# No. 07-2430-cv

**07-2548-cv XAP & 07-2550-cv XAP**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ONEIDA INDIAN NATION OF NEW YORK, also known as Oneida Indians of New York, also known as Oneida Indian Nation of New York, Oneida Indian Nation of Wisconsin, also known as Oneida Tribe of Indians of Wisconsin, Oneida of the Thames,
Plaintiffs-Appellees, Cross-Appellants,

UNITED STATES OF AMERICA,
Intervenor-Plaintiff-Appellee-Cross-Appellants

NEW YORK BROTHERTOWN INDIAN NATION,
by Maurice "Storm" Champlain, Vice Chief,
Intervenor-Plaintiff-Appellee,

v.

COUNTY OF ONEIDA, COUNTY OF MADISON,
Defendants-Cross-Appellees,

STATE OF NEW YORK,
Defendant-Appellant-Cross-Appellee.

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

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**BRIEF OF APPELLEE CROSS-APPELLANT UNITED STATES**


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## STATEMENT OF JURISDICTION

On September 3, 1998, the United States filed a Complaint in Intervention alleging jurisdiction under 28 U.S.C. § 1345. JA126; *see also* JA435. On May 31, 2007, the district court granted the defendants' motion for summary judgment in part and *sua sponte* certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). SPA31-32. Judge Lawrence E. Kahn's Memorandum-Decision and Order is published as *Oneida Indian Nation of New York v. New York*, 500 F. Supp. 2d 128 (N.D.N.Y. 2007). On July 13, 2007, this Court granted the parties' cross petitions for permission to appeal the district court's interlocutory order. JA807. This Court has jurisdiction under 28 U.S.C. § 1292(b). JA807.

## STATEMENT OF THE ISSUES

In this suit, the Oneida Indian Nation of New York, the Oneida Tribe of Indians of Wisconsin, and the Oneida of the Thames ("Tribes") and the United States challenge transactions by which the State of New York purchased land from the Tribes in violation of federal law. The issue presented in the defendant State of New York's appeal against the intervenor-plaintiff United States is whether the district court erred in holding that, following *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005), the United States' "non-possessory" claim may proceed.

The issue presented in the United States' cross appeal against the State is whether the district court's order dismissing the United States' "possessory" damages claim should be reversed because this Court erred when it held in *Cayuga* that 1) laches is available against the United States when acting in its sovereign capacity, as it does when it enforces federal statutes, asserts treaty rights on behalf of Indian tribes, or seeks to protect tribal lands and resources; 2) laches applies to claims brought within the applicable statute of limitations; 3) laches may bar all damages remedies premised on a possessory right to treaty-recognized Indian land acquired in violation of the Trade and Intercourse Act; and 4) when applying laches, the district court lacks the discretion to consider the reasonableness of the plaintiffs' delay in filing suit.

## STATEMENT OF THE CASE

The tribal plaintiffs in this case are successors of the historical Oneida Indian Nation, which occupied approximately 6 million acres of central New York State before the Revolution. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 230 (1985) [*Oneida II*]. Over the course of some 50 years, the State of New York purchased the Oneida's land without federal approval in violation of the Trade and Intercourse Act, 25 U.S.C. § 177, ignoring the United States' warning that such transactions were illegal. S*ee Oneida II*, 470 U.S. at 232. By 1843, the

Oneida were left with less than 1,000 acres. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 207 (2005).

The Tribes filed this suit in 1974 against Oneida and Madison Counties challenging the validity of thirty transactions between 1795 and 1846 in which the Oneida sold approximately 250,000 acres of their original reservation to the State. The United States intervened as a plaintiff in 1998 and joined the State as a defendant in 2000. See *Oneida Indian Nation of New York v. County of Oneida*, 199 F.R.D. 61, 70 (N.D.N.Y. 2000). On May 21, 2007, the district court granted the State's and Counties' motion for summary judgment in part, holding that "possessory" damages claims were barred by laches, but "non-possessory" claims could proceed. SPA32. This Court granted the State's petition and the Tribes' and United States' cross-petitions for permission to appeal under 28 U.S.C. § 1292(b).

## STATEMENT OF FACTS

### 1. Historical Background

The Oneida Indian Nation occupied approximately 6 million acres of central New York State before the Revolution. *Oneida II*, 470 U.S. at 230. In 1788, the Tribe ceded most of its land to the State of New York in the so-called Treaty of Ft. Schuyler, to which the federal government was not a party, retaining a reservation

of approximately 300,000 acres. *Id.* at 231. The United States, in the Treaty of Canandaigua of 1794, 7 Stat. 44, SPA42, Article II, acknowledged the Tribe's right to those "reservation" lands in recognition of the Tribe's aid to the colonists during the Revolution. *Oneida II*, 470 U.S. at 231 & n.1. The Treaty guaranteed that "the lands reserved to the Oneida . . . shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." SPA42.

The adoption of the Constitution clarified that "Indian relations [were] the exclusive province of federal law." *Id.* at 234; *see also* U.S. Const. Art. I, § 8, cl. 3 (Indian Commerce Clause); Art. II, § 2, cl. 2 (Treaty Clause). In 1790, Congress passed the first of the Trade and Intercourse Acts, Ch. 33, 1 Stat. 137, SPA60, Section 4 of which precluded alienation of Indian land without federal approval. In 1793, Congress strengthened the Act. 1 Stat. 330, § 8, SPA63; *Oneida II*, 470 U.S. at 230. The Act, as since amended, remains in effect today. 25 U.S.C. § 177, SPA103. Its purpose is "to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them . . . without the consent of Congress, and to enable the Government . . . to vacate any disposition of their lands made without its consent." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960).

In April 1795, notwithstanding the Trade and Intercourse Act and the Treaty of Canandaigua, the New York legislature passed a statute providing for the purchase of lands belonging to the Oneida and other tribes. E1302. Under the terms of that statute, tribal lands were to be resold by the State for at least four times the price paid to the tribes. *Id.*; *see also Cayuga Indian Nation of New York v. Pataki*, 165 F. Supp. 2d 266, 331, 346-47 (N.D.N.Y. 2001) ("It is undisputed that by its express terms the 1795 State Act provided that the State would purchase the Indian lands for what was the equivalent of only 50 cents per acre, whereas such lands were to be sold by the State for no less than the equivalent of $2.00 per acre."), *rev'd on other grounds* 413 F.3d 266 (2d Cir. 2005).

Upon learning of the State's intentions, Secretary of War Timothy Pickering sought the opinion of Attorney General William Bradford, who concluded that the language of the Trade and Intercourse Act was "too express to admit of any doubt" that the Act forbade the sale of tribal lands except pursuant to federal treaty. *Id.* at 334; E1581. Although that opinion was transmitted to outgoing Governor Clinton and incoming Governor Jay, the governors "ignored these warnings" and purchased most of the Oneida's remaining land. *Oneida II*, 470 U.S. at 232. Over the course of the following fifty years, the State continued to purchase Oneida land, leaving the Oneida by 1843 with less than 1,000 acres. *Sherrill*, 544 U.S. at

207. None of those transactions was authorized by the federal government as required by the Trade and Intercourse Act. The State resold the land for significantly more than it paid. *See* A735-36; *Cayuga*, 165 F. Supp. 2d at 347 ("the State realized even a greater profit than anticipated under that [1795] Act").

**2. Prior Litigation**

In 1966, Congress enacted 28 U.S.C. § 1362, which authorized federally recognized Indian tribes to bring civil actions arising under federal law without the consent of the United States and without alleging any minimum amount in controversy. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 784 (1991). The purpose of that enactment was "to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought." *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472 (1976); *see also Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 559 n.10 (1983). Shortly thereafter, in 1970, the tribal successors to the historic Oneida Indian Nation filed a "test case" against Oneida and Madison Counties challenging the validity of the 1795 transaction with the State and seeking as relief only the fair rental value of 872 acres of that land for calendar years 1968 and 1969. *See Oneida Indian Nation*, 199 F.R.D. at 65. In 1974, the Supreme Court held that the Tribes' claim fell within the district court's

federal question jurisdiction under 28 U.S.C. §§ 1331 and 1362. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974) [*Oneida I*].

In 1985, following the district court's final judgment for the Tribes, the case returned to the Supreme Court, which held that the Tribes could maintain a federal common-law cause of action against the Counties to vindicate their rights to land acquired by the State in violation of the Trade and Intercourse Act. *Oneida II*, 470 U.S. at 233-36. The Court further held that the suit was not barred by any statute of limitations, *id.* at 240-44, and indicated that laches should not bar the action. The Court identified various principles weighing against recognition of the laches defense and observed that "the application of laches would appear to be inconsistent with established federal policy." *Id.* at 244 n.16. In 2004, the Counties paid a judgment of approximately $57,000. *Oneida Indian Nation of New York v. County of Oneida*, No. 5:70-cv-35 LEK (N.D.N.Y. March 9, 2004) (satisfaction of judgment).

In 2000, the Oneida Indian Nation of New York filed another suit seeking to prevent the City of Sherrill from taxing land the State had purchased from the Tribe in violation of the Trade and Intercourse Act in 1805 and that the Tribe had reacquired on the open market in 1997. The Tribe asserted that, because Indian title to the land remained unextinguished, the Tribe's reacquisition of legal title

restored tribal sovereignty over the reacquired parcels. The Supreme Court, concluding that the circumstances of that case "evoke the doctrines of laches, acquiescence, and impossibility," held that those circumstances "render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate." *See Sherrill*, 544 U.S. at 221. The Court clarified, however, that "the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*." *Id.* The Court further noted, as it had in *Oneida II*, that "application of a nonstatutory time limitation" - *i.e.*, equitable doctrines such as laches - "in an action for damages would be 'novel.'" *Id.* at 221 n.14 (quoting *Oneida II*, 470 U.S. at 244 n.16).

