UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONEIDA INDIAN NATION OF NEW YORK, THE ONEIDA TRIBE OF INDIANS OF WISCONSIN and THE ONEIDA OF THE THAMES, Plaintiffs, -and- THE UNITED STATES OF AMERICA, -and- THE NEW YORK BROTHERTOWN INDIAN NATION, Plaintiffs-Intervenors, -against- THE COUNTY OF MADISON, NEW YORK, COUNTY OF ONEIDA, NEW YORK, and THE STATE OF NEW YORK, Defendants.	:	Civil Action No. 74-CV-187 (LEK) (DRH)

DEFENDANTS' REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Neither the Oneidas nor the U.S. offers any legitimate basis for avoiding the dispositive impact of Cayuga and Sherrill[1] on this action, or for delaying dismissal of this action beyond the pending summary judgment motion. Acknowledging that their possessory claims are subject to the rule set forth in Cayuga, the Oneidas nonetheless argue that their Complaint also contains a "non-possessory" "fair compensation" claim for violation of the Nonintercourse Act ("NIA") that is not subject to laches. That argument is evidently the result of a Cayuga-inspired epiphany. Until recently, the Oneidas unequivocally stated that their claims are possessory in nature; and, consistent with those statements, there is no non-possessory claim asserted in the Complaint by the Oneidas. Every count of the Complaint – including the NIA claims – rests on the Oneidas' claim of a continuing possessory right in the subject land. The request for recovery of the amount by which the State allegedly benefited on resale of the subject land is not an alternate claim but simply one element of the relief the Oneidas demand in vindication of their alleged possessory rights. The fact the Oneidas now assert that this form of monetary relief could be awarded in lieu of possession does not distinguish it from the monetary award in Cayuga – composed largely of the current value of the land in dispute there – which was designed as a substitute for possession of the land.

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[1] Unless otherwise defined, the capitalized terms used herein shall have the same meaning ascribed to them in Defendants' Memorandum Of Law In Support Of Motion For Summary Judgment, dated August 11, 2006 ("Def. Mem."). The following abbreviations have the meanings indicated: "Oneida Mem." refers to the Oneida Plaintiffs' Opposition To Defendants' Motion For Summary Judgment, dated December 14, 2006; "U.S. Mem." refers to the United States' Memorandum In Opposition To Summary Judgment, dated December 14, 2006; "Br. Opp." refers to Plaintiff Brothertown Indian Nation's Memorandum In Opposition To Defendants' Motion for Summary Judgment, dated November 28, 2006; "Miskinis Aff." refers to the Affirmation Of Steven Miskinis, dated December 14, 2006; "Smith Dec." refers to the Declaration Of Michael R. Smith In Support Of Oneida Plaintiffs' Opposition To Defendants' Motion For Summary Judgment, dated December 13, 2006; "Def. 7.1(a)(3) Stat." refers to Defendants' Statement Pursuant To Local Civil Rule 7.1(a)(3), dated August 11, 2006; "Oneida 7.1(a)(3) Resp." refers to the Oneida Plaintiffs' Response To Defendants' Statement Pursuant To Local Rule 7.1(a)(3), dated December 13, 2006; "U.S. 7.1(a)(3) Resp." refers to the United States' Response To Defendants' Statement Of Material Facts, dated December 14, 2006; and "Roberts Reply Aff." refers to the Reply Affirmation Of David B. Roberts, dated March 2, 2007.

Similarly meritless are the arguments that laches can never be decided without an evidentiary hearing, and that the prerequisites for the application of laches are lacking here. The Second Circuit in Cayuga, relying on the Supreme Court's Sherrill decision which actually involved the New York Oneidas, enumerated a set of criteria for applying laches to disruptive Indian land claims such as those here. Each of the factors cited by the Second Circuit is present in this case. Plaintiffs' claims are barred and they can and should be dismissed without further proceedings.

In its petition for a writ of certiorari in Cayuga, the U.S. acknowledged that the Second Circuit's decision in that case deprived the Oneidas "of any remedy for the State's unlawful acquisition of their lands. . . ." See U.S. Petition for Cert. at 9 (Miskinis Aff. Ex. 3). The U.S. was correct. Cayuga is dispositive of the Oneidas' claims. The opposition briefs are in reality nothing more than a thinly-veiled and plainly improper effort to have this Court disregard the Second Circuit's decision. The motion for summary judgment should be granted.

ARGUMENT

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT DISMISSING THE ACTION

A. The Claims Asserted In This Case Fall Squarely Within The Sweep Of The *Cayuga* Decision

1. The Oneidas' Claims Are Unquestionably Possessory

The Oneidas have not asserted in the Complaint a "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" (see, e.g., Oneida Mem. at 1), a fact demonstrated by the language of the Complaint itself. That pleading could not be clearer about the essentially possessory nature of the Oneidas' claims. The Oneidas' own description of the "Nature of the Action" is telling:

- The Oneidas bring "this action to vindicate tribal rights in approximately 250,000 acres of land located generally in the Counties of Madison and Oneida. . . ." Amended Complaint at ¶ 1 (Roberts Aff. Ex. A).

