UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS, et al.,	)	5:82-CV-0783 (Lead)
	)	5:82-CV-1114 (Member)
Plaintiffs,	)	5:89-CV-0829 (Member)
v.	)	**PLAINTIFF THE MOHAWKS OF AKWESASNE BY AND THROUGH THE MOHAWK COUNCIL OF AKWESASNE'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**
THE STATE OF NEW YORK, et al.,	)	
Defendants.	)	

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... **ii**

INTRODUCTION **1**

STANDARD OF REVIEW **2**

ARGUMENT **3**

A. Elements of an NIA Claim. 3

B. MCA Is an "Indian Tribe" under the *Montoya* Test 5

1. MCA Satisfies the First NIA Criterion Because NIA Protects the Rights of Indian Tribes That Have Indian Land in the United States. 7

2. The Supreme Court Has Recognized that Canadian Tribes Have a Cause of Action to Enforce the NIA. 11

3. The Supreme Court's Decisions in *Montoya* and *Candelaria* Are Consistent with *Oneida IV*. 13

C. MCA Joins SRMT's Arguments on the Second and Third Elements of the NIA *Prima Facie* Test and the Non-Diminishment of the 1796 Treaty Reservation Boundaries. 16

CONCLUSION **17**

TABLE OF AUTHORITIES

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 2-3

Calder v. Att'y-Gen. of B.C., [1973] S.C.R. 313 (Can.) 7

Canadian St. Regis Band of Mohawk Indians v. New York, 146 F. Supp. 2d 170 (N.D.N.Y. 2001) ..... *passim*

Canadian St. Regis Band of Mohawk Indians v. New York, Nos. 5:82-cv-0783, 5:82-cv-1114, 5:82-cv-0829 (LEK/TWD), 2012 WL 8503274 (N.D.N.Y. Sept. 28, 2012), *adopted in part and rejected in part*, 2013 WL 3992830 (N.D.N.Y. July 23, 2013) 16-17

Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York, 278 F. Supp. 2d 313 (N.D.N.Y. 2003) 4

Cannon v. Univ. of Chi., 441 U.S. 677 (1979) 9

Catawba Indian Tribe v. South Carolina, 718 F.2d 1291 (4th Cir. 1983), *aff'd*, 740 F.2d 305 (4th Cir. 1984) (en banc), *rev'd on other grounds*, 476 U.S. 498 (1986) 4

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 6

Chouteau v. Molony, 57 U.S. (16 How.) 203 (1853) 15

Coppola v. Bear Stearns & Co., 499 F.3d 144 (2d Cir. 2007) 2

Dark Storm Indus., LLC v. Cuomo, 471 F. Supp. 3d 482 (N.D.N.Y. 2020) 6

Dawkins v. Williams, 511 F. Supp. 2d 248 (N.D.N.Y. 2007) 6

Epps v. Andrus, 611 F.2d 915 (1st Cir. 1979) (per curiam) 4

Fletcher v. Atex, Inc., 68 F.3d 1451 (2d Cir. 1995) 3

Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51 (2d Cir. 1994) 3, 4, 5

Joint Tribal Council v. Morton, 528 F.2d 370 (1st Cir. 1975) 5, 7-8

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 3

McCandless v. United States ex rel. Diabo, 25 F.2d 71 (3d Cir. 1928) 6

McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) 16

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 9

Mitchell v. Minister of Nat'l Revenue, [2001] 1 S.C.R. 911 (Can.) 6

Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85 (Can.) 7

Mohegan Tribe v. Connecticut, 638 F.2d 612 (2d Cir. 1980) 3, 7, 9

Montoya v. United States, 180 U.S. 261 (1901) 5, 13, 14, 15

Montoya v. United States, 32 Ct. Cl. 349 (1897) 14

Mtn. States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985) 15

Oneida County, New York v. Oneida Indian Nation of New York State, 470 U.S. 226 (1985) 12

Oneida Indian Nation of N.Y. State v. Oneida County, 434 F. Supp. 527 (N.D.N.Y. 1977).....11

Oneida Indian Nation of N.Y. State v. Oneida County, 719 F.2d 525 (2d Cir. 1983) 12

Oneida Indian Nation of N.Y. v. New York, 194 F. Supp. 2d 104 (N.D.N.Y. 2002) 12-13

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 12

PACA Trust Creditors of Lenny Perry's Produce, Inc. v. Genecco Produce Inc., 913 F.3d 268 (2d Cir. 2019).....2, 3

R. v. Desautel, 2021 SCC 17 (2021).....6

Ray v. McCullough Payne & Haan, LLC, 838 F.3d 1107 (11th Cir. 2016) 8

Republic of Cape Verde v. A & A Partners, 89 F.R.D. 14 (S.D.N.Y. 1980) 6

Schaghticoke Tribal Nation v. Kent Sch. Corp., 595 F. App'x 32 (2d Cir. 2014)..... 4-5