Several months later, this Court, with one judge dissenting in part, reversed the district court's award of almost $248 million in damages to the Cayuga Tribes for land claims similar to those at issue in *Oneida I* and *II*. *Cayuga*, 413 F.3d at 266. The majority understood *Sherrill* to hold that "equitable doctrines, such as laches, acquiescence, and impossibility," *id.* at 273, can "apply to 'disruptive' Indian land claims," *id.* at 274, "even when such a claim is legally viable and within the statute of limitations," *id.* at 273. Although the district court had awarded only money damages, the Court found that ejectment was the Tribes' "preferred remedy," *id.* at 274, and that "this type of possessory land claim . . . is

indisputably disruptive," *id.* at 275. Accordingly, the Court held that the Tribes' claim was subject to laches. *Id.*

The Court further held that "the same considerations that doomed the Oneidas' claim in *Sherrill*" doomed the Cayugas' claim. *Id.* at 277. In particular, the Court focused on the long time that has passed since Indians inhabited the area, the development of the area in the intervening years, the fact that most of the members of the Cayuga tribes have long resided elsewhere, the "distinctly non-Indian character of the area and its inhabitants," and the Tribes' delay in filing suit against the State and local governments. *Id.* (quoting *Sherrill*, 544 U.S. at 202, 221). The Court also held that the Tribes' trespass claim and request for damages in the amount of fair rental value of the land "is predicated entirely upon plaintiffs' possessory land claim," and hence was also subject to laches. *Id.* at 278.

Finally, the Court held that the United States' claims were also barred by laches, because of the long time that has passed since the events at issue, because no statute of limitations applied "until one hundred and fifty years after the cause of action accrued," and because the United States intervened "to vindicate the interest of the Tribe, with whom it has a trust relationship." *Id.* at 279.

### 3. Procedural History

After the Oneida Tribes filed the instant suit against the Counties in 1974, the case lay largely dormant for twenty-five years while the test case proceeded. The United States intervened as a plaintiff in 1998, A125, and added the State as a defendant in 2000, A236. *Oneida*, 199 F.R.D. at 70. Also in 2000, the district court held that private landowners would not be joined as parties and that no relief would be available from them. *Id.* at 94-95. At that time, the court was "acutely aware of the claims of serious and even tragic harms which the State of New York allegedly perpetrated upon the Oneidas." *Id.* at 92. "By the same token, however," the court found it "unfathomable . . . that the remedy for such harms, if proven, should be the eviction of numerous private landowners more than 200 years after the challenged conveyances." *Id.*

In 2002, the district court, among other things, struck the State's and Counties' laches defense, noting that "even though the Supreme Court [in *Oneida II*] did not definitively decide the issue, the strong language it used in contemplating a laches defense has been recognized by lower courts as effectively barring the defense of laches in Indian land claims." *Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104, 124 (N.D.N.Y. 2002); *see also id.* at 123 ("Courts analyzing Indian land claim actions have consistently rejected the use of

delay-based defenses.") (citing, *inter alia*, *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1084, 1097 (2d Cir. 1982); *Oneida Indian Nation of New York v. County of Oneida*, 719 F.2d 525, 538 (2d Cir. 1983), *aff'd in part*, 470 U.S. 226 (1985); and *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1149 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989)). The court also struck the defendants' statute of limitations defense, holding that the Supreme Court's ruling on the statute of limitations in *Oneida II* was "clear and directly applicable." *Id.* at 128.

Later that year, the United States filed a Second Amended Complaint-in-Intervention "in order to seek relief only against the State of New York." A429; *see also* A434-35. The complaint stated that the United States intervened "to enforce federal law, namely, the restrictions on alienation set forth in the Trade and Intercourse Act, 25 U.S.C. § 177; to enforce the provisions of the Treaty of Canandaigua of 1794, 7 Stat. 44, to which the United States was a party; and to protect the treaty-recognized rights of the Oneida Nation." A436. The complaint pled two claims: one asserting that the State "interfered with [the] Oneida Nation's enjoyment of its rights to the Subject Lands under federal law and caused trespasses to the Subject Lands that originated with the State's illegal transactions," A445, and the other asserting that the State violated the Trade and

Intercourse Act, A446. For relief, the complaint sought a declaratory judgment "that the Oneida Nation has the right to occupy the lands that are currently occupied by the State of New York"; "monetary and possessory relief, including ejectment where appropriate, against the State of New York"; "mense profits or fair rental value . . . from the time when the State attempted to acquire each separate parcel of the Subject Lands in violation of the Trade and Intercourse Act, 25 U.S.C. 177, until the present"; and "appropriate monetary relief for those lands within the Claim Area over which the State no longer retains title or control." A446-47.

Following the completion of discovery on liability and this Court's *Cayuga* decision, the State and the Counties moved for summary judgment against the Tribes and the United States. On May 21, 2007, the district court granted the State and Counties' motion with respect to "possessory" damages claims, but denied it with respect to "fair compensation" claims. A740. First, the district court held that, following *Cayuga*, the Tribes' claims that are "predicated on their continuing right to possess land in the claim area and seek relief returning that land and damages based on their dispossession" are subject to laches. A717. Applying the doctrine of laches, the district court considered only the factors this Court identified in *Cayuga* as having "doomed" the Oneidas' claim in *Sherrill*: the long

lapse of time since the challenged transactions, the fact that most of the Oneida have lived elsewhere since the mid-nineteenth century, the distinctly non-Indian character of the area, and the development of the area by non-Indians. A717-21. The court declined to allow further discovery, because *Cayuga* held that "the *Sherrill* factors controlled." A721. In particular, the court found it unnecessary to consider whether the Tribes had unreasonably delayed filing suit. A722. The court observed, however, that "the Oneidas have diligently pursued their claims in various fora" and specified that its laches ruling did not, "in any substantial part, rest on any supposed deficiency in the Oneidas' efforts to vindicate their claims." *Id.*

Second, the district court held that the Tribes also asserted "non-possessory" claims against the State: they alleged that the State had provided the Oneida inadequate compensation for the land and sought "relief based on the benefit the State received from the land sales." A726. These claims for "fair compensation," the court held, were not foreclosed by *Cayuga*, A727, and were consistent with federal common law precedents, A728-34. Relying on those precedents, the court held that, to prevail on the "fair compensation" claims, the Tribes would have to show either inadequacy of consideration "coupled with evidence of the inferiority of the Oneida Indian Nation's negotiating position" or "gross inadequacy of

consideration received by the Plaintiffs in comparison to the fair market value of the land." A734. The court further held that the Tribes had presented sufficient evidence in support of their "fair compensation" claim to survive summary judgment: evidence showing that, in 1795, the State paid about 50 cents per acre for land it resold for $3.53 per acre and that, in 1829, the Oneidas received about $113,000 for land the State sold for more than $626,000. A735-36; *see also* A616 ("the State generally sold the land promptly").

The court concluded that, while *Cayuga* bars any attempts to vindicate the Tribes' rights that would cause disruption to the State, Counties, and "innocent third parties who now reside [on those] lands, . . . the equities also mandate that the Court not pass judgment without noting that the Oneidas and their ancestors have been subjected to historic levels of disruption." A739. The court observed that nothing in its order "questions settled expectations or projects remedies into the future." *Id.* Finally, the court *sua sponte* certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). A739-40, 741.

On June 5, 2007, the State petitioned this Court for permission to appeal the district court's order. The Tribes and the United States cross-petitioned separately on June 14, 2007. *See* Fed. R. App. P. 5(b)(2). On July 13, 2007, this Court granted the petition and cross-petitions. A807. Pursuant to the clerk's verbal

instructions, the United States filed a notice of appeal on July 17, 2007. A794. The Tribes filed a notice of appeal on July 18, 2007, A797, and the State followed suit on July 19, 2007, A803.

## SUMMARY OF THE ARGUMENT

I. United States' Cross Appeal -- The district court's dismissal of the United States' "possessory" damages claim should be reversed. The district court was bound to follow *Cayuga*. But that opinion was deeply flawed for several reasons. First, it held that laches may apply against the United States when acting in its sovereign capacity. That holding was directly contrary to longstanding Supreme Court precedent holding that laches cannot prevent the United States from pursuing its sovereign interests.

Second, *Cayuga* held that laches may apply to actions that Congress expressly preserved and that were filed within the statute of limitations. In other words, the majority held that courts may reject Congress' considered judgment as to when a particular type of claim may be filed. That holding was also directly contrary to longstanding Supreme Court precedent.

Third, *Cayuga* erred in barring the award of money damages for any claim asserting a "possessory" right to land acquired in violation of the Trade and Intercourse Act. That holding was contrary to the plain language of the Trade and

Intercourse Act and essentially validated transactions the statute declared void. That holding was also contrary to the Supreme Court's endorsement of a monetary remedy for "possessory" claims in *Oneida II* and *Sherrill*, and conflated questions of liability and remedy in exactly the manner the Supreme Court warned against in *Sherrill*.

Fourth, *Cayuga* wrongly prohibited trial courts from considering the first prong of the traditional laches analysis: reasonableness of the plaintiff's delay in filing suit. *Sherrill* did not authorize such a noteworthy departure from well established Supreme Court and circuit precedent.

II. State's Appeal -- The district court's decision to allow the United States' "non-possessory" claim to proceed should be affirmed. First, the district court found correctly that the United States' amended complaint fairly encompasses a "non-possessory" Trade and Intercourse Act claim. The State had timely notice of that claim, and it was fully briefed.

Second, the district court concluded correctly that it has the authority to remedy that claim. It is well established that the United States may sue to protect its sovereign and governmental interests, including its interest in protecting the treaty and property rights of federally recognized Indian tribes. In this case, the United States filed suit to enforce the Trade and Intercourse Act, which supports

either "possessory" claims based on an asserted right to possess the land that was wrongfully taken or "non-possessory" claims that seek only fair compensation.

The Act did not limit the district court's power and duty to effectuate that congressional enactment. Among the remedies available to the district court is restitution, which requires a defendant to disgorge benefits that were unjustly obtained. Restitution would partially vindicate the congressional policies underlying the Trade and Intercourse Act and the Treaty of Canandaigua without calling current land titles into question. It would merely deprive the State of the profit it made on the Oneidas' land. The Supreme Court has long endorsed such restitutionary remedies when unlawfully obtained Indian land could not be returned because it had passed into the hands of innocent purchasers.

Third, the district court concluded correctly that *Cayuga* did not extinguish its authority to remedy violations of the Trade and Intercourse Act. Rather, *Cayuga* only held that laches may bar remedies based on an asserted right to "possess" the lands at issue, which the Court concluded would be too "disruptive" and "forward-looking." Restitution, in contrast, would merely require the State to pay the Oneida fair compensation for the land and have no continuing consequences into the future. The "non-possessory" claim thus "involve[s] a concession that title has passed," *see United States v. Mottaz*, 476 U.S. 834, 842

(1986), and does not implicate the *Cayuga* majority's concerns.

