UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONEIDA NATION OF NEW YORK, THE ONEIDA TRIBE OF INDIANS OF WISCONSIN and THE ONEIDA OF THE THAMES, Plaintiffs, and THE UNITED STATES OF AMERICA, Intervenor, - against - THE COUNTY OF MADISON, NEW YORK, COUNTY OF ONEIDA, NEW YORK and THE STATE OF NEW YORK, Defendants.	74-CV-187 (LEK/DRH) ONEIDA PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUGMENT

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A. *Summary*

For two principal reasons, defendants are not entitled to summary judgment.

First, defendants focus solely on the Oneidas' claims for relief that are based on a possessory right, such as the claim for trespass damages, and ignore the Oneidas' non-possessory claim to compel the State of New York to pay fair compensation for the Oneidas' land based on its value when the State acquired it. The complaint alleges that the State purchased Oneida lands for a fraction of the prices for which the State resold the lands. Complaint, ¶¶31 & 35. The prayer for relief, at ¶6, seeks the fair price of lands conveyed to the State, less credit for what the State paid the Oneidas, "because New York State received benefits from its purported purchases and sales of the subject lands – including but not limited to the difference in value between the price at which New York State acquired or transferred each portion of the subject lands from the Oneida Indian Nation and its value . . ., disgorgement of these benefits, with interest."

This fair compensation claim is not governed by *Cayuga*'s laches analysis because it does not depend on a tribal possessory right and is not a "possessory land claim." Fair compensation simply provides the Oneidas with the value of their property at the time the State obtained it. It is firmly grounded in the Nonintercourse Act and federal common law and is the answer to the charge that the passage of time and changed circumstances bar the return of land to a wronged plaintiff. The same equitable rule that can bar return of land after transfer to third parties provides for fair compensation for the value of the land when it was lost. As to transactions specifically involving Indian lands, the Supreme Court has approved fair compensation damages when it was inequitable to restore tribal land rights in land already transferred to third parties. *United States v. Minnesota*, 270 U.S. 181, 206 & 215 (1926); *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357-59 (1926); *Felix v. Patrick*, 145 U.S. 317, 334-35 (1892).

Solid evidence supports the fair compensation claim. Experts have analyzed the value the State paid to the Oneidas for land bought between 1795 and 1827 and the value the State received upon re-sale of the same land. The State paid the Oneidas as little as one-twelfth of the value of Oneida land and never paid more than about one-third of its market value. The cumulative shortfall exceeded $500,000 in just the 1795 to 1827 period.

Underpayment was intentional. When it bought one-third of the Oneida reservation in 1795, the State acted pursuant to a statute requiring the State to pay no more than one-fourth of the value for which the State could sell the lands. From 1795 to at least 1827, the State held to this same approach, using Indian land sales as a source of funding for the state budget.

Second, the Oneidas' trespass damages claim against all defendants may not be dismissed by summary judgment. A decision regarding laches must be based on all the facts, developed through discovery and an evidentiary hearing. Because this Court held the laches defense unavailable and struck it, there has been no laches discovery, and no hearing regarding laches. As defendants earlier stated when they asserted the availability of the defense: "[L]aches is fact-specific and cannot be determined solely as a matter of law." Smith Decl., Ex. 8.

In *Cayuga*, the Second Circuit held that laches "can be applied" to possessory land claims, which are "subject to" the laches defense and "subject to dismissal *ab initio*." 413 F.3d at 268 & 277-78. *Cayuga* thus held that the defense is available, not that dismissal is required in all cases. The Second Circuit's holding did not change the black letter law that laches involves factual questions usually subject to discovery, then a hearing and finally a discretionary judicial determination. That is why the Second Circuit noted in *Cayuga* that the District Court had held hearings and had made a laches finding, which the Second Circuit relied on as the basis for its decision. "The District Court found that laches barred the possessory land claim, and the

considerations identified by the Supreme Court in *Sherrill* mandate that we affirm the District Court's findings that the possessory land claim is barred by laches." *Id*. at 277. "In light of these findings [regarding laches], and the Supreme Court's ruling in *Sherrill*, we see no need to remand to the District Court for a determination of the laches question." *Id*. at 280.

Defendants' Rule 7.1(a)(3) statement fails to allege unreasonable delay that causes prejudice, and thus does not establish a prima facie case of laches. Further, summary judgment is inappropriate because we present evidence disputing unreasonable delay and prejudice. The Oneidas did not delay, but sought redress from the state and federal governments, as Judge Port found. 464 F. Supp. at 531 & 536-37. The passage of time does not by itself bar the claim, because Congress presumed its viability when it enacted and amended the statute of limitations applicable to damage claims. 28 U.S.C. § 2415. The supposition that the timing of the Oneida claim creates prejudice is not supported by evidence. No one hints at prejudice to the State and Counties. Third parties purchased Oneida lands quickly after the State acquired them, so the passage of time changed nothing there. Title insurance as against land claims is available and adds nothing to the cost of policies. Real estate sales prices have been unaffected. It is easy to shape a judgment that cannot be construed to cloud titles: declare that the damages award does not cloud titles or have any collateral effect, something not sought by the Cayugas.

Finally, under well-established legal principles, which were not asserted in *Cayuga*, the State cannot invoke laches because it has unclean hands. The State intentionally violated federal law when it bought Oneida land and intentionally bought it for only a fraction of its value by using threats, lies, liquor and other exploitation.

B. *The Complaint Presents a Fair Compensation Claim that Is Not Governed by* Cayuga*'s Laches Analysis.*

The complaint contains possessory claims, but also a non-possessory claim. The non-possessory claim is against only the State of New York and is for damages in the amount by which the State underpaid the Oneidas for their land, which the State re-sold for large profits.

Paragraphs 31 and 35 of the tribal plaintiffs' amended complaint allege that the State of New York obtained Oneida lands by transactions in which the State paid the Oneidas a small fraction of the value the State received on re-sale of the land. Paragraph 6 of the prayer for relief prays for judgment against the State for the fair price of Oneida lands at the times of sale:

> (6) because New York State received benefits from its purported purchases and sales of the subject lands – including but not limited to the difference in value between the price at which New York State acquired or transferred each portion of the subject lands from the Oneida Indian Nation and its value – . . . disgorgement of the value of these benefits, with interest.

Defendants' moving papers do not address these fair compensation allegations, which are more than sufficient to state a distinct claim for relief. Fed. R. Civ. P. 8(a) & 54(c).[1]

1. Cayuga*'s laches analysis governs only possessory land claims.*

Cayuga held that possessory claims are subject to a laches defense because effectuating a tribal possessory right through ejectment of private landowners would be disruptive. *Cayuga*'s holding is limited to possessory claims. "[W]e conclude that the possessory land claim alleged here is the type of claim to which a laches defense can be applied." 413 F.3d at 268. The Cayugas' claim was "a 'possessory claim.'" *Id*. at 275. The court limited its holding to

[1]Defendants knew of the fair compensation claim and chose not to address it in their summary judgment papers. Page 3 of defendants' memorandum of law carefully lists all demands in the Prayer for Relief, save for fair compensation. Defendants have the evidence supporting the claim. Smith Decl., Ex. 10 at 15-20 (interrogatory answers, after subheading 8, stating, "The State paid the Oneida a fraction of the land's true value."). Price insufficiency allegations were part of the test case. 434 F. Supp. at 537; 719 F.2d at 529; 414 U.S. at 665.