Scott v. Harris, 550 U.S. 372 (2007) 3

Suñol v. Hepburn, 1 Cal. 254 (1850) 15

United States v. Candelaria, 271 U.S. 432 (1926) 5, 15-16

United States v. Joseph, 94 U.S. 614 (1876) 15

United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), *remanded on other grounds*, 653 F.2d 277 (6th Cir. 1981).....10

United States v. Pico, 72 U.S. (5 Wall.) 536 (1866).....15

United States v. Sandoval, 231 U.S. 28 (1913).....9, 15

United States ex rel. Diabo v. McCandless, 18 F.2d 282 (E.D. Pa. 1927) 10

Wagner v. Chiari & Ilecki, LLP, 973 F.3d 154 (2d Cir. 2020).....2

RULES

Federal Rule of Civil Procedure 56(a) 1, 2

Local Rule 7.1 1

STATUTES AND REGULATIONS

8 U.S.C. § 1359.....10

25 U.S.C. § 177.....4

42 U.S.C. § 1983.....3

86 Fed. Reg. 7554 (Jan. 29, 2021) 11

Act of Feb. 27, 1851, ch. 14, 9 Stat. 574 15
Act of July 22, 1790, ch. 33, 1 Stat. 137.....3
Act of June 30, 1834, ch. 161, 4 Stat.729 4
Act of Mar. 3, 1891, ch. 538, 26 Stat. 851..... 13-14
Act of Mar. 30, 1802, ch. 13, 2 Stat. 139.....4

TREATIES

Jay's Treaty, U.S.-U.K., 8 Stat. 116, Nov. 19, 1794.....9
Treaty of Ghent, U.S.-U.K., art. 9, 8 Stat. 218, Dec. 24, 1814.....10
Treaty with the Seven Nations of Canada, May 31, 1796, 7 Stat. 55 1

OTHER AUTHORITIES

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 8
First Nation Detail: Mohawks of Akwesasne, Indigenous & N. Affairs, Can. (Apr. 9, 2019), https://fnp-ppn.aadnc-aandc.gc.ca/FNP/Main/Search/FNMain.aspx?BAND_NUMBER=159&lang=eng 6
First Nation Detail: Oneida Nation of the Thames, Indigenous & N. Affairs, Can. (Apr. 9, 2019), https://fnp-ppn.aadnc-aandc.gc.ca/fnp/Main/Search/FNMain.aspx?BAND_NUMBER=169&lang=eng.....11

Pursuant to Federal Rule of Civil Procedure 56(a) and Local Rule 7.1, Plaintiff the Mohawks of Akwesasne, by and through the Mohawk Council of Akwesasne (hereinafter "MCA"), hereby respectfully requests that this Court grant partial summary judgment in its favor by deciding that: 1) MCA meets the first three elements of the four-part legal test used to determine whether a plaintiff can establish a *prima facie* case under the Non-intercourse Act, and 2) Congress has never disestablished or diminished the boundaries of the 1796 Treaty Reservation established for the St. Regis Indians. That is warranted for the reasons that follow.

INTRODUCTION

In 1796, the United States signed a treaty with the Seven Nations of Canada. *See* Treaty with the Seven Nations of Canada, May 31, 1796, 7 Stat. 55 ("1796 Treaty"). Among those Seven Nations were Mohawk Indians who lived, hunted, and fished at Akwesasne, which was in and around the Village of St. Regis near the St. Lawrence River. Under the Treaty, which was approved by a U.S. Commissioner and ratified by the Senate, the Seven Nations agreed to cede lands to the State of New York ("State"), while reserving certain lands in New York "to be applied to the use of the Indians of the village of St. Regis." Despite this treaty reservation, and the terms of the federal Non-intercourse Act ("NIA") forbidding sales of Indian lands without the approval of the United States, the State purported to purchase portions of that reservation from the St. Regis Indians in the 19th century.[1] The subject of the live claims in this suit are the State's illegal purchases of land within one of the portions of that Reservation—the "Hogansburg Triangle." The State purported to buy these lands from the St. Regis Indians in two so-called "treaties" in 1824 and 1825 and another purported land purchase in 1824. Material Facts ¶¶ 9-11; ECF No. 13 ¶¶ 53-

[1] The relevant facts of the treaty and subsequent illegal purchases are provided in more detail in the St. Regis Mohawk Tribe ("SRMT")'s memorandum of law in support of its motion for partial summary judgment. ECF No. 768-1. MCA adopts SRMT's recitation of background facts here.

55 (Am. Compl. for a Decl'y J., Inj. Relief & Damages). MCA, as an Indian tribe, Material Fact 1, which is a successor-in-interest to the Indians of St. Regis, has an undivided ownership interest in the Hogansburg Triangle and has filed suit to vindicate its rights.