## ARGUMENT

### Standard of Review

This Court reviews the grant or denial of a motion for summary judgment *de novo*. *See Avero Belgium Ins. v. American Airlines, Inc.*, 423 F.3d 73, 77 (2d Cir. 2005). On appeal from a summary judgment order, the Court "must view the pleadings in the light most favorable to . . . the party against whom summary judgment was sought." *Davis v. Bryan*, 810 F.2d 42, 45 (2d Cir. 1987); *see also Dillon v. Morano*, 497 F.3d 247, 251 (2d Cir. 2007) (court views record in light most favorable to non-moving party); *Deere & Co. v. Ohio Gear*, 462 F.3d 701, 705 (7th Cir. 2006); *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 190 (2d Cir. 1984) ("a court must construe the allegations of a complaint in the light most favorable to the plaintiff"). The Court "must resolve all ambiguities and draw all permissible inferences in favor of the non-moving party." *Dillon*, 497 F.3d at 251 (quoting *Jaegly v. Couch*, 439 F.3d 149, 151 (2d Cir. 2006)).

## I. United States' cross appeal against the State of New York:

### The district court's dismissal of the United States' "possessory" damages claim should be reversed because *Cayuga*, which it followed, was wrongly decided.

In *Cayuga*, this Court held that the doctrine of laches can bar claims brought by the United States in its sovereign capacity; that courts can use the doctrine of laches to disregard Congress' considered judgment to preserve the claims at issue and to specify the statute of limitations within which the claims may be filed in the future; that a court can use the doctrine of laches to effectively validate transfers of Indian land that violate federal law; and that, when applying laches in Indian land claim cases such as this, courts may ignore the first prong of the traditional laches analysis: whether the plaintiff's delay in filing suit is excusable. Those holdings were erroneous, and the district court's order applying *Cayuga* in this case should be reversed.[1/]

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[1/] The district court's order here presents the Court an opportunity to reexamine *Cayuga* in light of the district court's solution to the problem posed in this case. The United States seeks to preserve its "possessory" damages claim and its right to petition for *en banc* review of the application of *Cayuga* to that claim in this case, recognizing that any panel of this Court is bound by *Cayuga*.

### A. The district court erred in applying laches against the United States.

The district court, relying on *Cayuga*, dismissed the United States' "possessory" damages claim based on laches. *See* A714.[2/] In *Cayuga*, the Court recognized that "the United States has traditionally not been subject to the defense of laches," 413 F.3d at 278, but held nonetheless that "laches can apply against the United States in these particular circumstances," *id.* at 279. That holding was contrary to precedents of the Supreme Court, this Court, and other federal courts of appeals, and the district court's order following that holding should be reversed.

It is firmly established that the United States is not subject to laches when acting in its sovereign capacity. *See United States v. Beebe*, 127 U.S. 338, 344 (1888) ("The principle that the United States are not . . . barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest, is established past all controversy or doubt."); *see also*, *e.g.*, *United States v. California*, 332 U.S. 19, 39-40 (1947); *United States v. Summerlin*, 310 U.S. 414, 416 (1940) ("It is well

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[2/] Although the court's opinion often referred to "plaintiffs" generally, there is no dispute that the court intended for its order to apply to the United States as well. *See*, *e.g.*, A738 ("The Court has now dismissed Plaintiffs' and the United States' possessory land claims"); *see also* State Br. at 56 ("The complaints should have been dismissed in their entirety.").

settled that the United States is not . . . subject to the defense of laches in enforcing its rights."). Indeed, this Court recognized, several months before deciding *Cayuga*, that "it is well established that, as a general rule, [l]aches is not . . . available against the United States." *United States v. Milstein*, 401 F.3d 53, 63 (2d Cir. 2005) (internal quotes and citations omitted).

It is also firmly established that the United States acts in its sovereign capacity when it brings suit to vindicate Indian property interests protected by federal statute or treaty. *See Nevada v. United States*, 463 U.S. 110, 141-42 (1983); *Board of Comm'rs v. United States*, 308 U.S. 343, 350-51 (1939). For example, in *United States v. Minnesota*, 270 U.S. 181 (1926), the United States filed suit alleging that land patents issued to the State of Minnesota violated the United States' treaty with the Chippewa Tribe. The Supreme Court held that the United States' interests in the suit arose "out of its guardianship over the Indians, and out of its right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations, and in both aspects the interest is one which is vested in it as a sovereign." *Id.* at 194; *see also United States v. University of New Mexico*, 731 F.2d 703, 705-07 (10th Cir. 1984).

The actions of the State that are at issue here violated the Trade and Intercourse Act and the Treaty of Canandaigua, thereby directly invading the

sovereign rights of the United States. As the Supreme Court explained in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), the illegal alienation of Indian land violates both "proprietary rights of the Indian" and "governmental rights of the United States." *Id.* at 657 n.1 (quoting *Heckman v. United States*, 224 U.S. 413, 437–38 (1912)); *see also United States v. Boylan*, 265 F. 165, 173 (2d Cir. 1920) ("A transfer of the allotment to aliens is not simply a violation of the proprietary rights of the Indians; it violates the government[al] rights of the United States."). Thus, laches cannot bar the United States' claims in this case. *See Brooks v. Nez Perce County*, 670 F.2d 835 (9th Cir. 1982) (*per curiam*) (suit seeking damages for unlawful sale of Indian trust land was not barred by laches).

*Cayuga* cited *Clearfield Trust v. United States*, 318 U.S. 363, 367 (1943), in support of its assertion that the United States' immunity to laches "does not seem to be a per se rule." *Cayuga*, 413 F.3d at 278. As Judge Hall correctly pointed out in her dissenting opinion in *Cayuga*, however, *id.* at 287 (Hall, J., dissenting in part), the United States appeared in *Clearfield Trust* in the posture of a commercial actor, not in its sovereign capacity. *See Clearfield Trust*, 318 U.S. at 369 ("The United States as drawee of commercial paper stands in no different light than any other drawee.").

Similarly, Judge Hall concluded correctly that the other cases upon which

the *Cayuga* majority relied did not support the application of laches against the United States. *Cayuga*, 413 F.3d at 287-88 (Hall, J.). For example, the Court relied on *United States v. Administrative Enterprises, Inc.*, 46 F.3d 670 (7th Cir. 1995), but that court did not ultimately "pursue the question of the existence and scope of a defense of laches in government suits." *Id.* at 673. Thus, the discussion upon which the *Cayuga* majority relied was *dicta*. In that discussion, the Seventh Circuit suggested three circumstances in which laches might possibly apply against the United States: 1) in the "most egregious instances" of laches; 2) where no statute of limitations applies; and 3) where the government is acting to enforce private rights. *Id.* None of those possibilities is presented here. As explained below in Part I.B, Congress has established an applicable statute of limitations, and as explained above, the United States acts in its sovereign capacity in this suit. Thus, this case does not fall under the Seventh Circuit's second or third "possibility." *See id.* The first "possibility" is also inapplicable here, because, as Judge Hall pointed out, while many years have passed since the actions challenged in this suit, no court has considered the extent to which the delay in commencing this action "may be excused." *Cayuga*, 413 F.3d at 288 (Hall, J.).

The Supreme Court cases cited by the Seventh Circuit in *Administrative*

*Enterprises* are likewise inapplicable here, as Judge Hall explained. *Id.* at 287-88 & n.9. In *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 372-73 (1977), the Court indicated that the EEOC's undue delay in seeking backpay may be relevant to the amount of any monetary remedy, but it did not suggest that such delay could provide a basis for dismissal of the suit *ab initio*. *Heckler v. Community Health Services*, 467 U.S. 51 (1984), involved estoppel against the government, not laches. The Court there acknowledged the "substantial" arguments favoring a categorical ban on the application of estoppel against the United States, but left open the possibility of its application in exceptional cases. *Id.* at 60-61. The Court made clear, however, that a party asserting estoppel against the government must demonstrate, at a minimum, that it reasonably relied to its detriment on the government's misrepresentations of fact. *Id.* at 59, 61. The State did not attempt to make such a showing here.

The *Cayuga* Court's belief that *Sherrill* "substantially altered the legal landscape in this area" did not justify the use of laches to bar the United States' suit. *Cayuga*, 413 F.3d at 279. The United States was not a party in *Sherrill*, and the Court there made clear that it was not disturbing the holding in *Oneida II* that a monetary remedy was available even if the Tribe alone sued. *See* 544 U.S. at 221. Hence, the Supreme Court there did not even address, much less purport to

overrule, its longstanding and repeated holding that laches does not apply to the United States when acting in a sovereign capacity, as it does when it seeks to vindicate Indian land interests protected by federal statutes and treaties.

### B. The district court erred in applying laches to claims that were preserved by Act of Congress and filed within the statute of limitations.

The district court held, following *Cayuga*, that laches can apply to "viable possessory land claims that were filed within the applicable statute of limitations." A715. In *Cayuga*, the Court read *Sherrill* to permit the application of laches to claims filed within the statute of limitations. 413 F.3d at 273. That conclusion was erroneous.

In *Milstein*, 401 F.3d 53, this Court recognized the well-established rule that "[l]aches is not a defense to an action filed within the applicable statute of limitations." *Id.* at 63 (quoting *United States v. RePass*, 688 F.2d 154, 158 (2d Cir. 1982)); *see also Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946) ("If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive."); *United States v. Mack*, 295 U.S. 480, 489 (1935) ("Laches within the term of the statute of limitations is no defense at law."); *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 260 (2d Cir. 1997); *Lyons Partnership, L.P. v.*

*Morris Costumes, Inc.*, 243 F.3d 789, 798 (4th Cir. 2001) ("[A] court should not apply laches to overrule the legislature's judgment as to the appropriate time limit to apply for actions brought under the statute. Separation of powers principles thus preclude us from applying the judicially created doctrine of laches to bar a federal statutory claim that has been timely filed under an express statute of limitations.").

The Supreme Court's analysis in *Oneida II* establishes beyond question that the United States' claims in this case were expressly preserved by Act of Congress and timely under the detailed scheme established in 28 U.S.C. § 2415, SPA105. *See Oneida II*, 470 U.S. at 243 & n.15. The Court explained that when Congress first enacted that statute in 1966, it "provided a special limitations period of 6 years and 90 days for contract and tort suits for damages brought by the United States on behalf of Indians." *Id.* at 241-42. Claims that had accrued before the date of enactment were deemed to have accrued upon the statute's enactment. *Id.* (citing 28 U.S.C. § 2415(g)). This provision expressly preserves claims such as those at issue here and was specifically intended to do so. Indeed, because such claims were deemed not even to have *accrued* until 1966, they could not be found by a court to barred by events occurring prior to that date. Congress extended the limitations period four times. *Id.* at 242.