"possessory land claims of this type." *Id*. at 276. "[T]he instant claim, a possessory land claim, is subject to the doctrine of laches. . . ." *Id*. at 277. "We thus hold that the doctrine of laches bars the possessory land claim presented by the Cayugas here." *Id*. "Insofar as the Cayugas' claim in the instant case is unquestionably a possessory land claim, it is subject to laches." *Id*.

The Cayugas asserted a claim for trespass damages, not a fair compensation claim. The Second Circuit saw the trespass damages claim as derivative of the ejectment claim, dependent on the same possessory right, disruptive, and projecting relief into the present and the future. *Id*. at 274-75. The court observed that the damages were for the Cayugas' "loss of use and possession" of land and that a current value award was the equal of ejectment. *Id*. at 271-72. The District Court "'monetized' the ejectment remedy." *Id*. at 275. "[T]he award of damages stems entirely from the ejectment claim. . . ." *Id*. at 277 n.7. The trespass damages claim "is predicated entirely upon plaintiffs' possessory land claim." *Id*. at 278. "[T]he trespass claim . . . depends on the possessory land claim. . . ." *Id*.

The Second Circuit did *not* hold that a damage award is itself disruptive or subject to a laches defense. 413 F.3d at 274-78 & n.7. "[D]isruptiveness is inherent in the claim itself – which asks the Court to overturn years of settled land ownership – rather than an element of any particular remedy which would flow from the possessory land claim." *Id*. at 275.

2. *The claim for fair compensation is not a possessory land claim.*

The fair compensation claim does not depend on a continuing tribal possessory right. The claim for fair compensation is an *alternative* to a possessory claim. Fair compensation damages do not substitute for ejectment. An award of fair compensation assumes the rejection of our argument, *infra*, that laches does not bar the Oneida trespass damages claims, which are technically dependent on a possessory right. Instead of being based on a challenge to title, a fair

compensation award is based on the premise that titles cannot be challenged. As explained in the analysis of case law below, when a defendant has obtained a plaintiff's land in violation of law but the passage of time and changed circumstances bar its restoration, equity assures the plaintiff at least that he will have fair compensation for his lands, usually the defendants' profit on re-sale; in other words, equity's bar on return of land and assurance of fair compensation are part and parcel of the same equitable analysis. Fair compensation damages thus accept the finality of land conveyances and, instead of rescission, retrospectively make the transactions fair – all independent of any possessory right. If every allegation of possessory right and trespass were stricken from the complaint, the independent claim for fair compensation relief would be viable.

3. *Fair compensation damages are appropriate under the Nonintercourse Act and the federal common law.*

The Nonintercourse Act and federal common law restrict sale of tribal land, and the Oneidas' claims are solidly grounded in both. 470 U.S. at 233-36; 414 U.S at 667. The Act codified the common law rules and did not preempt common law remedies. 470 U.S. at 240; 414 U.S. at 667. In the Second Circuit, there is a right of action under the Act in addition to the common law right of action, 719 F.2d at 536-37, although the Supreme Court reserved on that question, 470 U.S. at 233. Thus, all remedies effectuating the purposes of the Act are available. "There is no evidence that Congress intended to deny common law remedies to the Indians." 719 F.2d at 531; *see Franklin v. Gwinnett Cy. Pub. Sch.*, 503 U.S. 60, 66 (1992) ("presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise").

The Nonintercourse Act focuses on fair compensation, permitting state agents to negotiate "compensation" only when "in the presence of and with the approbation of the commissioner of the United States." 25 U.S.C. § 177. In 1791, President Washington urged Congress to expand the Act "to obviate imposition" on tribes. I Richardson, *Messages & Papers*

of the Presidents 95 (1897); *see* F. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts*, 41-50 (1970). President Washington sent an official to the New York tribes to explain the Act's requirement that "the United States must be present, by their agent [at land sales], and will be your security that you shall not be defrauded in the bargain you make." Smith Decl., ¶43, Ex. 41 (60 *Pickering Papers*, 79). The Act is intended "to prevent the unfair, improvident or improper disposition by the Indians of land." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960).

The common law has long recognized the rule that, when equity bars restoration of land to a plaintiff after it has been transferred to innocent third parties, equity also requires a damage award for the difference between the price the defendant paid the plaintiff for the land and its true value when the defendant obtained it. Equity's bar to restoration of the land and equity's provision for fair compensation are two parts of the very same rule. For example, in *Bistline v. United States*, 229 F. 546, 548 (9th Cir. 1916), the court held that the United States was not entitled to be restored to land the defendant had sold to third parties but was entitled to damages, noting that the damages award did not vacate or annul defendant's sale to third parties. Similarly, in *Porter v. O'Donovan*, 130 P. 393, 395-97 (Ore. 1913), the defendants wrongfully obtained a deed from the plaintiff. The court set aside the conveyance of the land that the defendants retained but would not restore the plaintiff to the land that had been sold to "to an innocent purchaser." *Id*. at 396. The court ordered the defendants to pay damages equal to the value received on re-sale of the property, and the plaintiff to return such funds as defendants had paid him. *Id*. at 396-97; *accord Townsend v. Vanderwerker*, 160 U.S. 171 (1895) (plaintiff cannot get land because of third party rights, but can get land's value); *Pratt v. Law*, 13 U.S. 456, 494 (1815) (damages where specific performance impossible); *Hart v. Ten Eyck*, 2 Johns. Ch. 62

(N.Y. 1816) (where land re-sold to third parties, it could not be restored to plaintiff, but defendant could be ordered to provide plaintiff value of land at time when defendant obtained it); *Phillips v. Thompson*, 1 Johns. Ch. 131 (N.Y. Ch. 1814) (specific performance precluded but damages to be determined); *Warner v. Daniels*, 29 F. Cas. 246 (C.C.D. Mass. 1845) (damages if reconveyance impossible because of third-party rights); *Holland v. Anderson*, 38 Mo. 55 (1866) (same); *Daiker v. Strelinger*, 50 N.Y.S. 1074 (App. Div. 1898) (same); *Jackson v. Counts*, 106 Va. 7 (1906) (damages from defendant who procured deed, but no recourse against good faith purchaser); *Bailey v. Morgan*, 438 N.Y.S.2d 615 (App. Div. 1981); *Simon v. Marlow*, 515 F. Supp. 947 (W.D. Va. 1981); *see generally Glick v. Campagna*, 613 F.2d 21, 36-37 (3d Cir. 1979) (defendant not ordered to return stock where it had been re-sold to third party but ordered to pay damages equal to profit on re-sale); *Woodcock v. Bennet*, 1 Cow. 711 (N.Y. 1823) (where award of profit on re-sale of land is ordered, laches is not relevant because land's value when wrongfully obtained is measure of damages and value of later improvements not in issue).