In this motion for partial summary judgment, MCA asks the Court to decide in its favor several legal questions that are dispositive to its ability to obtain relief from the Defendants. First, MCA asks the Court to determine that MCA meets three of the four criteria for establishing a *prima facie* case to the lands in the Hogansburg Triangle under the NIA: that 1) it is an Indian tribe, 2) suing to adjudicate title to tribal land, and 3) the United States never consented to the alienation of that tribal land. Second, MCA asks the Court to enter judgment in its favor on the State Defendants' Counterclaims I and II, *see* ECF No. 315 ¶¶ 83-97 (N.Y. State Defs. Am. Answer to Am. Compl. of Canadian St. Regis Band of Mohawk Indians (82-CV-783)), and Municipal Defendants' First Counterclaim, *see* ECF No. 314 ¶¶ 105-106 (Mun. Defs. Am. Answer to Pl. Am. Compl.), because the boundaries of the Reservation established for St. Regis Indians in the 1796 Treaty were never disestablished or diminished.

STANDARD OF REVIEW

Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *PACA Trust Creditors of Lenny Perry's Produce, Inc. v. Genecco Produce Inc.*, 913 F.3d 268, 275 (2d Cir. 2019) (quoting Fed. R. Civ. P. 56(a)). "Material facts are those which might affect the outcome of the suit under the governing law, and a dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Wagner v. Chiari & Ilecki, LLP*, 973 F.3d 154, 164 (2d Cir. 2020) (quoting *Coppola v. Bear Stearns & Co.*, 499 F.3d 144, 148 (2d Cir. 2007) (internal quotation marks omitted)); *see also Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 252 (1986). "[A] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Genecco Produce Inc.*, 913 F.3d at 275 (quoting *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995)). The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)); *see Scott v. Harris*, 550 U.S. 372, 380 (2007).

ARGUMENT

A. Elements of an NIA Claim.

In Case No. 5:82-cv-0783, MCA makes two claims for relief against Defendants for the illegal purchase of lands in the Hogansburg Triangle. The first is a claim, brought under MCA's federal common law cause of action under the NIA, to recover tribal lands that were never validly purchased from the St. Regis Indians. The second is a claim that local and state officials are violating MCA's rights under 42 U.S.C. § 1983 by interfering with MCA's rights of ownership and occupation protected by federal law. Only the NIA claim is at issue in this motion.

Congress passed the first version of the NIA in the Act of July 22, 1790, ch. 33, 1 Stat. 137 ("1790 NIA"). Section 4 of the 1790 NIA provided that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." 1 Stat. at 138. Congress has since subsequently re-enacted the NIA with minor modifications. *See Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 57 (2d Cir. 1994) (citing *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 617-18 (2d Cir. 1980)).

In 1802, Congress enacted an amended version of the NIA that was in effect until 1834, during which time New York purported to purchase the Hogansburg Triangle from the St. Regis

Indians. Act of Mar. 30, 1802, ch. 13, 2 Stat. 139. Section 12 of the 1802 NIA provided that "no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution." The current version of the NIA, derived from the version enacted in 1834, *see* Act of June 30, 1834, ch. 161, § 12, 4 Stat.729, 730, provides that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177.

> To establish a *prima facie* case based on a violation of the NIA,
>
> > a plaintiff must show that (1) it is an Indian tribe, (2) the land is tribal land, (3) the United States has never consented to or approved the alienation of this tribal land, and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned.

Golden Hill, 39 F.3d at 56 (citing *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291, 1295 (4th Cir. 1983), *aff'd*, 740 F.2d 305 (4th Cir. 1984) (en banc), *rev'd on other grounds*, 476 U.S. 498 (1986); *Epps v. Andrus*, 611 F.2d 915, 917 (1st Cir. 1979) (per curiam)).[2] To constitute an "Indian tribe," a tribe must show it is "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Schaghticoke Tribal Nation v. Kent Sch. Corp.*, 595 F. App'x 32, 34 (2d Cir.

[2] This analysis relates to both standing to bring a claim and the merits of the claim itself. *Id.* MCA does not seek summary judgment on its standing as a descendant of the Village of St. Regis to bring its NIA claim, nor does it seek to resolve the fourth criterion of the *prima face* case test as applied to it, as the resolution of those issues will require further factual development. *See Canadian St. Regis Band of Mohawk Indians v. New York* ("*St. Regis IV*"), 146 F. Supp. 2d 170, 184 (N.D.N.Y. 2001); *Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York* ("*St. Regis VI*"), 278 F. Supp. 2d 313, 329 (N.D.N.Y. 2003).

2014); *Golden Hill*, 39 F.3d at 59 (both quoting *United States v. Candelaria*, 271 U.S. 432, 442 (1926) (quoting *Montoya v. United States*, 180 U.S. 261, 266 (1901))).[3] For ease of reference, we refer to this standard as the "*Montoya* test."