In 1982, Congress amended the statute in the Indian Claims Limitation Act, Pub. L. No. 97-394, 96 Stat. 1976, which "established a system for the final resolution of pre-1966" Indian land claims. *Oneida II*, 470 U.S. at 243. The 1982 Act directed the Secretary of the Interior to publish two lists of all Indian claims that could be affected by Section 2415. Pub. L. No. 97-394, §§ 3-4, 96 Stat. 1977-78. The 1982 Act also provided, with respect to contract and tort suits for money damages brought by the United States, that any claim that appears on one of the Secretary's lists must be filed within one year after the Secretary rejects the claim for litigation or three years after the Secretary submits a proposed legislative resolution to Congress. 28 U.S.C. §§ 2415(a), (b). Thus, for claims that were listed by the Secretary pursuant to the 1982 Act, Congress has established an express statutory limitations period that is not triggered unless and until the Secretary formally determines that a particular claim is not suitable for litigation and/or submits a proposed legislative resolution to Congress. "So long as a listed claim is neither acted upon nor formally rejected by the Secretary, it remains live." *Oneida II*, 470 U.S. at 243.

The Secretary included the Oneida claim on the first of the lists prepared and published in accordance with the 1982 Act, 48 Fed. Reg. 13,698, 13,920 (March 31, 1983), and did not subsequently identify the claim as unsuitable for

litigation or propose a legislative resolution. Hence, the United States' claims seeking money damages in this case were specifically preserved by Congress in 1966 and were filed within the limitations period enacted by Congress. Thus, under the statutory scheme Congress enacted, the claims at issue here "remain[] live." *Oneida II*, 470 U.S. at 243. And as explained above, by preserving the claims as of 1966, Congress determined that the passage of time prior to that date would not bar the suit. Laches is therefore not applicable.

Moreover, no statute of limitations applies at all to suits brought by the United States "to establish the title to, or right of possession of, real or personal property." 28 U.S.C. § 2415(c); *see Oneida II*, 470 U.S. at 243 n.15. Congress included that provision to make "clear that no one can acquire title to Government property by adverse possession or other means." S. Rep. No. 89-1328, at 3 (1966). Thus, Section 2415 "does not limit the time for bringing an action to establish the *title* or possessory right to real or personal property but any claims for *monetary relief* arising from these actions must be filed before the deadline." S. Rep. No. 95-236, at 1-2 (1977) (emphasis added); *see also* S. Rep. No. 96-569, at 1-2 (1980) ("It is important to note that the statute only imposes a limitation on claims seeking monetary damages. It does not bar actions involving titles to land, but any claims for monetary relief arising from these actions must be filed before the

deadline."). To the extent that the United States' claims against the State are encompassed by Section 2415(c), they are not time barred, and subjecting such claims to alternative, judicially created timing requirements contradicts Congress' intent that such claims be subjected to "no time limit" at all. *See* S. Rep. No. 89-1328, at 3.

*Sherrill* did not purport to overrule or carve out an exception to the rule that laches is not applicable to claims that are affirmatively preserved by Act of Congress and filed within the statute of limitations. In fact, *Sherrill* contains *no discussion* of statutes of limitations, perhaps because Section 2415 was not applicable to that suit. And the Court in *Sherrill* expressly noted that "the question of damages for the Tribe's ancient dispossession is not at issue in this case." 544 U.S. at 221. Rather, the Tribe there sought "equitable relief prohibiting, currently and in the future, the imposition of property taxes" on land the Tribe purchased in 1997 and 1998 in open-market transactions. *Id.* at 212. Hence, Section 2415(a) and (b), which apply only to claims for money damages, were not applicable to the claims in that case. Section 2415(c), which concerns actions to establish title to real property, was not applicable in *Sherrill* either, because the Tribe there did not seek title or possession -- it already owned the land -- but rather sought to re-establish tribal sovereignty over the land. *See* 544 U.S.

at 211-12. Congress has not spoken to such claims in any statute of limitations. Hence, *Sherrill* did not give the Supreme Court any occasion to overrule its longstanding precedents holding that claims filed within the statute of limitations may not be dismissed based on laches.

Application of laches is particularly inappropriate in Indian land claims cases, because the legislative history of Section 2415 reveals that Congress was not only aware of ancient claims like the ones presented here, but specifically intended to preserve them. *E.g.*, S. Rep. No. 96-569, at 3 (1980) (claims covered include "claims for substantial areas of land along the eastern seaboard for violations of the 1790 Indian Intercourse Act"); *see also* S. Rep. No. 89-1328 (1966); S. Rep. No. 92-1253 (1972); S. Rep. No. 95-236 (1977); H.R. Rep. No. 95-375 (1977). Despite that unambiguous legislative intent, *Cayuga* held that laches barred the claims there based on factors that were not distinctive to the Cayuga claims, but rather are characteristic features of the type of suit that Congress addressed expressly in Section 2415. *See Cayuga*, 413 F.3d at 277 (considering the time that has passed since Indians occupied the land, the intervening development of the area, and the fact that most tribal members now reside elsewhere).

The district court here, following *Cayuga*, effectively rejected Congress'

considered judgment to preserve claims such as these at issue here, striking what it determined to be the appropriate balance of the competing interests. Like the borrowing of a state statute of limitations that the Supreme Court disapproved in *Oneida II*, the court's invocation of laches to dismiss "possessory" damages claim here is a "violation of Congress' will" as expressed in Section 2415. *See Oneida II*, 470 U.S. at 244; *cf. United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) ("Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute.").

### C. The district court erred in applying laches to bar the award of money damages for claims alleging a possessory right to land acquired in violation of the Trade and Intercourse Act.

The district court held that laches barred claims for money damages premised on a possessory right to land acquired in violation of the Trade and Intercourse Act. A716-17. The court relied on *Cayuga*, where this Court held that requests for money damages grounded on the asserted right to possess the land at issue were barred by laches. *Cayuga*, 413 F.3d at 278. That holding was in error for several reasons. First, it is contrary to the plain language of the Trade and Intercourse Act. Since 1793, federal law has provided that *no* purchase of Indian land made without congressional authorization "shall be of any validity in law or equity." 25 U.S.C. § 177. The transactions at issue here did not conform to the

requirements of the Trade and Intercourse Act and hence were invalid. *See Oneida II*, 470 U.S. at 245 (the Trade and Intercourse Act "codified the principle that a sovereign act was required to extinguish aboriginal title and thus that a conveyance without the sovereign's consent was void *ab initio*").

*Cayuga* erred in using the doctrine of laches to validate void transactions. In *Ewert v. Bluejacket*, 259 U.S. 129 (1922), the Supreme Court held that a deed by which Indian land was sold in violation of a federal statute was void and that laches "cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions." *Id.* at 138 (quoted in *Oneida II*, 470 U.S. at 244 n.16). When *Cayuga* used the equitable doctrine of laches to dismiss the possessory claims entirely, instead of merely cabining the remedies, the Court effectively validated the illegal transactions by which the State dispossessed the Cayuga of their land, contrary to the express terms of an Act of Congress. As the Supreme Court observed in *Oneida II*, "the application of laches would appear to be inconsistent with established federal policy" in the Trade and Intercourse Act. 470 U.S. at 244 n.16; *see also id.* at 239 ("Congress apparently contemplated suits by Indians asserting their property rights"); *Oneida Indian Nation*, 719 F.2d at 538 (permitting violations of the Act "to go unremedied . . . would be patently inconsistent" with the Act). The

application of laches here is also inconsistent with the fundamental tenet that "extinguishment of Indian title requires a sovereign act." *Oneida II*, 470 U.S. at 244 n.16; *see also id.* at 248; *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 347 (1941) ("'the exclusive right of the United States to extinguish' Indian title has never been doubted").

Second, *Cayuga*'s disallowance of "possessory" damages as a remedy for Trade and Intercourse Act violations conflicts with the Supreme Court's endorsement of that remedy in both *Oneida II* and *Sherrill*. In the Oneida test case, this Court concluded that "the Oneidas may assert a federal common law action to recover damages for the Counties' wrongful possession of their land." *Oneida Indian Nation*, 719 F.2d at 530.[3/] The Supreme Court affirmed that holding in *Oneida II*, 470 U.S. at 253-54; *see also id.* at 229-30; *Sherrill*, 544 U.S. at 202 (*Oneida II* "recognized that the Oneidas could maintain a federal common-law claim for damages").

In *Sherrill*, the Supreme Court expressly declined to overrule *Oneida II*:

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[3/] In an earlier appeal in another Oneida case, this Court held correctly that a request for declaratory relief "would alone render the claims justiciable." *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1082 (2d Cir. 1982). The Court further observed that if "ejectment of current occupants . . . is deemed an 'impossible' remedy . . . the court has authority to award monetary relief for the wrongful deprivation." *Id.* at 1083 (quoting *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926)).

"the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*." *Sherrill*, 544 U.S. at 221. The Court also repeated its observation in *Oneida II* that "application of a nonstatutory time limitation in an action for damages would be 'novel.'" *Id.* at 221 n.14 (quoting 470 U.S. at 244 n.16); *see also id.* at 217 ("It is well established that laches . . . may bar long-dormant claims for *equitable relief*.") (emphasis added); *see also Ivani Contracting*, 103 F.3d at 259 (holding laches may not bar a claim for damages under 28 U.S.C. § 1983).

In fact, the Supreme Court's reasoning in *Sherrill* endorses the award of damages in lieu of actual possession. *Id.* at 208-11. The Court repeatedly referred to the district court's 2000 opinion in this case, *Oneida*, 199 F.R.D. 61, in which Judge McCurn held that ejectment would not be awarded against private landowners, but recognized the availability of damages against the State. The Supreme Court noted with apparent approval that Judge McCurn "found it high time 'to transcend the theoretical'" and adopt "'a pragmatic approach.'" 544 U.S. at 211 (quoting *Oneida*, 199 F.R.D. at 92). The Court also relied, *id.* at 217-20, on two Indian-law cases holding that damages were available even though -- indeed, because -- recovery of the land was not. *Yankton Sioux Tribe*, 272 U.S. at 357–59; *Felix v. Patrick*, 145 U.S. 317, 334 (1892).