Similarly, the common law remedy of disgorgement can be used to effectuate the Nonintercourse Act through an award of fair compensation. Disgorgement here simply prevents the State from being unjustly enriched by its unlawful conduct and does not depend upon a possessory right in the Oneidas. "A fundamental equitable maxim of federal common law is that no person should be able to profit from his own wrong." *Met. Life Ins. Co. v. Kelley*, 890 F. Supp. 746, 748 (N.D. Ill. 1995). Thus, in *SEC v. Cavanagh*, 445 F.3d 105 (2d Cir. 2006), the court affirmed disgorgement of profits made on the illegal sale of securities. The court inquired into "whether the remedies available at chancery in 1789 included disgorgement," *id.* at 118, to determine whether the First Judiciary Act conferred equitable power on courts to order disgorgement. The court ruled that disgorgement was "available to *private* equity plaintiffs in

chancery in 1789," 445 F.3d at 118 n.29, so there is no doubt here that this Court can order the State to disgorge its illegal profits. *See United States v. Lane Labs-USA, Inc.*, 427 F.3d 219 (3d Cir. 2005) (disgorgement for statutory violation); *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) (same); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) (same).

Fair compensation principles apply to Indian land. In *United States v. Minnesota*, 270 U.S. 181 (1926), lands were illegally transferred to Minnesota decades before suit. Relief depended on whether the land had been sold to third parties, in which case fair compensation, not restoration of the land, would be ordered. "[T]he United States [which sued on behalf of the affected tribe] is entitled to cancellation of the patents as to these lands, unless the state has sold the lands, and in that event is entitled to recover their fair value." *Id*. at 206. "[T]he United States is entitled to a decree canceling the patents for such as have not been sold by the state and charging her with the value of such as she has sold." *Id*. at 215. "[T]he value should be determined on the basis of the prices which would have been controlling had the particular lands been dealt with . . . under the Act of 1889," which was net proceeds after sale. *Id*. at 198 & 215.

In *Yankton Sioux Tribe v. United States*, 272 U.S. 351 (1926), the Court considered the violation of a treaty that confirmed tribal title to 648 acres in exchange for a cession of 150,000 acres. The tribe never obtained possession of the 648 acres, which were occupied by a non-Indian school, and the ceded lands were settled by "innumerable innocent purchasers." *Id*. at 357. The Court concluded that it was "impossible" to award the tribe possession of the 648 acres or to set aside the cession of the 150,000. *Id*. Nonetheless, the Court concluded that it "would be most inequitable" and "utterly indefensible upon any moral ground" to deny all remedies. *Id*. Thus, the Court awarded "just compensation" for the 648 acres of land. *Id*. at 357-59.

And, in *Felix v. Patrick*, 145 U.S. 317 (1892), the Court declined to set aside an illegal transfer of Indian land because it would unsettle a large number of third-party titles. *Id*. at 335. The Court also decided, however, that "justice requires only what the law, in the absence of the statutory limitation [on transfer], would demand – the repayment of the value of the scrip, with interest thereon." *Id*. at 334; *see id*. at 333 (Indian owner may have been paid scrip's "full value"). *See United States v. Debell*, 227 F. 760, 764 (8th Cir. 1915) (where deed for Indian's land was unlawfully conveyed to defendant who then sold to an innocent third party purchaser at a profit, United States could not obtain judgment voiding third party's deed, but could recover "proceeds" of defendant's sale to third party because defendant "cannot escape accounting for the proceeds he obtained for the property, or the value thereof, on the ground that he placed the land itself beyond the reach of the court" by sale to third party).

Felix is cited in *Sherrill*, and *Yankton Sioux* is cited in *Sherrill* and *Cayuga*, 544 U.S. at 217 & 219; 413 F.3d at 277. Neither *Sherrill* nor *Cayuga* addressed fair compensation, however, because the issue was presented in neither case. *See People ex rel. Cayuga Nation v. Comm'rs*, 207 N.Y. 42 (1912) (under 1909 law, State paid additional compensation to Cayugas). Both *Sherrill* and *Cayuga* invoke equity and thus are consistent with *Minnesota*, *Yankton Sioux* and *Felix* and with equity's provision for fair compensation when a conveyance cannot be rescinded.[2]

[2]A possessory land claim by the Shinnecocks was dismissed on laches grounds. *Shinnecock Indian Nation v. New York*, 2006 U.S. Dist. Lexis 87516 (E.D.N.Y. Nov. 28, 2006). Apart from eviction and trespass damages, the relief requested included damages equal to the value received by local governments on re-sale of the land. The court never evaluated this element of relief, however, and treated all damage demands as an extension of the tribe's possessory land claim and its demand for ejectment. The court never considered a non-possessory fair compensation claim such as is advanced here for the simple reason that the tribe never argued that it had one.

4. *There is ample proof of the fair compensation claim.*

The State paid the Oneidas far less than their land was worth. In the 1795 purchase of about a third of the Oneida reservation, the State paid the Oneidas "approximately fifty cents per acre" and re-sold "to white settlers for about $3.53 per acre." 719 F.2d at 529. Underpayment infected the State's purchases from 1795 through at least 1827, with the State re-selling Oneida land for between about three to twelve times what the State paid for the land. These facts are explained in the attached declaration of James P. Costigan, who reviewed county records and records in the State Archives, such as the Surveyor General's Books of Sales of State Lands 1786-1927 and the Comptroller's Ledgers for Bonds and Mortgages held by the State of New York 1796-1916. For the purchases of Oneida land from 1795 to 1827, Mr. Costigan determined the difference between the value paid by the State to the Oneidas and the value the State realized on resale, which exceeded $500,000. Declaration of James P. Costigan Regarding Sale and Re-Sale Prices of Oneida Lands ("Costigan Fair Comp. Decl."), ¶11, Ex. 1.

The State's underpayment to the Oneidas was intentional. The State financed its budget by buying Indian land cheaply and re-selling it for a profit. Smith Decl., ¶3, Ex. 1 at 40-44, 179 (report of expert Alan Taylor). By the Legislature's February 13, 1794 resolution, the State told the Oneidas it would purchase land "for their sole benefit." *Id.*, ¶15, Ex. 13. A year later, the Legislature passed a law requiring the Governor to purchase Oneida lands for no more than 4 shillings per acre and then to sell for no less than 16 shillings per acre, titling the law "An Act for the better Support of the Oneida," etc. *Id.*, ¶16, Ex. 14. New York's Council of Revision vetoed this Act: "The restrictions therefore on the agents in respect to the amount of the annuities to be stipulated by them, is inconsistent with the assurances contained in the above recited resolutions, and which, agreeably to the request of both houses were made to the Indians by his Excellency

the Governor." *Id.*, ¶17, Ex. 15. The Legislature overrode the veto. *Id.*, ¶18, Ex. 16. The State then acquired more than 1/3 of the Oneidas' lands in 1795, paying a fraction of value, but assuring the Oneidas that payment was "just and generous, and the price as much as the lands may be worth under all the circumstances." *Id.*, ¶19, Ex. 17; Costigan Fair Comp. Decl., ¶11, Ex. 1; 719 F.2d at 529 (State paid 1/7th of land value). Underpayment continued through at least 1827. Smith Decl., ¶¶20-29, Ex. 18-27; Costigan Fair Comp. Decl., ¶11, Ex. 1.