B. MCA Is an "Indian Tribe" under the *Montoya* Test

MCA is an "Indian tribe" under the *Montoya* test, and therefore its claim for the illegal taking of the Hogansburg Triangle from the St. Regis Indians satisfies the first criterion of the *prima facie* test. There can be no genuine dispute that MCA is a body of Indians, united under one government, which inhabits a particular, well-defined territory. *See Joint Tribal Council v. Morton*, 528 F.2d 370, 378 (1st Cir. 1975) (finding tribe passed the *Montoya* test where "[n]o one in this proceeding has challenged the Tribe's identity as a tribe in the ordinary sense"). Defendants have either admitted MCA's status as an Indian tribe in their pleadings, *see* Material Fact ¶ 1; ECF No. 13 ¶ 4; ECF No. 314 ¶ 4, or have in their briefs relied on or adopted by reference statements acknowledging MCA's status as an Indian tribe located in Canada.[4] And MCA's status as an Indian tribe is also established by judicially-noticeable information from the Government of

[3] The Second Circuit in *Schagticoke* reasoned that, when dealing with an unrecognized Indian tribe within the United States, a district court making this determination should defer to the Department of the Interior's findings of fact, made during the federal regulatory recognition process, when necessary to avoid an "independent, complex evidentiary hearing" on the non-recognized tribe's tribal status. 595 F. App'x at 34-35. The federal regulatory recognition process is not relevant here because MCA has not and will not initiate a proceeding under Interior's recognition regulations, *see St. Regis IV*, 146 F. Supp. 2d at 183 n.10 (quoting *Golden Hill*, 39 F.3d at 60) ("[w]e need not decide whether deference would be appropriate if no recognition application were pending"), and Defendants have either admitted or cannot genuinely dispute that MCA is an "Indian tribe," which eliminates any need for factual development on that question.

[4] *See, e.g.*, ECF No. 135 at 9, 12-13 (Defs. Suppl. Mem. of Law at 4, 7-8); ECF No. 137 at 20 (Suppl. Mem. of Law on Behalf of State Defs. In Supp. of Their Mot. to Dismiss, Point III); ECF No. 165 at 16 (Mun. Defs. Reply Mem. of Law at 10); ECF No. 177 at 31 (State Defs. Mem. of Law in Supp. of Their Mot. to Dismiss Compls. of Tribal Pls. & U.S. at 28); ECF No. 184 at 24-25, 36-37 (Mun. Defs. Mem. of Law in Supp. of Mot. to Dismiss Pls. Compls. at 12-13, 24-25).

Canada, about which the Defendants cannot establish a genuine dispute.[5] *See Dawkins v. Williams*, 511 F. Supp. 2d 248, 270-71 n.53 (N.D.N.Y. 2007) (quoting *Republic of Cape Verde v. A & A Partners*, 89 F.R.D. 14, 23 (S.D.N.Y. 1980)) ("A party may not deny knowledge or information of a matter of public record or general public notice."); *see also Dark Storm Indus., LLC v. Cuomo*, 471 F. Supp. 3d 482, 490 & n.4, 494 (N.D.N.Y. 2020) (judicially noticing dispositive facts provided on a government website at summary judgment stage).

MCA's status as an Indian tribe is confirmed by its treatment as a tribe by Canada. *See McCandless v. United States ex rel. Diabo*, 25 F.2d 71, 73 (3d Cir. 1928) ("Both Great Britain and the United States have resident in them the Indians of the Six Nations, both have reservations where members of this tribe live and toward them both countries hold the guardian relation pointed out by Chief Justice Marshall in [*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)]."). Canadian law acknowledges the existence of Indian tribes and their rights on terms that parallel United States law. *See, e.g., R. v. Desautel*, 2021 SCC 17, ¶ 29 (2021) (quoting *Mitchell v. Minister of Nat'l Revenue*, [2001] 1 S.C.R. 911, 926-27 (Can.)) ("Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures . . . [T]he Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown. With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as 'fiduciary' . . . .") (alteration and

[5] *See* First Nation Detail: Mohawks of Akwesasne, Indigenous & N. Affairs, Can. (Apr. 9, 2019), https://fnp-ppn.aadnc-aandc.gc.ca/FNP/Main/Search/FNMain.aspx?BAND_NUMBER=159&lang=eng (entry in Canadian government directory of Canada-recognized tribes, listing locations of MCA's reserves, MCA's government officials, schedules of funding provided to MCA by the Canadian federal government, MCA's population, and tribal financial information required by Canadian federal law).

first ellipsis in opinion); *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, 129-30 (Can.) (La Forest, J., concurring) (Canadian "legislative restraints on the alienability of Indian lands are but the continuation of a policy that has shaped dealings between the Indians and the European settlers since the time of the Royal Proclamation of 1763" and "sections of the Indian Act relating to the inalienability of Indian lands seek to give effect to this protection by interposing the Crown between the Indians and the market forces which, if left unchecked, had the potential to erode Indian ownership of these reserve lands"); *Calder v. Att'y-Gen. of B.C.*, [1973] S.C.R. 313, 320-21, 339-44 (Can.) (relying on U.S. Supreme Court decisions to determine nature of Canadian aboriginal title).[6] Thus, MCA is an "Indian tribe" as that term is used in the *Montoya* test.