Third, *Cayuga*'s rejection of "possessory" damages as a remedy for violations of the Trade and Intercourse Act also conflicts with the Supreme Court's admonition in *Sherrill* that questions concerning the substantive scope of a plaintiff's rights or a defendant's duties differ fundamentally from questions concerning the selection of an appropriate remedy after a breach of law has been established. 544 U.S. at 213 ("The distinction between a claim or substantive right and a remedy is fundamental.") (quoting parenthetically *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1467 (10th Cir. 1987)). The Supreme Court in *Sherrill* focused not on the nature of the claim, but on the "appropriateness of the relief" requested, and concluded that equitable considerations barred the unique remedy the Tribe sought: "declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations." 544 U.S. at 214; *see also Cayuga*, 413 F.3d at 288-90 (Hall, J., dissenting).

The Supreme Court found that the unilateral revival of tribal sovereignty after a two-hundred-year hiatus would cause "disruptive practical consequences" for the State and local governments, as well as neighboring landowners. *Sherrill*, 544 U.S. at 219; *see also id.* at 202-03. The Court did not, however, hold that

courts may use laches to dismiss possessory Indian land claims. In *Cayuga*, this Court's conclusion that the Tribes' inability to recover possession also precluded them from obtaining damages, *Cayuga*, 413 F.3d at 278, conflated questions of liability and remedy in the precise manner the Supreme Court in *Sherrill* cautioned against.

Finally, *Cayuga* erred in concluding that *Sherrill* required outright dismissal of the "possessory" Trade and Intercourse Act claims. On appeal in *Sherrill*, this Court held that land the Tribe purchased on the open market was not subject to local taxation because the land was part of the Tribe's historic reservation over which it had never lawfully relinquished title. *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003); *see Sherrill*, 544 U.S. at 212. The Supreme Court reversed, but did not reach that merits question and thus did not address the Trade and Intercourse Act in its analysis. *See id.* at 215 n.9; *see also id.* at 214 n.8 ("We resolve this case on considerations not discretely identified in the parties' briefs."); *id.* at 222-23 (Stevens, J., dissenting). Instead, the Court decided the case based on considerations that "evoke[d] the equitable doctrines of laches, acquiescence, and impossibility," *id.* at 221, which the parties had not briefed, *see id.* at 222 (Souter, J., concurring); *id.* at 224, 225 n.5 (Stevens, J., dissenting), without squarely applying any of them.

Moreover, the Tribe's interests as sovereign were not at issue in *Cayuga* and are not at issue here, as they were in *Sherrill*. An award of money damages, even when premised on an asserted right to possession, is not "disruptive" in the way the Court in *Sherrill* found the reestablishment of tribal sovereignty would be: it does not implicate sovereignty and governance, upset settled expectations, undermine State and local governmental administration, or adversely impact private landowners. *See* 544 U.S. at 214-21 & n.9; *see also Cayuga*, 413 F.3d at 285 (Hall, J.) ("Indeed, there does not appear to be anything in the money damages award in this case that would be disruptive.").

Therefore, this Court overstepped its bounds in *Cayuga* when it held that the equitable doctrine of laches barred the award of money damages for claims alleging a "possessory" right to land the State acquired in violation of the Trade and Intercourse Act. The district court's similar holding in this case should be reversed.

### D. The district court erred in failing to consider, when applying laches, whether the plaintiffs' delay in filing suit was reasonable.

The district court held that "the *Sherrill* factors controlled" the laches inquiry. A721. The district court here, like *Cayuga*, examined the long lapse of time since the challenged transactions, the fact that most of the Oneida have lived

elsewhere since the mid-nineteenth century, the distinctly non-Indian character of the area, and the development of the area by non-Indians. *Id.*; A717-21. The district court found it unnecessary to consider whether the Tribes' delay in filing suit was unreasonable because *Cayuga* mandated dismissal based on an analysis of the *Sherrill* factors alone. A722; *see also Cayuga*, 413 F.3d at 277 ("the considerations identified by the Supreme Court in *Sherrill* mandate that we affirm the District Court's finding that the possessory land claim is barred by laches").

*Cayuga* wrongly altered the traditional laches analysis by making any inquiry into unreasonable delay irrelevant.[4/] As Judge Hall pointed out in her dissenting opinion in *Cayuga*, 413 F.3d at 283-84, traditional laches law requires the defendant to establish "both plaintiff's unreasonable lack of diligence under the circumstances in initiating an action, as well as prejudice from such a delay." *See King v. Innovation Books*, 976 F.2d 824, 832 (2d Cir. 1992); *see also Kansas*

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[4/] The district court also erred in holding that the application of laches in the context of Indian land claims may be resolved based on what the court termed "self-evident" facts, without discovery or development of a case-specific factual record. A721 & n.2. The doctrine of laches requires a court to examine all of the equities. *E.g.*, *Robins Island Preservation Fund, Inc. v. Southold Development Corp.*, 959 F.2d 409, 423 (2d Cir. 1992) ("'[T]he existence of laches is a question primarily addressed to the discretion of the trial court,' which must consider the 'equities of the parties.'") (quoting *Gardner v. Panama R. Co.*, 342 U.S. 29, 30-31 (1951) (*per curiam*)). To the extent that *Cayuga* foreclosed such an inquiry, it was wrongly decided.

*v. Colorado*, 514 U.S. 673, 687 (1995) ("The defense of laches 'requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'"); *Milstein*, 401 F.3d at 63 ("the defense of laches, . . . requires that the defendant prove unreasonable delay resulting in prejudice"). The "*Sherrill* factors" go to the second prong of a traditional laches analysis: prejudice to the defendant. The district court here found in *favor* of the Tribes on the first prong, unreasonable delay in filing suit, but *Cayuga* did not weigh that factor in its analysis.

*Sherrill* did not require the Court in *Cayuga* to depart radically from traditional laches law. The Supreme Court in *Sherrill* described the "long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court," 544 U.S. at 216, but did not consider whether that delay was unreasonable. The Court based its decision on general equitable principles, but did not actually rest on any particular doctrine. The Court's conclusion was firmly grounded on its belief that the Tribe's unilateral assertion of sovereignty over land that had been governed by the State for 200 years would be especially "disruptive." *Id.* at 203, 217, 219. The Court did not forbid lower courts to consider the first prong of the traditional laches test when actually applying the doctrine of laches. Such a noteworthy shift in jurisprudence would

surely have merited some discussion. *Cf. Chabad-Lubavitch of Vermont v. City of Burlington*, 936 F.2d 109, 112 (2d Cir. 1991) ("We assume that if the Supreme Court had wanted to change an area of law as complex as the Establishment Clause, it would have done so through a written opinion . . . .").

Had the district court weighed the first factor of the traditional laches analysis, its calculus would have changed. The district court found that the Tribes "have diligently pursued their claims in various fora" and specified that its laches ruling did not, "in any substantial part, rest on any supposed deficiency in the Oneidas' efforts to vindicate their claims." A722. The court cited a law review article as "enumerating barriers that Oneidas faced to bringing suit," as well as a district court opinion in the Oneida test case finding that "the Oneidas did protest the continuing loss of their tribal land." A722 n.3 (quoting *Oneida Indian Nation of New York v. Oneida County*, 434 F. Supp. 527, 536-37 (N.D.N.Y. 1977)). As this Court recognized, "New York's abuse of the Oneidas was not accomplished without protest." *Oneida Indian Nation*, 719 F.2d at 529.

*Cayuga* erred in foreclosing consideration of the first factor of the traditional laches test, and the district court's order following that holding should be reversed.

## II. State of New York's appeal against the United States:

### The district court held correctly that the United States' "non-possessory" claim may proceed.

*Cayuga* did not foreclose the district court from allowing claims that are not based on an asserted right to possess the lands at issue to go forward. The United States' "non-possessory" claim was timely raised, fully briefed, and addressed in the district court's opinion. That claim, consistent with the United States' well-established authority to file suit to protect its sovereign and governmental interests, seeks to enforce the Trade and Intercourse Act through an award of restitution, that is, by recovering the profit the State realized from reselling the Oneidas' land. *Cayuga* did not address any such backward-looking claim that accepts the validity of current land titles. Thus, the district court properly discharged its duty to allow a remedy for the State's violations of federal law.

### A. The district court concluded correctly that the United States asserted a "non-possessory" claim.

The State contends that the United States asserted only claims grounded on the Oneidas' alleged right to possess the lands at issue. State Br. at 37. The district court concluded to the contrary that the United States asserted a "claim for fair compensation." *See* A734. On appeal, the Court should read the United States' complaint in the light most favorable to the United States, *see Davis*, 810

F.2d at 45, *Town of Orangetown*, 740 F.2d 190, resolve all ambiguities in favor of the United States, *Dillon*, 497 F.3d 251, and affirm the district court's conclusion.

At the pleading stage, a party's complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "A complaint need only 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Amron v. Morgan Stanley Inv. Advisors Inc.*, 464 F.3d 338, 343 (2d Cir. 2006) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002)); *see also Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007). The complaint need not specify the "legal theory, facts, or elements underlying" the claim. *Phillips v. Girdich*, 408 F.3d 124, 130 (2005). Rather, the complaint need only set forth "those facts necessary to a finding of liability." *Amron*, 464 F.3d at 343. "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic*, 127 S. Ct. at 1965.

Consistent with Rule 8(f)'s admonition that "[a]ll pleadings shall be so construed as to do substantial justice," Fed. R. Civ. P. 8(f), this Court has held that "*[a]ll* complaints must be read liberally." *Phillips*, 408 F.3d at 128 (emphasis in original). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to

dispose of unmeritorious claims." *Swierkiewicz*, 534 U.S. at 512. Pleading under the Federal Rules of Civil Procedure is not "a game of skill in which one misstep by counsel may be decisive to the outcome." *Conley v. Gibson*, 355 U.S. 41, 48 (1957), abrogated on other grounds, *Bell Atlantic*, 127 S. Ct. at 1969.

As described above, the United States' complaint asserted a violation of the Trade and Intercourse Act, which provides that conveyances of Indian land that do not conform to its requirements are of no "validity in law or equity." 25 U.S.C. § 177. Claims under the Trade and Intercourse Act may certainly assert a right of possession, and the United States' Trade and Intercourse Act claim here may be read to include such an assertion. As explained below in Part II.B.2, however, Trade and Intercourse Act claims may also focus on the terms of the illegal transaction and assert that the price paid for the land was unfair. Trade and Intercourse Act claims of that variety do not depend on any asserted right of possession. To the contrary, a "fair price" Trade and Intercourse Act claim acquiesces in the effectiveness of the transaction.