In 1829, the Legislature authorized purchase of Oneida lands at "a fair price," defined as the appraised value minus cost of resale. Smith Decl., ¶¶30-32, Ex. 28 (1829 law), Ex. 29 (1834 Surveyor General report) & Ex. 30 (1835 Report of Comm. on Indian Affairs). The State's appraisals proved to be low. *Id.*, ¶¶32-40, Ex. 30-38. In 1839, the State required payment to the Oneidas equal to resale price minus cost of sale, retroactive to 1829, although it is unclear that the 1839 law was faithfully followed. *Id.*, ¶36, Ex. 34. By 1829, however, the State already had acquired most of the Oneidas' land without paying a fair price. The Surveyor General later confessed: the 1795-1829 Oneida land purchases were "conducted with a view to the benefit of the [State's] treasury." *Id.*, ¶31, Ex. 29 (1834 Report). As put by the New York Senate: "the descendants of the original lords of the soil within this State have received but a poor indemnity for what has been wrested from them by the rapacity of our people." *Id.*, ¶102, Ex. 100.

C. *Whether Laches Bars the Oneidas' Claim for Trespass Damages Requires Discovery and a Hearing, which Will Prove that a Laches Bar Should Not Be Imposed.*

1. *There has been previous laches litigation regarding the Oneida claim.*

In 1970, the Oneidas filed a test case regarding a small amount of land occupied by Madison County and Oneida County, and the Counties asserted a laches defense. Judge Port ruled that the defense was unavailable and also found against the defendants as to certain factual bases of the defense. For more than a century, the Oneidas suffered from limited ability to speak

English, illiteracy and poverty. 434 F. Supp. at 536. "[A]lthough their attempts to redress grievances were totally futile, the Oneidas did protest the continuing loss of their tribal land." *Id*. The Oneidas repeatedly sought redress from the state and federal governments. *Id*. at 536-37. "[T]hey have patiently for many years sought a remedy by other means – but to no avail." *Id*. at 531. The Counties have admitted this. Smith Decl., ¶6, Ex. 4 (good faith memo: "they made repeated but unsuccessful efforts to obtain redress from many governmental authorities").

The Counties did not appeal Judge Port's laches rulings. 470 U.S. at 245. Thus, on subsequent review of a final judgment awarding trespass damages to the Oneidas, the Supreme Court did not decide whether laches might bar the Oneida claim. *Id*. at 245 (defense was waived). The Court said, however, that it would have thought claims more than a century old "would have been barred long ago" but that it could not find any "relevant legal basis for holding that the Oneidas' claims are barred." *Id*. at 253. The Court added that "equitable considerations" might guide the selection of appropriate remedies. *Id*. at 253 n.27.

In this case, which builds on the test case and concerns most of the Oneida reservation, defendants also asserted a laches defense. Relying on circuit precedent, this Court struck the defense. 194 F. Supp. 2d at 124. Consequently, there has been no discovery concerning laches.

2. *The laches inquiry is fact-intensive and requires defendants to prove unreasonable delay and unfair prejudice*.

A laches bar cannot be imposed with respect to the claim for trespass damages, a possessory claim under *Cayuga*, unless defendants demonstrate unreasonable delay and prejudice attributable to the delay, *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 259 (2d Cir. 1997), as to which defendants bear the burden of proof, *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 191 (2d Cir. 1996) (if claim timely under statute of limitations, defendants bear burden). Defendants' Rule 7.1(a)(3) statement, however, does not assert

unreasonable delay or unfair prejudice, or allege a causal relationship between the two. Defendants assume that a laches bar must be imposed with respect to old possessory land claims, even for trespass damages, asserting only what is true about all old land claims: that Indian land was sold long ago to non-Indian settlers and that suit was not filed until contemporary times.

When it is available, "laches is fact-specific and cannot be determined solely as a matter of law." Smith Decl., Ex. 8 (defendants' memorandum in this case opposing striking defenses, including laches). "Whether laches bars an action in a given case depends upon the circumstances of that case and is a question primarily addressed to the discretion of the trial court." *Burnett v. N.Y. Cen. R.R. Co.*, 380 U.S. 424, 435 (1965). "The equitable nature of laches necessarily requires that resolution be based on the circumstances peculiar to each case. The inquiry is a factual one. The determination of whether laches bars a plaintiff from equitable relief is entirely within the discretion of the trial court." *Tri-Star Pictures v. Leisure Time Prod.*, 17 F.3d 38, 44 (2d Cir. 1994) (citation omitted).

By seeking to avoid traditional laches rules, defendants are seeking the imposition of a de facto statute of limitations, not laches. Whereas a true laches analysis is focused on the reason for delay, here defendants assert that reasons for delay are irrelevant. Defs. Memo, at 25; *see* Defs. Rule 7.1(a)(3) Statement (unreasonable delay not alleged). Defendants offer no fact to show that a trespass damage award will prejudice anyone, or that delay in filing suit is the cause of any prejudice. The facts on which defendants do rely, the passing of many years since the State obtained tribal land and its subsequent development by non-Indians, were those known to the Supreme Court in *Oneida II* when it suggested that equitable considerations may affect relief but that only laches could possibly bar the Oneida claim. 470 U.S. at 244 n.16 & 253 n.27. They are the facts known to Congress when it enacted 28 U.S.C. § 2415, a statute of limitations

governing old Indian claims, with a purpose "to give the Indians one last opportunity to file suits." 470 U.S. at 244. Both the Supreme Court and Congress, therefore, evaluated the problem of old Indian claims and addressed them by, respectively, providing that equitable principles can affect remedy and by providing a future statutory time bar intended to preserve old claims. By urging a broad equitable bar to all old Indian claims, without regard to particular facts, defendants are really arguing for a ruling in conflict with *Oneida II* and section 2415. Defendants cannot do this in the guise of laches, a principle under which the reason for delay is always relevant and the connection between delay and prejudice must always be established.[3]

3. Cayuga *does not require dismissal of possessory claims as a matter of law.*

Cayuga does not hold that old possessory claims must be dismissed. The court explained: "we affirm the District Court's finding that the possessory land claim is barred by laches." 413 F.3d at 277. The outcome was based "on the findings of the District Court," *id*. at 268, "findings" that obviated the need for remand, *id*. at 280. The findings were supported by a full record. *Id*. at 272. The court could not have decided the laches question as a matter of law because that decision requires fact-finding. The discretionary nature of a laches ruling is significant: affirmance of a finding does not imply that a contrary finding would be an abuse of discretion. *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 75 (2d Cir. 1998) (courts can "rule either way" on discretionary matter); *Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 377 (2d Cir. 1997) ("discretion normally implies the authority . . . to

[3]For the black-letter rules that the facts matter, that a hearing is required in the absence of undisputed facts, that imposition of a laches bar depends upon achieving equity and is not mechanically dictated by the passage of time, that defendants bear the burden to prove unreasonable delay and prejudice caused by delay, and that the decision to impose a laches bar or not is subject to the trial court's discretion, see *Ikelionwu v. United States*, 150 F.3d 233, 237 (2d Cir. 1998); *DeSilvo v. Prudential Lines, Inc.*, 701 F.2d 13, 15 (2d Cir. 1983); *Larios v. Victory Carriers, Inc.*, 316 F.2d 63, 66-67 (2d Cir. 1963); Dobbs, *Law of Remedies* § 2.4(4) (2d ed. 1993).

decide a disputed matter either way"); *United States v. Arvizu*, 534 U.S. 266, 275 (2002) (discretion permits "affirmance of opposite decisions on identical facts").