1. MCA Satisfies the First NIA Criterion Because NIA Protects the Rights of Indian Tribes That Have Indian Land in the United States.

Municipal Defendants have, in the past, nevertheless argued that MCA cannot establish a *prima face* case under the NIA because it is not located within the United States. *See* ECF No. 184 at 36 (incorporating *id.* at 19-28) (Mun. Defs. Mem. of Law in Supp. of Mot. to Dismiss Pls. Compls. at 24 (incorporating *id.* at 7-16)). That proposition is defeated by the text of the NIA itself and the Senate's decision to ratify the 1796 Treaty. The NIA protects "Indian *land* within the United States." *St. Regis IV*, 146 F. Supp. 2d at 183 n.11 (quoting *Mohegan Tribe*, 638 F.2d at 619). As the First Circuit explained in *Joint Tribal Council*, Congress passed the NIA to protect all Indian lands from alienation:

> Congress is not prevented from legislating as to tribes generally; and this appears to be what it has done in successive versions of the Nonintercourse Act. There is nothing in the Act to suggest that 'tribe' is to be read to exclude a bona fide tribe not otherwise federally recognized. . . . [W]e find an inclusive reading consonant with the policy and purpose of the Act. That policy has been said to be to protect the Indian tribes' right of occupancy . . . and the purpose to prevent the unfair,

[6] For the Court's convenience, these Canadian Supreme Court decisions are attached as Exhibits 1-4.

> improvident, or improper disposition of Indian lands. Since Indian lands have, historically, been of great concern to Congress, we have no difficult in concluding that Congress intended to exercise its power fully.

528 F.2d at 377 (citations omitted). In other words, when Congress said in the 1802 NIA that "no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from *any* Indian, or nation, or tribe of Indians, within the bounds of the United States" would be valid without federal approval, (emphasis added), it meant just that: the NIA governs the sale of lands by *any* Indian, or nation, or tribe of Indians.

As this Court has acknowledged, the phrase "within the United States,"—found in the NIA in effect from 1802 to 1834, but not the current version—describes the location of the land being purchased, granted, leased, or conveyed, not the location of Indian, or nation, or tribe of Indians from whom the conveyance is sought. *St. Regis IV*, 146 F. Supp. 2d at 183 n.11. That makes sense under the rules of grammar. The subjects of this sentence of the NIA are "*purchase, grant, lease*, or other *conveyance* of lands, or of any title or claim thereto . . . ." (emphasis added). These nouns are modified by two prepositional phrases, each acting as an adjectival phrase and each set off from the other by a comma: "*from* any Indian, or nation, or tribe of Indians"; and "*within* the bounds of the United States." (emphasis added). Plainly, then, the phrase "within the bounds of the United States" describes which purchases of Indian land are subject to the NIA, not which tribes are subject to it. *See Ray v. McCullough Payne & Haan, LLC*, 838 F.3d 1107, 1111-12 (11th Cir. 2016) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152-53 (2012)).

If more were needed, this plain meaning also makes sense in light of the context in which the 1802 NIA was enacted—in particular, the Senate's prior ratification of the 1796 Treaty. The Second Circuit explained in *Mohegan* that, in light of the 1796 Treaty with the Seven Nations *of*

Canada, the contention that the NIA is limited to Indian tribes within the United States "is simply historically inaccurate, since the United States in fact entered into treaties with tribes under the jurisdiction of foreign countries respecting land within United States borders, and these treaties complied with the requirements of the federal statutory restraints against alienation." 638 F.2d at 619 (quoted in *St. Regis IV*, 146 F. Supp. 2d at 183 n.11).[7] That is manifestly correct both from the terms of the 1796 Treaty itself and from the context in which the 1796 Treaty was ratified.

The term "Seven Nations of Canada" in the 1796 Treaty would not have been lost on the Senate, which ratified the 1796 Treaty against the backdrop of its then-recent ratification of Jay's Treaty, U.S.-U.K., Nov. 19, 1794, 8 Stat. 116. Jay's Treaty recognized the existence and right of "Indians dwelling on either side of the . . . boundary line" between the United States and British North America to travel and trade across the border. *Id.* art. III. This shows the Senate was aware that Indian tribes, like the Seven Nations and the St. Regis specifically mentioned in the 1796 Treaty, existed in Canada and had determined that the United States could acknowledge and protect the legal rights of Indians on both sides of the boundary. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation."); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens know the law . . . ."). Congress and the United Kingdom subsequently reaffirmed this treaty right when they restored the rights of all belligerent Indian tribes after the War of 1812, without limiting the restored rights to Indian tribes

[7] If there were any question about the NIA's plain meaning as described by the Second Circuit and this Court—and there is none—the Court should defer to Congress's determination that Indian tribes in Canada could by treaty hold land in the United States, protected under principles of federal law. *See United States v. Sandoval*, 231 U.S. 28, 46-47 (1913) ("in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts").

located within their respective boundaries. *See* Treaty of Ghent, U.S.-U.K., art. 9, 8 Stat. 218, Dec. 24, 1814 (both signatories "restore to such [T]ribes or [N]ations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven previous to such hostilities"); *see United States v. Michigan*, 471 F. Supp. 192, 206, 255 (W.D. Mich. 1979), *remanded on other grounds*, 653 F.2d 277, 278 (6th Cir. 1981).