The United States' complaint fairly encompasses such a "non-possessory" Trade and Intercourse Act claim.[5/] In the complaint, which must be read in the

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[5/] "Rule 8(e)(2) of the Federal Rules of Civil Procedure permits plaintiffs to 'plead two or more statements of a claim, even within the same count, regardless of consistency.'" *Adler v. Pataki*, 185 F.3d 35, 41 (2d Cir. 1999)

light most favorable to the United States, *see Davis*, 810 F.2d at 45, the United States asserted, *inter alia*, that the State "made substantial profits on its purported sales of the Subject Lands," A444, and asked the court to award "appropriate monetary relief" and "such other relief as this Court may deem just and proper," A447. The Tribes' amended complaint is more specific, A207, A230, but the State admitted below that the complaints are "parallel," Defs.' Mem. of Law in Supp. of Mot. for Summ. J. (Aug. 11, 2006), Docket No. 582 at 3.[6] More importantly, the United States had no obligation to make its complaint any more detailed. The complaint included a short and plain statement of the facts showing that the State violated the Trade and Intercourse Act. *See Amron*, 464 F.3d at 343. It did not need to specify whether the theory of recovery under the Trade and Intercourse Act was based on an asserted right to possession of the lands at issue or the asserted deficiency of compensation paid to the Tribes for the land or both. *See Phillips*, 408 F.3d at 130.

Furthermore, the request for "appropriate monetary relief" fully satisfied Rule 8, which does not require a party to frame the request for relief using any "set

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[6] The Tribes could not assert a "non-possessory" claim until the United States joined the State as a defendant in 2000. Until then, the Counties were the only defendants, and the only wrong they committed was in possessing illegally obtained lands. The State's failure to pay fair compensation for the land is not attributable to the Counties.

of particular words; any concise statement identifying the remedies and the parties against whom relief is sought will be sufficient." 5 *Federal Practice & Procedure* § 1255. In addition, Rule 54(c) confirms the power of the federal courts to provide a plaintiff with whatever relief is appropriate, regardless of whether the plaintiff sought that relief in the complaint. Fed. R. Civ. P. 54(c) ("every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such in the party's pleadings"); *see also Terry v. UNUM Life Ins. Co. of America*, 394 F.3d 108, 110-11 (2d Cir. 2005); *Powell v. National Bd. of Medical Examiners*, 364 F.3d 79, 86 (2d Cir. 2004); *Dopico v. Goldschmidt*, 687 F.2d 644, 650 (2d Cir. 1982) ("if plaintiffs can prove a violation . . . , the District Court has inherent power to fashion relief appropriate to the situation"). Omissions in the prayer for relief "are not in and of themselves a barrier to redress of a meritorious claim." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 66 (1978). Thus, the United States was not obligated in its complaint to expressly request disgorgement, restitution, or any other type of relief more specific than "monetary relief" in order to adequately state a "non-possessory" Trade and Intercourse Act claim.

The State does not contend on appeal and did not contend in the trial court that the United States' assertion of a "non-possessory" theory of recovery in

response to the State's summary judgment motion caused it any prejudice. Again, the United States had no obligation to spell out its legal theories at the pleading stage. "A plaintiff should not be prevented from pursuing a claim simply because of a failure to set forth in the complaint a theory on which the plaintiff could recover, provided that a late shift in the thrust of the case will not prejudice the other party in maintaining its defense." *Green Country Food Market, Inc. v. Bottling Group, LLC*, 371 F.3d 1275, 1279 (10th Cir. 2004); *see also Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir. 1996) ("there is no burden on the plaintiff to justify its altering its original theory"); 5 *Federal Practice & Procedure* § 1219 ("when a party has a valid claim, he should recover on it regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage"). "[W]hat is important is whether the defendant was reasonably aware of the claim, not whether plaintiffs at some time in the pre-trial period happened to use the right phrase." *Sobel v. Yeshiva University*, 839 F.2d 18, 25 (2d Cir. 1988).

In this case, the State had adequate notice of and opportunity to respond to the United States' "non-possessory" arguments, which are grounded on the same facts as the "possessory" arguments and were fully briefed in the lower court. The United States enunciated its "non-possessory" theory in response to the State's

motion for summary judgment, which was the first summary judgment motion following the filing of the United States' amended complaint and the first point at which the United States was obliged to spell out its theory of the case. Indeed, the State cannot claim unfair surprise when it did not request additional discovery, supplemental briefing, or a continuance in the district court or in its opening brief on appeal. *See* 5 *Federal Practice & Procedure* § 1219 (commenting that cases in which prejudice to the opposing party "cannot be rectified by an appropriate court order . . . are very rare"). In fact, the State affirmatively argued that further discovery was not necessary. Defs.' Reply Mem. (Mar. 3, 2007), Docket No. 606 at 24 ("There is No Need for Discovery").

Finally, even if the United States' complaint, read in the light most favorable to the United States, did not adequately plead a "non-possessory" claim or theory, this Court may deem the United States' complaint "constructively amended" to include a "non-possessory" claim. *See Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1087 (2d Cir. 1993). In *Wahlstrom*, for example, the complaint pled only a state-law claim, but because the parties had briefed federal claims in the trial court and on appeal, and the trial court had decided the federal issues, this Court deemed the complaint "constructively amended" to include a claim under federal law. *Id.*; *see also Purofied Down*

*Products Corp. v. Travelers Fire Ins. Co.*, 278 F.2d 439, 444 (2d Cir. 1960) ("Even though the appellate level has been reached, pleadings may be deemed amended to conform to the issues tried below."); 6A *Federal Practice & Procedure* § 1494; *compare City of Rome, NY v. Verizon Communications, Inc.*, 362 F.3d 168 (2d Cir. 2004) (declining constructive amendment where plaintiff did not articulate a basis for recovery under federal law). Here too, even if the United States' complaint is read to include only a "possessory" damages claim, because the parties fully briefed and the trial court decided the "non-possessory" issues, the complaint should be treated on appeal as if it had been amended. *See Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 654 n.2 (9th Cir. 1981) ("where both parties have fully argued a claim below, we will treat the pleadings as though they have been amended for purposes of appellate review").

### B. The district court concluded correctly that is has the authority to remedy the United States' "non-possessory" claim.

The State argues that, even if the United States' complaint alleged a "non-possessory" claim, that claim does not state a viable cause of action. State Br. at 48. That argument is meritless. The United States has a right to enforce federal law in federal court, as it seeks to do here.

### 1. The United States has the authority to file suit to protect its governmental interests.

The Supreme Court has long recognized that the United States "has a right to apply to its own courts for any proper assistance in the exercise of [its powers] and the discharge of [its duties]." *In re Debs*, 158 U.S. 564, 584 (1895); *see also United States v. American Bell Tel. Co.*, 128 U.S. 315, 357-58 (1888) (equity action to set aside patents as fraudulently obtained). Article II of the Constitution charges the President with the duty to ensure that the laws are "faithfully executed," and Article III extends the judicial power to cases in which the United States is a party. *See* U.S. Const. Art. II, § 3; Art. III, § 2. Accordingly, the Supreme Court held in *Cramer v. United States*, 261 U.S. 219 (1923), that "[t]he United States may lawfully maintain suits in its own courts to prevent interference with the means it adopts to exercise its powers of government and to carry into effect its policies." *Id.* at 233 (internal quotes omitted). The government need not have a pecuniary interest in the dispute, but may file suit simply to protect its sovereign and governmental interests. *Heckman*, 224 U.S. at 437-38, 439; *Debs*, 158 U.S. at 584, 586.

It is firmly established that the United States' authority to maintain legal actions includes the right to sue on behalf of federally recognized Indian tribes.

*See Moe*, 425 U.S. at 473. The United States may, for example, file suit to protect the treaty or property rights of tribes and tribal members. *See*, *e.g.*, *Montana v. United States*, 450 U.S. 544 (1981) (suit by United States "proceeding in its own right and as fiduciary for the Tribe" to quiet title to the bed and banks of the Big Horn River and to vindicate the Tribe's treaty right to regulate hunting and fishing on reservation land); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (suit by United States "on its own behalf and as trustee for seven Indian tribes" to vindicate the Tribes' treaty fishing rights); *Cramer*, 261 U.S. at 233 (holding United States may file suit on behalf of Indians to cancel illegally obtained land patents); *Heckman*, 224 U.S. at 437-41 (suit by United States to cancel illegal conveyances of Indian land). In *United States v. Board of Commissioners of Osage County*, 251 U.S. 128, 133 (1919), the Supreme Court held that "the United States as guardian of the Indians had the duty to protect them from spoilation and, therefore, the right to prevent their being illegally deprived of the property rights conferred" by statute.

As explained in part I.A above, the United States acts in its sovereign capacity when it files suit to vindicate Indian property interests protected by federal statute or treaty. Such suits fulfill the government's interest as trustee for Indian tribes, as well as independent governmental interests. *See Wilson*, 442 U.S.

at 657 n.1; *U.S. v. Minnesota*, 270 U.S. at 194; *Boylan*, 265 F. at 173. In *Heckman*, 224 U.S. at 437, the Supreme Court said that enforcing statutory prohibitions on the alienation of Indian land "is distinctly an interest of the United States." An illegal sale of Indian land "is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States." *Id.* at 438.

The Supreme Court in *United States v. California*, recognized that "Congress has given a very broad authority to the Attorney General to institute and conduct litigation in order to establish and safeguard government rights and properties." 332 U.S. at 27 (citing numerous cases and the statute now codified at 28 U.S.C. § 518). Indeed, Congress has specifically authorized the United States Attorneys to represent Indians "in all suits at law and in equity." 25 U.S.C. § 175; *see also* 28 U.S.C. § 509 (vesting all functions of other Justice Department officers in the Attorney General); *id.* § 510 (authorizing the Attorney General to delegate his functions).

No further statutory authority is required to bring suits such as this. "The United States Code is filled with sections authorizing federal litigation in various kinds of cases, but the government can sue even if there is no specific authorization." Charles Alan Wright, *The Law of Federal Courts* 113 (4th ed.

1983); *see also United States v. Lahey Clinic Hospital, Inc.*, 399 F.3d 1, 15-16 (1st Cir. 2005); *United States v. South Florida Water Management District*, 28 F.3d 1563, 1571 (11th Cir. 1994); *United States v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir. 1972). Consequently, in *Moe*, the Supreme Court held that the United States would have standing to challenge a state tax on Indians, even absent specific enabling legislation. 425 U.S. at 474 & n.13. Therefore, the United States has the authority to apply to the federal courts to vindicate the tribal and governmental interests implicated by the State's violation of the Trade and Intercourse Act.