Defendants suggest that *Cayuga* treats laches as barring all old possessory claims, without regard to the particular facts. They rely on a misreading of *Cayuga*'s statement that the Cayugas' claim was "subject to dismissal *ab initio*" and that a court "would be required to find the claim subject to the defense of laches under *Sherrill* and could dismiss on that basis." 413 F.3d at 278. That claims are "subject to" a laches defense means only that the defense is available. Whether the laches bar should be imposed depends on the facts, which defendants implicitly admit by filing a Rule 56 summary judgment motion and not a Rule 12 motion to dismiss. Thus, the Second Circuit, after saying that the Cayugas' claims were subject to a laches defense, also said that the trial court "*could* dismiss on that basis." 413 F.3d at 278 (emphasis added); *see id*. at 268 (laches "can be applied"). This distinguished between what the court held as a matter of law (that the Cayuga claims were subject to a laches defense) and what it held on the basis of discretionary trial court "findings" made on a full record.[4]

If defendants rely on *Sherrill* in seeking a laches ruling without discovery or a hearing, the answer is that *Sherrill* did not apply a laches bar. Based on the "evoc[ation]" of several equitable doctrines, including laches, the Court applied "equitable considerations" to bar an

[4]In the Shinnecock land claim, the court recently granted a Rule 12(b)(6) motion to dismiss on the basis of laches. 2006 U.S. Dist. Lexis 87516 (E.D.N.Y. Nov. 28, 2006). The court relied on the *Cayuga* language quoted in the text, above, for the proposition that, as to a possessory land claim, courts "can apply" the laches defense "at the pleadings stage." The court then held, as a matter of law, that dismissal was required because the complaint asserted possessory claims as to land transactions well over one hundred years old. The court thus erroneously translated *Cayuga*'s statement that the laches defense is applicable into a holding that all old possessory land claims are barred by the defense. That is a time bar, not laches. It does not appear that the record contained evidence regarding the real estate market, title insurance or other facts that raised a fact question concerning any prejudice that defendants might have asserted, or significant evidence concerning justification for delay, both of which are advanced here. *See* text, *infra*. In contrast to this case, it does not appear that that the plaintiff was willing to accept a judgment shaped by the court to avoid any claimed prejudice, and the court did not hold that a judgment could not be so shaped.

assertion of sovereignty. 540 U.S. at 221. *Sherrill* was clear that the "equitable considerations" it applied were the same "equitable considerations" that *Oneida II* had indicated might affect remedy. *Id*. at 211-17. *Oneida II* reserved on whether laches could be a bar to claims, 470 U.S. at 244-45, and *Sherrill* did not take up the previously reserved laches question. The Second Circuit did. It invoked laches to dispose of *Cayuga*, explaining that the record contained a laches finding made by the trial court after a hearing, a finding that it affirmed. Although *Cayuga* referred to *Sherrill*'s "equitable considerations," it did not dispose of the case on the basis of them. This is because *Oneida II*, while suggesting that equitable considerations may affect the shape of remedies, indicated that the Court had not found any "relevant legal basis for holding that the Oneidas' claims are barred." *Id*. at 253. In other words, *Oneida II* left open the possibility that laches may bar claims, while equitable considerations may affect the relief that is available. To be consistent with *Oneida II*, the Second Circuit could only decide the Cayugas' claims on the basis of laches, not equitable considerations, and that is what it did.[5]

4. *The Oneidas did not unreasonably delay, and there is no unfair prejudice to defendants or others.*

An evidentiary hearing will show that the Oneidas did not unreasonably delay and that any delay in filing suit did not create unfair prejudice.

a. *No unreasonable delay*. The Oneidas did not delay. They asserted their rights repeatedly over a long period. They frequently petitioned the State of New York for relief regarding the transactions by which the State obtained Oneida land. Despite "poverty and

[5]Defendants refer to *Sherrill*'s equitable considerations and to impossibility and acquiescence. *Cayuga* purported to affirm a laches bar, not equitable considerations, impossibility or acquiescence. Although defendants' answers here include a laches defense, they do not include equitable considerations, impossibility or acquiescence. We object to consideration of these defenses. *Sherrill* explicitly "contrast[ed]" the Oneida land claim for trespass damages with relief as to sovereignty in explaining why equitable considerations barred sovereignty relief, 544 U.S. at 212; it makes no sense, therefore, to suggest that *Sherrill*'s equitable considerations bar the Oneida land claim. Further, it is not impossible to award damages, and the Oneidas never acquiesced.

illiteracy," the Oneidas "did protest the continuing loss of their tribal land," often petitioning the federal government for redress between 1840 and 1875, and doing so "innumerable times" between 1909 and 1965. 434 F. Supp. at 536-37. The Counties admitted that the Oneidas sought redress. Smith Decl., ¶6, Ex. 4 (Counties' good faith memo: "they made repeated but unsuccessful efforts to obtain redress from many governmental authorities"). The test case proved the same thing. *Id.*, ¶¶7-9, Ex. 5-7 (exhibit 5 in good faith proceeding and exhibits 54 & 55 in liability trial); s*ee id.*, ¶¶107-213, Ex. 105-211 (cataloging efforts to obtain redress). "New York's abuse of the Oneidas was not accomplished without protest." "Their protest continued, especially between 1840 and 1875, and between 1909 and 1965." 719 F.2d at 529.

The Oneidas should not be penalized for respecting the intergovernmental relationships between themselves and the state and federal governments by pursuing remedies from the legislative and executive branches. The courts have been clear that a political solution is preferred. 434 F. Supp. at 531; 470 U.S. at 253. "This is in no way intended to be critical of the plaintiffs' conduct. The trial of this case demonstrated that they have patiently for many years sought a remedy by other means – but to no avail." 434 F. Supp. at 531.