The upshot of this history as to the Seven Nations' rights was explained by the Eastern District of Pennsylvania in the *Diabo* case:

> At the time the boundary line between the United States and the now Dominion of Canada was fixed and located by agreement with Great Britain, *the line was run in large part through what may be termed Indian territory in the sense of lands, the right of occupancy of which was recognized by both the contracting parties to be in the Indians. The boundary line to establish the respective territory of the United States and of Great Britain was clearly not intended to, and just as clearly did not, affect the Indians. It made no division of their country*. The Jay Treaty of 1794 recognized this fact in the provision that the Indians residing on either side of the line, which as between the United States and Great Britain was established as a boundary line, should be unaffected in their right to pass this line at will. It has been argued to us pro and con that this treaty was abrogated by the War of 1912 [sic]. We do not see that the rights of the Indians are in any way affected by the treaty, whether now existent or not. The reference to them was merely the recognition of their right, which was wholly unaffected by the treaty, *except that the contracting parties agreed with each other that each would recognize it*. The right of the Indians remained, whether the agreement continued or was ended.

United States ex rel. Diabo v. McCandless, 18 F.2d 282, 282 (E.D. Pa. 1927), *aff'd* 25 F.2d 71 (3d Cir. 1928) (emphasis added). And those rights remain in effect today, both under the treaties and pursuant to federal laws recognizing Canadian Indians' rights held under those treaties which establish that Indians in Canada are, in fact, Indians. *See* 8 U.S.C. § 1359 ("Nothing in this subchapter shall be construed to affect the right of *American Indians born in Canada* to pass the borders of the United States . . . .") (emphasis added).

For these reasons, the NIA protects the Indian tribes' rights to Indian lands in the United States, even if the tribes are located partially or entirely in Canada. That makes MCA an "Indian tribe" under the first criteria of the *prima facie* test.

2. The Supreme Court Has Recognized that Canadian Tribes Have a Cause of Action to Enforce the NIA.

That MCA is an "Indian tribe" under the NIA is further shown by the rulings of this Court and the United States Supreme Court on the Oneida tribes' land claims. In those cases, the courts concluded that an Indian tribe in Canada had a right of action under the NIA to prosecute an Indian land claims case in federal court in the United States. In the Oneida land claim "test case," three Oneida tribal plaintiffs brought claims against Oneida County, New York, arguing that the State had illegally purchased the Oneida Nation's historic lands in New York in violation of the NIA. *Oneida Indian Nation of N.Y. State v. Oneida County*, 434 F. Supp. 527, 532 (N.D.N.Y. 1977). Those plaintiffs were the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin—both of which are federally-recognized Indian tribes, *see* 86 Fed. Reg. 7554, 7556 (Jan. 29, 2021)—and the Thames Band Council, "a band of Oneidas from Ontario, Canada," 434 F. Supp. at 532, which is an Indian tribe recognized by Canada.[8]

The District Court, applying the four-part test for a *prima facie* NIA claim, found that all three plaintiffs were "Indian tribes" under the first factor, which had been shown in that particular case because they "are the direct descendants of the Oneida Indian Nation which inhabited the area in question before and after the passage of the first Nonintercourse Act." *Id.* at 538. On appeal, the defendant-appellants argued that all three Tribes lacked a cause of action under the NIA, but

[8] *See* First Nation Detail: Oneida Nation of the Thames, Indigenous & N. Affairs, Can. (Apr. 9, 2019), https://fnp-ppn.aadnc-aandc.gc.ca/fnp/Main/Search/FNMain.aspx?BAND_NUMBER=169&lang=eng.

the Second Circuit affirmed the District Court's ruling that the Oneida tribes could sue under the NIA. *Oneida Indian Nation of N.Y. State v. Oneida County*, 719 F.2d 525 (2d Cir. 1983). The Supreme Court then concluded, in *Oneida County, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985) ("*Oneida IV*"), that the three Tribes had a "firmly established" common law right to sue. *Id.* at 233.

The Supreme Court expressly noted that the Thames Band council were one of the plaintiffs who initiated the suit. *Id.* at 229. It went on to conclude that "the Oneidas can maintain this action for violation of their possessory rights based on federal common law." *Id.* at 236. The Court's conclusion relied on its review of federal court decisions in which Indian tribes sought relief from defendants who interfered with the tribes' right to lands in the United States. *Id.* at 233-36. The existence of the federal common law cause of action was based on "well-defined principles [that] had been established governing the nature of a tribe's interest in its property and how those interests could be conveyed," *id.* at 233, and derived from the Indians' "*federal* right to the lands at issue in this case," *id.* at 235 (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 671 (1974)). *Oneida IV*, thereby establishes that Indian tribes can bring suit under the NIA to vindicate their rights in land within the United States, without limitation to where those tribes might reside at the time they file suit.