**2. The Trade and Intercourse Act protects both "possessory" and "non-possessory" interests.**

The Trade and Intercourse Act protects the "possessory" interest in Indian lands by declaring invalid sales of those lands made without the consent of the United States. 25 U.S.C. § 177. The Act was intended "to enable the Government, acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent." *Tuscarora*, 362 U.S. at 119. Hence, "possessory" land claims are appropriate under the Act.

If equitable principles bar recovery of possession, however, a Trade and Intercourse Act claim may instead focus on the terms of the illegal transaction itself. The Act protects Indians' "non-possessory" interests by ensuring fair

compensation for Indian land. It does so through the requirements that agents of a state negotiate "the compensation to be made for their claim to lands within such State" only "in the presence and with the approbation of the commissioner of the United States" and that any resulting agreements be approved by Congress. 25 U.S.C. § 177. The Act does not prohibit sales of Indian lands altogether; it ensures, via federal oversight of such sales, that the Indians will not be coerced or swindled. The Supreme Court held that the "obvious purpose" of the Act was "to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them." *Tuscarora*, 362 U.S. at 119. Consequently, "non-possessory" claims that seek fair compensation for the land (rather than recovery of possession) are also appropriate under the Trade and Intercourse Act.[7]

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[7] The State asserts that the Supreme Court in *Oneida II* "did not ground the Oneidas' right of action in the Nonintercourse Act." State Br. at 49. Since the United States was not a party to that suit, the Court there did not address *the United States'* authority to file suit to enforce the Act.

The State also cites several cases for the proposition that the Tribes cannot state a federal common law contract claim in this case. *See* State Br. 51-52. None of those cases concerns *the United States'* right to enforce federal law in federal courts. For example, *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 94 F.3d 747 (2d Cir. 1996), was a contract action filed by an electric utility against a tribe. The Court there held that it lacked jurisdiction under 28 U.S.C. § 1331, because there was no live controversy between the parties concerning the validity of the contract under federal law, and any disputes about the terms of the contract arose only under state law. *Id.* at 753. There is no dispute that the Court has jurisdiction over the United States' claims in this case. *See* 28 U.S.C. § 1345.

### 3. An award of a "non-possessory" monetary remedy is within the district court's authority to vindicate the congressional policy underlying the Trade and Intercourse Act.

Federal courts have at their disposal all legal and equitable powers to effectuate the congressional policies underlying federal statutes. For example, "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes. As this Court long ago recognized, there is inherent in the Courts of Equity a jurisdiction to give effect to the policy of the legislature." *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960) (internal quotes and ellipses omitted) (quoted in *United States v. Sasso*, 215 F.3d 283, 289 (2d Cir. 2000) (upholding district court's authority to order contribution under RICO)). The Supreme Court in *Mitchell* held that when the courts have the power to enforce a statute, "Congress will be deemed to have granted as much equitable authority as is necessary to further the underlying purposes and policies of the statute." *United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 225 (3d Cir. 2005) (discussing *Mitchell*, 361 U.S. at 291-92).

Unless Congress has expressly or by necessary implication restricted the courts' equitable remedial discretion, the courts retain the full scope of that

discretion. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see also Conboy v. AT&T Corp.*, 241 F.3d 242, 255 (2d Cir. 2001). When Congress has given no indication of what remedies are available in actions to vindicate rights under a federal statute, "[a]ll appropriate relief is available." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 68 (1992).

The Trade and Intercourse Act does not contain a "comprehensive scheme of remedies" that might limit the courts' remedial discretion. *See Conboy*, 241 F.3d at 255. In the Oneida test case, this Court held that the Trade and Intercourse Acts "were not comprehensive statutes" that preempted previously available remedies, but instead "augmented the protection of Indian property rights previously afforded by federal common law by adding an additional statutory prohibition." *Oneida Indian Nation*, 719 F.2d at 531. The Court found "no evidence to suggest that Congress intended to deny common law remedies to the Indians." *Id.* The Supreme Court affirmed that holding, *Oneida II*, 470 U.S. at 253, observing that the Act "does not speak directly to the question of remedies for unlawful conveyances of Indian land," *id.* at 237. The Supreme Court also noted that the provision at issue here, Section 8 of the 1793 statute, now codified as amended at 25 U.S.C. § 177, "contains no remedial provision" and "does not address directly the problem of restoring unlawfully conveyed land to the

Indians." *Id.* at 238-39. Accordingly, this Court must "presume the availability of all appropriate remedies" in actions under the Trade and Intercourse Act to ensure that the purposes of the Act are fulfilled. *See Franklin*, 503 U.S. at 66.

Among the available remedies is restitution, *see S.E.C. v. Cavanagh*, 445 F.3d 105, 119-20 (2d Cir. 2006), which is available at law and in equity, *FTC v. Verity International, Ltd.*, 443 F.3d 48, 66-67 (2d Cir. 2006). "[T]he ancient remedies of accounting, constructive trust, and restitution have compelled wrongdoers to 'disgorge'-- *i.e.*, account for and surrender -- their ill-gotten gains for centuries." *Cavanagh*, 445 F.3d at 119. Restitution and disgorgement "compel[] an award equal to the defendant's gain." *Id.* at 120. While a damages action focuses on compensating the plaintiff for his loss, a restitution action aims "at forcing the defendant to disgorge benefits that it would be unjust for him to keep." Dan B. Dobbs, *Handbook on the Law of Remedies* § 4.1, at 224 (1973); *see also Pereira v. Farace*, 413 F.3d 330, 340 (2d Cir. 2005). The purpose of restitution is "to prevent the defendant's unjust enrichment by recapturing the gains the defendant secured in a transaction." 1 Dan B. Dobbs, *Law of Remedies* § 4.3(1), at 552 (2d ed. 1993). In the case of wrongfully obtained property, "the effect can be to give the plaintiff the gain a defendant makes from the sale of the plaintiff's property and any reinvestment of the funds." *Cavanagh*, 445 F.3d at

119-20 (quoting parenthetically 1 Dobbs, *Law of Remedies* § 4.3(1), at 589).[8/]

"[T]he Supreme Court has upheld the power of the Government without specific statutory authority to seek restitution, and has upheld the lower courts in granting restitution, as an ancillary remedy in the exercise of the courts' general equity powers to afford complete relief." *S.E.C. v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir. 1971). An order to disgorge profits "may be considered as an order appropriate and necessary to enforce compliance with" a statute. *See Porter*, 328 U.S. at 400; *see also Lane Labs-USA*, 427 F.3d at 229 ("the restitution ordered by the District Court will deter future violations of the FDCA"); *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997) ("The primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains."). "Such action is within the recognized power and within the highest tradition of a court of equity." *Porter*, 328 U.S. at 402.

Accordingly, courts have held that restitution is available to remedy violations of a host of federal statutes. *See Lane Labs-USA*, 427 F.3d at 224 (upholding district court's authority to order restitution for violations of the Food, Drug and Cosmetics Act) (citing *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470

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[8/] In the present context, restitution would also compensate the Tribe for the money it lost in the sale of the land to the State as compared to the amount it would have received if it had sold the land with the approval of the United States.

(11th Cir.1996) (Federal Trade Commission Act); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (Securities Exchange Act); *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 583-84 (9th Cir. 1982) (Commodities Exchange Act); *Interstate Commerce Comm'n v. B & T Transp. Co.*, 613 F.2d 1182, 1184-85 (1st Cir. 1980) (Motor Carrier Act)).

Restitution is appropriate to remedy the State's violations of the Trade and Intercourse Act. "In framing . . . remedies . . ., courts must act primarily to effectuate the policy of the [statute] and to protect the public interest while giving necessary respect to the private interests involved." *Porter*, 328 U.S. at 400. Courts may consider countervailing interests in fashioning a remedy appropriate to the circumstances. For example, generations of good-faith purchasers of land acquired initially in violation of the Trade and Intercourse Act may call into question the propriety of restoring possession of the land to the Tribe. But other "non-possessory" remedies are available to effectuate Congress' intent. *See Mitchell*, 361 U.S. at 292 (courts have the power "to provide complete relief in the light of statutory purposes").

An award of fair compensation for the lost lands or disgorgement of the State's profits from the illegal transactions, for example, would vindicate the congressional policy of the Trade and Intercourse Act, while giving "necessary

respect" to other relevant considerations. *See Porter*, 328 U.S. at 400. By reforming and thereby confirming the previously unlawful transactions, that "non-possessory" remedy does not call current title into question, but rather confirms the *status quo* and reinforces repose. *See Mottaz*, 476 U.S. at 842 (holding that a claim to recover the profits from an unlawful sale of Indian land "would involve a concession that title had passed . . . and that the sole issue was whether [the Indian] was fairly compensated for the taking of her interests"). "Restitution of the profits of these transactions merely deprives the [State] of the gains of [its] wrongful conduct." *See Texas Gulf Sulphur*, 446 F.2d at 1308. Correspondingly, such an award would also reflect fair compensation for the land and enable recovery of the Tribe's loss.

But "a decision that *no* remedy is available" would abdicate the "historic judicial authority to award appropriate relief in cases brought in our court system." *See Franklin*, 503 U.S. at 74; *see also American Bell*, 128 U.S. at 357-58; *Texas Gulf Sulphur*, 446 F.2d at 1308 ("It would severely defeat the purposes of the Act if a violator . . . were allowed to retain the profits from his violation.").

#### 4. Precedent supports an award of a "non-possessory" monetary remedy in this case.

The Supreme Court has provided monetary remedies when returning possession of unlawfully obtained Indian land was not possible. In *Felix v. Patrick*, 145 U.S. 317, *cited with approval in Sherrill*, 544 U.S. at 217, 219, for example, Sophia Felix received scrip that would have allowed her to locate and patent 480 acres of land. Although the statute under which the scrip was issued provided that "no transfer or conveyance of such scrip should be valid," an unknown person illegally obtained 120 acres' worth of Felix's scrip. *Id.* at 325. That unknown person later transferred the scrip to the defendant, Patrick, who used it to locate lands, which subsequently were "platted and recorded as an addition to the city of Omaha." *Id.* at 326. Patrick then sold "a large part of the lands" to innocent purchasers. *Id.* Felix's heirs filed suit to recover the land 28 years after Felix relinquished the scrip. *Id.* at 330.