Moreover, defendants must prove "the unreasonableness of the delay rather than the number of years that have elapsed." *Armstrong v. Virgin Records, Ltd.*, 91 F. Supp. 2d 628, 644 (S.D.N.Y. 2000). Defendants' Rule 7.1(a)(3) statement does not allege "unreasonable delay," alleging only that suit was not filed until 1970. State law had barred suit by Indian tribes. *Seneca Nation v. Appleby*, 196 N.Y. 318 (1909); *see Jackson v. Reynolds*, 14 Johns. 335 (1817) (holding state court available to Oneidas only if suit brought in the name of an attorney appointed for them for that purpose by the State itself, effectively blocking suit against State). Until *Oneida I*, tribes reasonably believed federal courts were unavailable to decide land claims, 414 U.S. 661;

464 F.2d 916 (2d Cir. 1982); *see* 28 U.S.C. § 1362. The Eleventh Amendment also barred federal court suit against the State, the actual wrongdoer and thus the party most equitably made a defendant. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). Delay is excused where then-prevailing law would have required dismissal of an earlier suit. *In re Beaty*, 306 F.3d 914, 927 (9th Cir. 2002); *accord Travelers Ins. v. Cuomo*, 14 F.3d 708, 714 (2d Cir. 1994) (previous law "created little hope for the success of suit"), *rev'd on other grounds*, 514 U.S. 645 (1995); *Wauchope v. Dep't of State*, 985 F.2d 1407, 1411 (9th Cir. 1993) (suit would have been futile); *Stone v. Williams*, 873 F.2d 620, 624 (decision changed law that barred suit), *vacated on other grounds*, 891 F.2d 401 (2d Cir. 1989); *Aluminum Fab. Co. v. Season-All Window Corp.*, 160 F. Supp. 41, 46 (S.D.N.Y. 1957) ("To hold plaintiffs guilty of laches for failing to institute a suit which the courts have held would have been futile, would produce a ludicrous result.").

Congress was aware of these matters and of the antiquity of the Oneida and other claims. It enacted a law by which old damages claims were preserved, deeming them to have "accrued" in 1966 for limitations purposes, and declaring that title claims are not subject to any limitations bar. 28 U.S.C. § 2415(c) & (g). Under the plain terms of section 2415, the running of the statute of limitations is tolled as to claims on a list published by the Secretary of the Interior. The Oneida claim is on that list. 48 Fed. Reg. 13698, 13920 (March 31, 1983).

Claims generally are not barred by laches if brought within a statute of limitations. *Ivani*, 103 F.3d at 260; *Ikelionwu*, 150 F.3d at 238. *Cayuga* concluded, however, that Indian land claims may be subject to laches even if timely brought under the statute of limitations, but the decision does not address *Ivani*, *Ikelionwu*, or the special accrual provisions of section 2415, of which the court was apparently unaware. The Second Circuit certainly did not say that laches may bar a claim before it is deemed to have accrued. Nor could it have done that, given the

inherent contradiction in such an idea and the need to avoid conflict with Congress's judgments expressed in the applicable statute of limitations. *See* 470 U.S. at 244 (*Oneida II* explanation that, by section 2415, "Congress intended to give the Indians one last opportunity to file suits").

Evaluation of Oneida "delay" as a part of a laches calculus must be at least affected by Congress's judgment regarding accrual of old land claims like the Oneida claim, which should be taken into account. Section 2415 expresses a federal policy to excuse delay by Indian tribes with respect to old land claims, in light of the multiple hardships they confronted. 470 U.S. at 241-44 & nn.14-15 (*Oneida II* explanation of legislative history of section 2415); *see* Smith Decl., ¶¶321-34, Ex. 319-32. The statute "presumes the existence of an Indian right of action" concerning old land claims, 470 U.S. at 244, a presumption that should affect the equitable laches balance in favor of the Oneidas. *See also Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472 (1976) (28 U.S.C. § 1362, enacted the same year as 25 U.S.C. § 2415, reflects a "congressional purpose 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").[6]

b. ***No unfair prejudice*****.** In *Cayuga*, there was a hearing, with evidence regarding prejudice. Here, defendants assume prejudice. No prejudice to the State or Counties is even claimed to result from delay in awarding damages. Also, because of Oneida demands for

[6]In *Cayuga*, the Second Circuit affirmed a laches finding, notwithstanding the District Court's subsidiary finding that the Cayugas' delay was not unreasonable. 413 F.3d at 279-80. The Second Circuit did not hold, however, that the reasons for delay are irrelevant. First, the court noted that the District Court's finding regarding reasonableness was made in the relief phase of the case, and not in connection with whether laches barred the Cayugas' claims. Second, the Second Circuit was clear that the Cayugas sought landowner ejectment, which it believed had an overriding importance with respect to prejudice. Third, laches is a discretionary decision, and the Second Circuit did not suggest that it would have reversed a District Court holding that laches did not bar the Cayuga claim, if it had believed the record reflected such a holding. Finally, a holding that the reasons for delay are irrelevant with respect to tribal claims would amount to a holding that the passage of time bars the claims, a de facto statute of limitations directly inconsistent with Congress's judgment in 28 U.S.C. § 2415 and 28 U.S.C. § 1362 that tribes should be able to sue on claims that the United States had failed to sue on as their trustee.

redress, the State was aware of the Oneidas' claims and cannot assert surprise or that it took actions unaware of the Oneida claim. *See Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 192 (2d Cir. 1996); *King v. Allied Vision, Ltd.*, 807 F. Supp. 300, 306 (S.D.N.Y. 1992).

Third parties are not affected by delay. Because third parties bought Oneida land quickly after the State acquired it, the timing of this action affects only the identity of third parties, not the fact that there are third parties who own land. *See* Defendants' Rule 7.1(a)(3) Statement, ¶¶2, 4, 8-9 (admitting that ownership changed in the mid-19th century); *King v. Innovation Books*, 976 F.2d 824 (2d Cir. 1992) (delay occurred after circumstances changed). A suit by the Oneidas only a few years after the State's re-sale of Oneida land could have encountered exactly the same arguments about prejudice that have been made here. *See* 1788 N.Y. Laws, ch. 43, p. 685 (in 1795, 50-year statute of limitations for actions in New York to recover real property).

If it is the nature of the claims, not delay, that defendants claim causes prejudice to third parties, that has nothing to do with laches, which must be rooted in the effects of delay. Moreover, the facts show that the Oneida land claim has not caused prejudice to anyone. The Oneida land claim has not affected real estate prices. Declaration of James P. Costigan Regarding Impact of Land Claim on Land Prices, ¶¶6-10, Ex. 1-3; Freunscht Decl., ¶¶5-7; Carucci Decl., ¶5. At no charge, land purchasers within the land claim area can add specific land claim coverage to their title insurance policies, which anyone financing a land purchase is required to obtain. Thomas Decl., ¶¶6-8. Such no-cost coverage reveals the conclusion of insurance professionals that land claim litigation for damages technically based on a possessory right, but structured by the parties and the courts to produce a damage award against the State and the Counties, does not cause any disruption.

There is no proof, or even an allegation, that a trespass damages award will prejudice anyone. If, without evidence, such damages are believed to threaten prejudice because they are based on an unextinguished tribal possessory right, a judgment can be shaped to eliminate the threat. The *Cayuga* judgment did not protect from a cloud on title that could be read into a damage award. Here, the Court can join a damage award with a declaration that the tribal possessory right technically underlying a trespass damage award cannot be effectuated by enforcing Oneida rights other than as to damages against defendants and that the damage award does not imply or have any secondary or collateral affect on anyone's title or right to possess or transfer property. *See Waddell v. Small Tube Prods, Inc.*, 799 F.2d 69, 79 (3d Cir. 1986) (should determine if there is equitable solution short of dismissal). With such a declaration, no one could claim prejudice.

c. *Discovery needed.* There has been no laches discovery because the Court struck the defense. Before summary judgment can even be considered, we are entitled to such discovery with respect to Oneida efforts to vindicate their rights, the absence of prejudice from the timing of suit, and the State's unclean hands (described below). These are all matters that experts have not been asked to address directly, and to which document requests have not been addressed, inasmuch as the laches defense was stricken. Thus, we are entitled to documents that detail the many decades of Oneida demands for redress with respect to their lands; that show the Oneida land claim has had no effect on prices or the volume of real estate sales or the marketability of titles, for which there is title insurance as against tribal land claims; and that show the State's unclean hands with respect to its treatment of the Oneidas and their demands for redress. Fed. R. Civ. P. 56(f); Smith Rule 56(f) Decl., ¶¶7-9.