The District Court revisited the treatment of the Thames Band in a later Oneida land claims case, *Oneida Indian Nation of N.Y. v. New York* ("*Oneida Reservation*"), 194 F. Supp. 2d 104 (N.D.N.Y. 2002), in which it affirmed that all three Indian tribes could bring an NIA action. In that case, the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin, and the Oneida of the Thames had all brought suit against the State and Oneida County for the illegal purchase of Oneida Reservation land. *Id.* at 111. On motions to dismiss, the State asserted, *inter*

alia, that the Thames Band's NIA claim was subject to a statute of limitations, despite the fact that the Supreme Court in *Oneida IV* had found statutes of limitations inapplicable to NIA claims, because the Thames Band "does not have a trust relationship with the United States." *Id.* at 128. The District Court was unconvinced that the distinction mattered: "[t]he Thames Oneida was also a plaintiff in the test case, and the Supreme Court surely would have specified that its ruling was inapplicable to the Thames Oneida if that were the case." *Id.*

This Court's and the Supreme Court's rulings in the *Oneida* cases establish that the location of an Indian tribe in Canada does not foreclose it from bringing suit as an "Indian tribe" under the NIA. The District Court, applying the four-part NIA *prima facie* test, found that the Thames Band was an "Indian tribe," and on appeal the Supreme Court affirmed on the basis that all three plaintiffs were Indian tribes with an established common-law right to sue. Had the Court's reasoning been limited to Indian tribes in the United States, it "surely would have specified that its ruling was inapplicable to the Thames Oneida." *See id.* at 128. But it did not. *Oneida IV* therefore establishes that MCA's status as a Canadian-recognized tribe has no impact on its ability to maintain, as an "Indian tribe," a *prima face* NIA claim against Defendants.

3. The Supreme Court's Decisions in *Montoya* and *Candelaria* Are Consistent with *Oneida IV*.

The Supreme Court's decision in *Oneida IV* is fully consistent with the cases on which *Schaghticoke* and *Golden Hill* relied on for the *Montoya* test—*Candelaria* and the eponymous *Montoya*. (Although, if there were any question on that score, it would be resolved by the Supreme Court's more recent decision.)

In *Montoya*, the Court interpreted a federal law providing that the United States courts had jurisdiction over claims for the taking or destruction of property by "Indians belonging to any band, tribe, or nation in amity with the United States . . . ." 180 U.S. at 264 (quoting Act of Mar.

3, 1891, ch. 538, 26 Stat. 851). The claims in that case arose from the theft of livestock in New Mexico by a group of Indians called "Victoria's band," which included Indians from Mexico, who had crossed and re-crossed the international border before settling in Mexico. *See id.* at 261 n.†, 269; *Montoya v. United States*, 32 Ct. Cl. 349, 351-52 (1897). The question before the *Montoya* Court was whether the claimant had proved that Victoria's band was a group of "individual marauders" who themselves were members of a larger "band, tribe, or nation" that was in "amity" with the United States, rather than an independent "band, tribe, or nation" in a state of war with the United States. 180 U.S. at 264-65.

In order to define these terms, the Court discussed of the nature of "the North American Indians." *See id.* at 265. The Court concluded that a "nation" meant "a large tribe or group of affiliated tribes possessing a common government, language, or racial origin and acting, for the time being, in concert." *Id.* The Court then explained that "[b]y a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory . . . ." *Id.* at 266. And by band, the Court said, it meant "a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design." *Id.* at 266. The Court made no indication that it intended to limit these definitions to groups of Indians located only within the United States, although the inclusion of Mexican Indians in Victoria's band and its location in Mexico gave the Court an obvious occasion and reason to do so—and its use of the term "North American Indians" makes clear no such limitation was assumed or implied. In fact, the Court concluded that this group of Indians in Mexico were "a band" which had separated off from other tribes and formed its own polity that was not "in amity" with the United States. *Id.* at 268-70.

Montoya forecloses any assertion that MCA is not an Indian tribe simply because it is located in Canada.

In *Candelaria*, the Supreme Court relied on *Montoya* to determine whether the Pueblos of New Mexico were "Indian tribes" under the NIA. 271 U.S. at 441 (discussing Act of Feb. 27, 1851, ch. 14, 9 Stat. 574, 587 ("1851 NIA")). The view of some non-Indians at the time, expressed by the Court an earlier but since abrogated decision, was that the Pueblo Indians were distinct from other Indians because they lived in one location as opposed to being "nomadic" and held fee title to their lands. *See United States v. Joseph*, 94 U.S. 614 (1876), *recognized as disapproved, Mtn. States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 242-43 (1985). Although the Supreme Court had since rejected that notion in another context, *see Sandoval*, 231 U.S. at 39, the question in *Candelaria* was whether these supposed distinctions prevented the Pueblos from being "Indian tribes" under the NIA.

