.3d at 646). While certain aspects of *Gould* may have presented pure questions of law, the *Gould* court *also* decided whether the Nation's reservation had been disestablished. All that matters here is that *this* finding is not a pure question of law and forecloses the County's disestablishment counterclaim.

No more helpful for the County is *Gould*'s statement that its decision regarding Tax Law § 670(16)(a) "applies only to th[at] statute" and not necessarily "Indian Law § 6 or Real Property Tax Law § 454." Mem. 13 (quoting *Gould*, 14 N.Y.3d at 646). That caveat merely recognizes that the County would be free to seek to distinguish these latter statutes as a matter of *state* law—for example, by arguing that unlike Tax Law § 670(16)(a), these statutes do not turn on whether the Nation has a federal reservation. What the County cannot relitigate is the argument that the "Nation reservation has been disestablished" under federal law—exactly what its counterclaim nevertheless seeks. Answer at 7.

[10] The County mischaracterizes *Gould* when it asserts that "*Gould* notes that whether the Nation's . . . lands would constitute a 'reservation' for purposes of federal law is an open question." Mem. 14. *Gould* did no more than recognize the trivial point that *all* federal-law questions are in some sense open until directly resolved by the U.S. Supreme Court. *See Gould*, 14 N.Y.3d at 640 (noting that the "Supreme Court has not yet determined whether" the Nation's reservation continues to exist, and that such a determination "would settle the issue").

Supp. 2d 128, 137-44 (N.D.N.Y. 2004) (considering text, legislative history, and context to conclude that the Treaty of Buffalo Creek did not "terminate the Cayugas' reservation"); *see also Cayuga Indian Nation of N.Y. v. Cuomo*, 730 F. Supp. 485, 485 (N.D.N.Y. 1990) (McCurn, J.) (extensive analysis concluding that 1795 and 1807 sales were "invalid under the Nonintercourse Act" and never "ratified by the federal government"). The County does not even attempt to identify any error in the analyses of Judge Hurd or the other courts that have considered this question.

The County's claim is particularly untenable, even at the motion-to-dismiss stage, given the Second Circuit's holding in *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 166 (2d Cir. 2003), *rev'd*, 544 U.S. 197 (2005), that the Oneida Nation's materially identical reservation remains intact. *See Love v. Coughlin*, 714 F.2d 207, 208 (2d Cir. 1983) (dismissal warranted when "controlling precedent clearly forecloses the pleading"). The County alludes to "unique factual issues and legal arguments that apply to the Cayugas," Mem. 15, but it does not specify what those could be. The County's unexplained and conclusory assertions cannot save its claim from dismissal. *See, e.g.*, *Yip v. Bd. of Trustees of State Univ. of N.Y.*, No. 03-CV-00959C, 2004 WL 2202594, at *3 (W.D.N.Y. Sept. 29, 2004), *aff'd*, 150 F. App'x 21 (2d Cir. 2005) ("In order to avoid dismissal," plaintiff must present "more than . . . conclusory allegations" (internal quotation marks omitted)).

The County correctly observes that the Supreme Court vacated the Second Circuit's initial decision in *Oneida Indian Nation*. But the Second Circuit nevertheless has continued to treat its reservation-status holding as "the controlling law of this circuit." *Oneida Indian Nation of N.Y. v. Madison Cnty.*, 665 F.3d 408, 443 (2d Cir. 2011) (quotation marks omitted); *see also Cayuga Indian Nation of N.Y. v. Seneca Cnty., N.Y.*, 890 F. Supp. 2d 240, 245 (W.D.N.Y. 2012)

("Although the Supreme Court vacated the Second Circuit's ruling, it did not do so on the merits, and there is no reason to believe that the Second Circuit would reach a different decision today."), *aff'd*, 761 F.3d 218 (2d Cir. 2014). The County nowhere grapples with this inconvenient fact.

Finally, the County maintains that the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 221 (2005), undermines the Nation's "reservation status." Mem. 18. But as the Second Circuit has held, *Sherrill* is irrelevant to the disestablishment question—because its conclusion regarding sovereign authority (based on considerations of "laches, acquiescence, and impossibility," *id.*) has nothing to do with the test for disestablishment (whether Congress "clearly evince[d]" an intent to disestablish, *Solem*, 465 U.S. at 470). *See Oneida Indian Nation of N.Y. v. Madison Cnty.*, 605 F.3d 149, 157 n.6 (2d Cir. 2010), *vacated as moot*, 562 U.S. 42 (2011); *Madison Cnty.*, 665 F.3d at 443-44 (reaffirming 2010 *Madison County* opinion and holding that "the Oneidas' reservation was not disestablished," and "the Supreme Court's decision in *Sherrill III* did not upset that determination"). The New York Court of Appeals reached the same conclusion in *Gould*. 14 N.Y.3d at 327 ("*City of Sherrill* dealt with whether a tribe could exercise sovereign power over reacquired land . . . —not whether reacquired land is ascribed reservation status."). There is no reason for a different result here.

CONCLUSION

The Nation respectfully requests that its motion to dismiss the counterclaim be granted.

Dated: November 16, 2015

Respectfully submitted,

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