D. *The State Is Not Entitled to Assert a Laches Defense Because It Has Unclean Hands.*

"[O]ne who seeks Equity's assistance must stand before the court with clean hands." *Stone v. Williams*, 891 F.2d 401, 404 (2d Cir. 1989) (internal quotation marks and citation omitted). "The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court an abettor of iniquity." *Bein v. Heith*, 47 U.S. 228, 247 (1848). Intentional statutory violation "bars further consideration of the laches defense" and is "not a mere factor to be weighed in balancing the equities." *Hermes Int'l v. Lederer de Paris Fifth Ave.*, 219 F.3d 104, 107 (2d Cir. 2000). Unclean hands was not raised in *Cayuga*. It was raised but not addressed in *Shinnecock*.

New York intentionally violated the Nonintercourse Act, buying Oneida land in 1795 in the face of the "clear policy" of the Nonintercourse Act and the warning of the Secretary of War. 470 U.S. at 232; *see* 719 F.2d at 529 ("federal authorities repeatedly urged New York . . . to seek and secure the appointment of federal commissioners"); 434 F. Supp. at 534-35 (New York ignored federal warnings regarding Oneida lands). The need for a federal commissioner at the 1795 Oneida negotiations was twice proposed to and rejected by the Legislature. Smith Decl. ¶¶47, 51, Ex. 45, 49. When a federal agent asked to see the state law authorizing the 1795 Oneida transaction, state negotiators would not provide it. *Id.* ¶61, Ex. 59. The law would have shown that the State was going to buy Oneida land for a fraction of its value.

The State knew what the Act required. In 1795, New York sought the participation of a federal commissioner for a purchase of Mohawk land. 434 F. Supp. at 534-35 (Mohawks had been British allies, and Oneidas had been American allies; "State feared excessive federal protective intervention in the latter case"). In 1798, the State obtained a federal commissioner

for an Oneida land purchase and submitted the purchase for the Senate's consent and the President's approval. 470 U.S. at 246-47 & n.20. In 1802, the State again obtained the appointment of a federal commissioner but failed to obtain the President's approval of the resulting land purchase. *Id*. Thereafter, the State bought Oneida lands without any effort to obey the Nonintercourse Act. 719 F.2d at 529; 434 F. Supp. at 535; Smith Decl., ¶12, Ex. 10 at 8-12 (interrogatory answer showing State knowingly violated law); *id.*, ¶11, Ex. 9 (State's interrogatory answers admitting lack of federal statute or treaty); *id.*, ¶80, Ex. 78 (expert report).

The State's underpayment for Oneida land was part of its "abuse of the Oneidas." 719 F.2d at 529. Judge Port previously found that the Oneidas were vulnerable.

> The tribe was suffering from famine and widespread alcoholism. The poverty they then experienced became locked in a vicious circle with the loss of their land. These problems were complicated by the Oneidas' illiteracy. Prior to 1800, at the time the great mass of their land was lost, only a few Oneidas even had a minimal ability to understand English orally. None could read or write. This state continued through the early 1800s, during the time of removal.

434 F. Supp. at 536 (citations omitted). The State exploited this vulnerability and told the Oneidas it was purchasing land for full value. Smith Decl., ¶19, Ex. 17 ("the terms we have offered are just and generous, and the price as much as the lands may be worth under all the circumstances"); *id.*, ¶12, Ex. 10 at 12, 15 (interrogatory answers citing misstatements by state negotiators). State law forbade sales of Indian land to any purchaser but the State, restricting the Oneidas' ability to bargain for fair value. During negotiations, the State pressured the Oneidas by telling them that they were ungrateful for the State's efforts to help them and that the State would not enforce laws against non-Indian squatters if the Oneidas did not sell; by purchasing Oneida land from tribal factions and not from the Oneida Nation; by excluding Oneida women from negotiations conducted in Albany, away from Oneida land; by bribing Nation leaders; and by intoxicating Oneidas during negotiations or promising liquor if the Oneidas agreed to the

terms of sale. 719 F.2d at 529; 434 F. Supp. at 535; Smith Decl., ¶12, Ex. 10 at 12-14, 20-28 (interrogatory answers citing documents showing manipulation of Oneidas); *id*. ¶3, Ex. 1, at 40-44, 121-30, 135-39, 143-44 & 161-81 (portions of report of expert Alan Taylor explaining abuse of Oneidas); *id.*, ¶¶81-106, Ex. 79-104 (cataloging State's abuse of the Oneidas).

E. *The Counties Are Barred by Collateral Estoppel from Asserting the Defense of Laches.*

In the test case, Madison County and Oneida County unsuccessfully asserted a defense of laches, and the District Court held the defense unavailable. 434 F. Supp. at 542. On appeal, the Counties waived the laches defense. 470 U.S. at 245. The Counties are bound by the decision that laches is not an available defense. *Purdy v. Zeldes*, 337 F.3d 253, 258 (2d Cir. 2003). While there is an exception to accommodate significant changes in the law, that exception does not apply here. The Counties chose to let the laches decision stand, waiving it on appeal.

F. *We Preserve Arguments that* Cayuga *Was Incorrectly Decided and that Possessory Claims Are Not Subject to a Laches Defense.*

In *Cayuga*, the Second Circuit misread *Sherrill* to "*hold*" that "*laches*" "can . . . be applied to *Indian land claims*, even when such a claim is legally viable and within the *statute of limitations*." 413 F.3d at 273 (emphasis added). None of this is correct. *Sherrill* was not an Indian land claim case. The Nation had possession of the relevant land and disputed taxability. Nor did the Supreme Court mention any statute of limitations. Nor was *Sherrill* a laches case. The Court never suggested that it resolved the case on the basis of a laches bar.

Cayuga is contrary to *Sherrill*, as reflected in the *Cayuga* certiorari petitions, which we adopt. Smith Decl., ¶¶13, 14, Ex. 11, 12. *Sherrill* turned in major part on the premise that "equitable considerations" permitted the trespass damages in *Oneida II* but did not permit recognition of the tax immunity that was in issue in *Sherrill*. The Court's focus was on the effect of equitable considerations on remedy, and the distinction between a damages remedy and a

taxation/sovereignty remedy made all the difference. *Cayuga* misapplied *Sherrill* because it treated *Sherrill*'s equitable considerations, which may affect the decision about what relief is available, as if they were the same as laches, which bars claims, and then, as to claims for possession and trespass damages, erroneously affirmed a laches bar not imposed in *Sherrill*.