The *Candelaria* Court determined that, when Congress referred to "Indian tribes" in the NIA, it referred to "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined, territory." 271 U.S. at 442 (quoting *Montoya*, 180 U.S. at 266). That included the Pueblos, who were undoubtedly Indians. The Indian character of the Pueblos was reinforced by the history of their treatment by Spain and Mexico, which had "extended a special guardianship" over the Pueblos, similar to the federal trust relationship, making it impossible for the Pueblos to alienate their lands without the approval of the Spanish or Mexican governments. *Id.* (citing *Chouteau v. Molony*, 57 U.S. (16 How.) 203, 237 (1853); *United States v. Pico*, 72 U.S. (5 Wall.) 536, 540 (1866); *Suñol v. Hepburn*, 1 Cal. 254, 274 (1850)). So, Congress's apparent intention in passing the 1851 NIA was to "continu[e] a policy which prior governments had deemed essential to the protection of

such Indians." *Id.* *Candelaria*, then, articulated a standard for tribal status that relies on the nature of the tribe, not its geographic location. The Pueblos had been "Indian tribes" no matter which empire claimed authority over them or exercised a trust responsibility toward them and retained that essential quality after the United States annexed the Mexican Cession and enacted the 1851 NIA. The *Candelaria* Court also emphasized the similarities between the rights and powers of an "Indian tribe" to hold and alienate land under federal law and the laws of other settler nations in North America. Both conclusions show that MCA is an "Indian tribe" under the *Montoya* test.

For all these reasons, MCA is entitled to a judgment that it is an "Indian tribe" under criterion one of the four-part *prima facie* test.

C. MCA Joins SRMT's Arguments on the Second and Third Elements of the NIA *Prima Facie* Test and the Non-Diminishment of the 1796 Treaty Reservation Boundaries.

MCA joins SRMT's arguments, presented in its memorandum of law in support of its motion for partial summary judgment, ECF No. 768-1, which show that the Plaintiffs have met the second and third criteria of the *prima facie* case under the NIA because the 1796 Treaty recognized St. Regis Indian title in the boundaries of the Reservation established by the treaty and the United States never approved of the alienation of those lands from the St. Regis Indians. For that reason, the Court should enter summary judgment in favor of MCA on those elements of the *prima face* test for MCA's claims to the Hogansburg Triangle. MCA also joins SRMT's arguments that the 1796 Treaty Reservation boundaries were never diminished by Congress under the rule described in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). For that reason, the Court should enter summary judgment in favor of MCA on the State Defendants' Counterclaims I and II, *see* ECF No. 315 ¶¶ 83-97, and Municipal Defendants' First Counterclaim, ECF No. 314 ¶¶ 105-06.[9]

[9] The Court concluded in *St. Regis IV* that SRMT's and the United States' claims regarding the 144 acres in the Hogansburg Triangle purportedly conveyed to New York State on December 14, 1824 are barred by *res judicata*. *See* 146 F. Supp. at 191-92; *Canadian St. Regis Band of Mohawk*

CONCLUSION

For the foregoing reasons, MCA respectfully requests that the Court enter summary judgment on its favor on the first three elements of the NIA *prima facie* test and enter summary judgment that the State's Counterclaims I and II and Municipal Defendants' First Counterclaim fail as a matter of law.

Respectfully submitted,

Dated: May 17, 2021

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Indians v. New York, Nos. 5:82-cv-0783, 5:82-cv-1114, 5:82-cv-0829 (LEK/TWD), 2012 WL 8503274, at *19 n.35 (N.D.N.Y. Sept. 28, 2012) ("*St. Regis XVI*"), *accepted in part and rejected in part*, 2013 WL 3992830 (N.D.N.Y. July 23, 2013) (as corrected and clarified) ("*St. Regis XVII*"). However, MCA and the People of the Longhouse at Akwesasne still have live claims for the 144-acre parcel. *See St. Regis IV*, 146 F. Supp. at 190; *St. Regis XVI*, 2012 WL 8503274, at *19 n.35. SRMT's arguments for a NIA *prima facie* case and undiminished reservation boundaries as to the other portions of the Hogansburg Triangle apply with equal force to the 144-acre parcel, which no one disputes is within the boundaries of the 1796 Treaty Reservation that was reserved for the St. Regis Indians. *See* ECF No. 13, Ex. A; ECF No. 477-9 at 2 (Ex. 7 to Mun. Defs. Mot. for J. on Pleadings). Therefore, MCA is entitled to summary judgment on these issues as to its claims for the entire Hogansburg Triangle.

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2021, I electronically filed the above and foregoing document and attachments with the Clerk of Court via the ECF System for filing.

/s/ Frank S. Holleman
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