The Supreme Court held that, since Patrick had "no right to locate the scrip for his own benefit," he would be deemed to have located it as a constructive trustee for Felix. *Id.* at 327. The Court explained that "wherever a person obtains the legal title to land by any artifice or concealment, . . . a court of equity will impress upon the lands so held by him a trust in favor of the party who is justly

entitled to them." *Id.* at 328. Although the typical remedy would be to "order the trust executed" by returning possession of the property to Felix, *id.*, the Court refused to order that remedy. The Court emphasized that the consequences of dispossessing the innocent persons who occupied the land "would be disastrous." *Id.* at 335. The Court thus concluded that "justice requires only what the law, in the absence of the statutory limitation, would demand, the repayment of the value of the scrip, with legal interest thereon." *Id.* at 334.[9/]

Similarly, in *U.S. v. Minnesota*, 270 U.S. 181, Indian land had been mistakenly conveyed to the State of Minnesota, which in turn had conveyed much of it to good-faith third-party purchasers. The Court held that "the patenting [of the land] was contrary to law and in derogation of the rights of the Indians. . . . Therefore the United States is entitled to a cancellation of the patents as to these lands, unless the state has sold the lands, and in that event is entitled to recover their value." *Id.* at 206.

Again, in *Yankton Sioux Tribe*, 272 U.S. 351, *cited with approval in Sherrill*, 544 U.S. at 219, the Supreme Court redressed the infringement of a Tribal

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[9/] The Court ultimately dismissed the case entirely, because Felix was "long since dead, and the party who procured it from her is unknown," because the Court was not satisfied that Felix had not received fair payment for the scrip when she conveyed it, and because the Court found it "improbable" that anything could be proven about "the nature of the original transaction." *Felix*, 145 U.S. at 333.

property right with monetary compensation. The Court found that, although the Yankton Sioux Tribe held title to certain lands, the United States could not return possession of the lands to the Tribe, because "the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers." *Id.* at 357. Accordingly, the Court concluded that the Tribe was "entitled to just compensation as for a taking under the power of eminent domain." *Id.* at 359. Thus, the Supreme Court has long endorsed the award of monetary remedies in cases such as this.

**5. The district court's approach is also consistent with the purposes of the Trade and Intercourse Act.**

The case law discussed by the trial court also supports its authority to award a monetary remedy for the United States' "non-possessory" claim. Contrary to the State's assertion, Br. at 47, the district court did not reject the United States' Trade and Intercourse Act claim. The court found that "a claim predicated on a violation of the Nonintercourse Act and seeking remedies effectuating the intent of the act might . . . be appropriate" and that "no precedent . . . forecloses Plaintiff from asserting a right of action under the Nonintercourse Act." A725 n.4. The district court -- which did not address the principles applicable only to the United States as a plaintiff -- decided to pursue a different course of analysis because it believed

that, after *Cayuga*, "common law claims are on stronger ground." *Id.* Thus, the court concluded that the "non-possessory" claim "is best styled as a contract claim that seeks to reform or revise a contract that is void for unconscionability." A727. The court further opined, however, that the analysis of the common law claims would be the same as the analysis required to determine an appropriate remedy under the Trade and Intercourse Act. A725 n.4.

The trial court did not err in holding that cases filed against the United States under the Indian Claims Commission Act ("ICCA'"), 60 Stat. 1049 (1946), are somewhat analogous to the case at bar. A728. The ICCA waived the United States' sovereign immunity from Indian land claims, but, consistent with the Supreme Court's earlier decisions in *Felix*, *Minnesota*, and *Yankton Sioux*, the Act allowed only compensatory damages for successful claims. *See Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1460-61 (10th Cir. 1987), *cited in Sherrill*, 544 U.S. at 213. Consistent with the Supreme Court's earlier decisions, the Tenth Circuit in *Navajo* observed that the subsequent settling of the land precluded any return of possession to the tribes under the ICCA. *Id.* at 1467. Drawing a parallel to the Supreme Court's opinion in *Yankton Sioux Tribe*, the Tenth Circuit observed that the ICCA's restriction to monetary remedies "represents a fundamental policy choice made by Congress out of the sheer, pragmatic necessity

that . . . land title in 1946 could not be disturbed because of the sorry injustices suffered by native Americans in the eighteenth, nineteenth, and early twentieth centuries. Those injustices would have to be recompensed through monetary awards." *Id.* Thus, the district court held correctly that the Court of Claims' approach to fashioning remedies under the ICCA is relevant here.

The State contends that the ICCA cases the district court discussed are irrelevant because that Act gave Indian tribes "specific statutory authority" to sue the United States. State Br. at 50. To the contrary, the fact that the ICCA waived the United States' sovereign immunity does not detract from the relevance of those cases to the United States' "non-possessory" claim here. The Court of Claims faced cases parallel to this one in which the court had to determine the appropriate monetary award for land taken unlawfully or with insufficient compensation. The district court was not wrong to look to those cases for guidance as to how a court may remedy invalid land transactions without implicating possessory rights.

The United States does not agree with the entirety of the district court's analysis. For example, the United States believes that, to establish liability under the plain language of the Trade and Intercourse Act, it need only show that the transactions by which the State acquired Oneida land were not federally authorized; it need not also show "inferiority of the Oneida Indian Nation's

negotiating position" or "gross inadequacy of consideration." A734. To the extent that the district court read the ICCA cases as imposing those additional requirements *on the United States* when it seeks to enforce the Trade and Intercourse Act, the district court erred, and this Court should clarify the proper standard for the district court to apply as this case proceeds. Nonetheless, the district court held correctly that the United States' "non-possessory" claim is "consistent with federal law." *Id.*

### C. *Cayuga* does not bar the United States' "non-possessory" claim.

*Cayuga* did not extinguish the lower courts' authority to remedy violations of the Trade and Intercourse Act. It only held that laches may bar "disruptive" remedies, that is, remedies based on an asserted right of possession. *Cayuga*, 413 F.3d at 277. Had the Court in *Cayuga* intended to cut off all possible relief in Indian land claims cases, it would not have analyzed each of the proposed remedies at issue there separately. *Cayuga* first addressed the "ejectment claim," *id.* at 275, then the other requests for relief, including the request for "trespass damages," *id.* at 278 ("we must also consider whether their other claims . . . are likewise subject to dismissal"). If all remedies for Trade and Intercourse Act violations are inherently "disruptive" and therefore barred by laches, the Court would have so stated. Instead, *Cayuga* held only that the particular relief

requested in that case was disallowed.

A "non-possessory" monetary remedy would not implicate the Court's concerns in *Cayuga*. The Court found that the claims there were "disruptive" because they were premised on the Cayugas' right to "possession of a large swath of central New York State and the ejectment of tens of thousands of landowners" and sought "to overturn years of settled land ownership." *Id.* at 275. Restitution or fair compensation, in contrast, is not premised on a current right to possession of the land; it merely depends on the unfairness of the transactions. Dobbs, *Handbook on the Law of Remedies*, § 4.1, at 224 (restitution is aimed at "forcing the defendant to disgorge benefits that it would be unjust for him to keep"). Restitution does not call into question current titles; instead it accepts the transactions by which the State acquired the land and simply requires the State to provide the Tribes the fair compensation the Trade and Intercourse Act was designed to secure.

The Supreme Court explained in *Mottaz* that an Indian plaintiff's claim for "monetary damages" in the amount of "the proceeds realized" from the allegedly unlawful sale of her land "*would involve a concession that title had passed* . . . and that the sole issue was whether [she] was *fairly compensated* for the taking of her

interests." 476 U.S. at 842 (emphasis added).[10/] Following *Mottaz*, the Tenth Circuit observed that non-Indians who held title to land "claimed by Indians could not be secure in their ownership until the Indians' claims were litigated." *Navajo Tribe of Indians*, 809 F.2d at 1467. By allowing the Indians' claims to go forward under the ICCA, but limiting them to monetary remedies, "non-Indians were assured of continued possession regardless of the outcome of the litigation." *Id.* The monetary remedy essentially "forced the Indian to accept a *post factum* sale." *Id.* (citation and emphasis omitted). The fair compensation remedy thus furthers the purposes of the Trade and Intercourse Act without disrupting the *status quo*. Indeed, by confirming the validity of the current land titles, the fair compensation remedy would resolve this long-lasting dispute with finality, thereby protecting the *status quo*. Moreover, unlike the "possessory" remedies requested in *Cayuga*, restitution or fair compensation does not "project redress into the present and future." 413 F.3d at 275 (internal quotes omitted).

The State argues that the district court erred in allowing the "non-possessory" claims to go forward, because those claims are indistinguishable from

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[10/] Since the plaintiff in that case sought not restitution of profits, but rather "*current* fair market value," the Supreme Court held that her claim challenged the current title to the land and was thus barred by the statute of limitations in the Quiet Title Act. *Mottaz*, 476 U.S. at 841, 842 (emphasis in original).

the claims asserted in *Cayuga*. State Br. at 28-29. The United States did not pursue a "non-possessory" claim under the Trade and Intercourse Act in its briefing in *Cayuga*. Rather, the United States sought only ejectment and trespass damages, *see Cayuga*, 413 F.3d at 271, both of which are premised on an asserted present-day right to possess the land, *see id.* at 274, 278; *see also Mescalero Apache Tribe v. Burgett Floral Co.*, 503 F.2d 336, 338 (10th Cir. 1974). In this case, in contrast, the United States timely briefed a "non-possessory" claim under the Trade and Intercourse Act. Hence, this case is materially different from *Cayuga*.

The State further argues that, since awarding any relief in this case "would necessarily involve a finding that the [challenged] transactions violated federal law," all of the claims are disruptive. State Br. at 29. A finding that the transactions by which the State obtained Oneida land were unlawful is not, however, inherently disruptive. Indeed, there can be little dispute that the State violated federal law; the only real issue in this case concerns the appropriate remedy for those violations. The United States' "non-possessory" claim does not question the current title to the land, but seeks to recover the benefit the State enjoyed as a result of its violations of the Trade and Intercourse Act. Hence, that claim is not "disruptive" within the meaning of *Cayuga*.

Moreover, the State's suggestion that its violations of federal law and the continuing impact of those violations on the Oneida should go unremedied conflicts with the fundamental proposition that ours is "a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *See Franklin*, 503 U.S. at 66 (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1803)). Therefore, the district court correctly allowed the United States' "non-possessory" claim to proceed in order to afford a remedy for the State's violation of the Trade and Intercourse Act and the Treaty of Canandaigua.

## CONCLUSION

For the foregoing reasons, the district court's dismissal of the United States' "possessory" damages claim should be reversed, and its order allowing the United States' "non-possessory" claim to proceed should be affirmed.

Respectfully submitted,

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90-6-20-1
December 10, 2007

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