Sherrill discussed laches as part of a background discussion of several equitable doctrines. The Court said that the facts "evoke[d] the doctrines of laches, acquiescence, and impossibility" and made it "inequitable" to grant relief as to sovereignty. 544 U.S. at 221. The Court called this evoked mixture "equitable considerations," said that it would "resolve this case" on the basis of them, *id*. at 214, and did so, *id*. at 217. *Oneida II* had reserved on the question whether equitable considerations might affect the relief that is available. 470 U.S. at 252 n.27. In *Sherrill*, the Court answered "the question of equitable considerations limiting the relief available to OIN, which we reserved in *Oneida II*." *See* 544 U.S. at 215. While *Oneida II* also reserved on the question whether laches might bar the Oneida claim, 470 U.S. at 244, *Sherrill* nowhere purported to answer that question, and did not answer it.

The Supreme Court rejected the argument that *Sherrill* and *Oneida II* were inconsistent. 544 U.S. at 202, 213. The Court believed *Oneida II*'s recognition that the Oneidas "could maintain a federal common law claim for damages for ancient wrongdoing" did not require courts to "project redress for the Tribe into the present and future" with respect to sovereignty and taxation. *Id*. at 202. The Court observed that a possessory claim for damages did not involve the *remedial* questions presented by the sovereignty/tax issues in *Sherrill*, that equitable considerations may "limit[] the relief available," that the relief sought in *Oneida II* was "[i]n contrast to" the relief sought in *Sherrill*, that *Oneida II* "recognized the Oneidas' aboriginal title," and that questions about rights and remedies are different. *Id*. at 211-14; *see id*. at 213 &

217 (distinction between claim and remedy "is fundamental;" Oneidas not entitled to "disruptive remedy"), 214 & n.8 (questions are whether equity limits "relief available" and "appropriateness of the relief" sought; focusing on "equitable cast of the relief"), 216 n.9 ("relief OIN seeks . . . is unavailable"), 221 n.14 (equity may limit "specific relief"). The Court stated that its application of equitable considerations to affect relief did not affect the damages relief at issue in land claim litigation: "In sum, 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*. at 221. This focus on relief and the contrast between damages and injunctive or declaratory relief was pointless if the Oneidas' claim was barred. The Court could just have said that and been done with it. Instead, the Court engaged in a remedy analysis that assumed the Oneidas' possessory claim was alive.[7]

Not only did *Sherrill* not impose a laches bar to the Oneida claim, it suggests that the bar should not be imposed. *Sherrill* echoed *Oneida II*'s statement that application of laches to the Oneida claim for damages would be novel, distinguishing *Sherrill* as involving sovereignty and taxation, not damages. *Id*. at 221 n.14; *see* 470 U.S. at 244 n.16.

Oneida II also indicated that a laches bar would be inconsistent with federal policies embodied in the statute of limitations governing such damage claims, 28 U.S.C. § 2415, particularly subsection (g), which provides that old tribal land claims are deemed for limitations purposes to have accrued in 1966, assuring that the new statute of limitations could not be construed as affecting tribes' right to sue on existing, old damage claims. Congress enacted section 2415, and amended it later, to establish a solution for dealing with old land claims for damages that the United States had not pursued. In *Oneida II*, the Court reviewed section 2415's

[7]The Court's application of equitable considerations to shape available relief in no way means that possessory-based claims are barred, by laches or otherwise.

legislative history and, rejecting any state law time bars, relied on its "federal policy" to preserve old tribal land claims. 470 U.S. at 241-43 & n.15. "Congress' concern [was] that the United States had failed to live up to its responsibilities as trustee for the Indians" and "intended to give the Indians one last opportunity to file suits . . . on their own behalf." *Id*. at 244.

The same delays that prompted Congress to preserve old damages claims were, however, transformed by *Cayuga* into a reason for imposing a laches bar, even against the United States, which is not subject to the defense when it is suing as a sovereign to protect federal and tribal rights with respect to land protected by federal treaties, *Bd. of Comm'rs v. United States*, 308 U.S 343, 350-51 (1939). This was error. Courts cannot enforce a common law rule that conflicts with a federal statute, *Milwaukee v. Illinois*, 451 U.S. 304, 314-15 (1981), an error all the more pronounced as to claims for possession, which Congress concluded are not subject to any limitations period at all. 28 U.S.C. § 2415(c). *See also* 25 U.S.C. § 233; 1950 Cong. Rec. 11239 (Rep. Morris) (amendment to section 233 to preserve New York tribes' rights, including "right to go into United States Court in regard to claims that they might have growing out of any transactions in regard to land dealings with the State of New York"); Smith Decl., ¶¶321-34, Ex. 319-32 (attaching portion of section 2415 legislative history).[8]

[8]In 1982, the year Congress amended section 2415 to provide for tolling of tribal damage claims and to provide that tribal title claims were subject to no limitations period, Congress also rejected legislation specifically written to extinguish the Oneida land claim and other old land claims. *See* Smith Decl., ¶333, Ex. 331 (Hearing on S.2084, To Establish a Fair and Consistent National Policy for the Resolution of Claims Based on a Purported Lack of Congressional Approval of Ancient Indian Land Transfers and to Clear the Titles of Lands Subject to Such Claims (June 23, 1982). The legislation stated a purpose, among other things, "to remove the clouds on the titles to land located within the States of New York and South Carolina." *Id*. at 6 (subsection (b)(1) of the Senate bill). Despite vigorous advocacy by members of New York's congressional delegation, Congress rejected it. Instead, Congress amended section 2415 to provide a limitations deadline that would not affect claims such as the Oneida claim and to exempt tribal title claims from section 2415 altogether.

G. *Conclusion*

Defendants' motion for summary judgment should be denied.

Plaintiffs' non-possessory fair compensation claim is not barred by laches because fair compensation is the remedy demanded by equity when, based on the passage of time and changed circumstances, it is inequitable to invalidate a land transaction and restore land to a plaintiff. Fair compensation has nothing to do with a continuing tribal possessory right. It is an award of the fair price of the land at the time it was obtained by the State; indeed, if fair value had been paid at the outset, the tribal plaintiffs would be entitled to no award under this theory, showing that fair compensation depends on no rights existing after the State obtained the land.

Plaintiffs' trespass damages claim, to the extent that it can be called a possessory land claim, should not be dismissed. Plaintiffs have not filed a Rule 7.1(a)(3) statement establishing a prima facie case of laches showing unjustified delay or prejudice from delay. The record demonstrates disputed issues of material fact regarding justification for delay: decades of efforts to obtain redress from the executive and legislative branches of the state and federal governments, state courts that denied plaintiffs access, and then-prevailing federal precedent that made a federal court claim futile. The record also demonstrates that delay caused no prejudice; the third party interests on which all claims of prejudice are founded were the same shortly after the transfer of land from the Oneidas to the State of New York as they are today, particularly if trespass damages are calculated without regard to the value of any improvements resulting from development of the land. The record also shows that this litigation has not affected the real estate market, that title insurance policies add (at no extra cost) coverage with respect to Indian land claims, and that any judgment in this case can include declarations sufficient to absolutely assure no clouding of title or other impact on the interests of landowners.

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Respectfully submitted,

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