- "Under Federal common law, the Nonintercourse Act and the Treaty of Canandaigua, Plaintiff Tribes . . . have 'possessory' rights in the subject lands 'based on federal common law,' . . . and seeks in vindication of those rights," various forms of relief. Id. at ¶ 3.[2]

Each count or claim in the Complaint alleges that the Oneidas have an unextinguished possessory interest in the subject land. See, e.g., id. at ¶¶ 41-43; 46; 48-49; 51-52; 54-55; 58-59; 61-62.[3] That includes the NIA claims on which the Oneidas rely in their opposition papers (see, e.g., Oneida Mem. at 6), which are contained in Counts II and V of the Complaint. Count II (against New York alone) alleges:

> Under the Nonintercourse Act, 25 U.S.C. §177, Plaintiff Tribes have a continuing right to title to and possession of the subject lands, absent a transfer of the subject lands in compliance with that Act.
>
> Defendant New York State deliberately, willfully and in bad faith violated the Nonintercourse Act by entering into the 26 Agreements and the Letters Patent Transfers. As a result of these Agreements and Transfers, the Oneida Indian Nation was unlawfully dispossessed of the subject lands, and that unlawful dispossession of the subject lands continues to the present day.

Amended Complaint at ¶¶ 48, 49 (Roberts Aff. Ex. A) (emphasis added).[4]

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[2] The relief listed includes the very relief that the Oneidas now claim relates to their alleged non-possessory claim – i.e., disgorgement of the amount by which the State allegedly was enriched by reason of its "taking" of the land. See Amended Complaint at ¶ 3; 25-26, par. (5) (Roberts Aff. Ex. A).

[3] The U.S. Complaint also reflects the possessory nature of the claims. Describing the nature of the action, the U.S. alleges that the Oneidas have a continuing possessory interest: "[b]ecause these [challenged] transactions violated the Trade and Intercourse Act, the State of New York failed to extinguish the Plaintiff Tribes' right to possess the Subject Lands under federal law." U.S. Complaint at ¶ 1(b) (Roberts Aff. Ex. B). The U.S. purports to seek "monetary and other relief … for [the State's] denial of the Plaintiff Tribe's enjoyment of their rights to the Subject Lands under federal law and for the trespasses to the Subject Lands…" Id. at ¶ 2. The U.S.' NIA claim is clearly possessory in nature: the State "continues to assert control and possession of some of the Subject Lands… [By transferring other portions of the land to third parties, the State authorized and caused] Third Party Trespasses. As a result of New York's unlawful actions, the Third Party Trespasses violated, and continue to violate the Nonintercourse Act and the Plaintiff Tribes' federal rights to the Subject Lands." Id. at ¶ 28.

[4] The second NIA claim, Count V, is against all defendants. Paragraph 58 of that count is identical to paragraph 48 quoted above. Paragraph 59 states as follows: "Defendants, who claim title to and the right to possess portions of the subject lands derived from the illegal transactions described in paragraphs 26-34 above, have kept and

The *ad damnum* clause is equally clear that the Oneidas assert, and seek a determination that they have, a current possessory interest in the land. Thus, the first element of requested relief is a "declaration that (a) Plaintiff Tribes have possessory rights to the subject lands confirmed by federal law, and there has been no termination of those possessory rights; (b) the subject lands were conveyed unlawfully from the Oneida Indian Nation in violation of Federal law; (c) the 30 Agreements and Letter Patent Transfers were void *ab initio*; (d) the subject lands have been in the unlawful possession of trespassers; . . . ." Id. at 24, par. (1).

Quite simply, the non-possessory fair compensation claim (Oneida Mem. at 7), which the Oneidas now espouse, is nowhere to be found in the Complaint. Nor is "fair compensation" an element of damages requested. The closest the Oneidas come is a request for disgorgement of benefits received by the State from its "purported purchases and sales of the subject lands." Id. at 26, par. (6).[5] This is not a distinct element of damages for a single claim. It is simply one of a cumulative list of remedies for all the Oneidas' possessory claims.[6]

Consistent with the language of the Complaint, the Oneidas themselves have uniformly described their claims as possessory in nature. In support of their motion to amend the original complaint to add a defendant class of private landowners, the Oneidas repeatedly emphasized the possessory nature of the claims. At oral argument, counsel for the Oneidas and the U.S. asserted:

- "[t]he essence of the Oneida claim is, as you know, that their title was never extinguished and the acts of the state of New York, which purported

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continue to keep Plaintiff Tribes out of possession of the subject lands in violation of the Nonintercourse Act." Amended Complaint at ¶ 59 (Roberts Aff. Ex. A).

[5] Defendants dispute the allegations in the Complaint and the assertions contained in the opposition papers about the alleged inadequacy of the price paid to the Oneidas in the challenged transactions. See, e.g., Oneida Mem. at 11-12. Since those allegations do not bear on Defendants' motion, they are not addressed in this reply.

[6] So also, the factual allegation relating to the claimed disparity between the price paid in 1795 by the State and the amount received on resale of the land is not part of a distinct claim but merely a factual allegation contained in a description of the transactions. See Amended Complaint at ¶¶ 31, 35 (Roberts Aff. Ex. A).

to do so, were illegal and invalid and conveyed no rights whatsoever." March 29, 1999 Transcript at 12:25-13:4 (Roberts Reply Aff. Ex. MM).

- "This is a case of possession." Id. at 20:13.

- The "basic thrust of this action" is "the claim of possession." Id. at 48:23-24. See also id. at 56:9-11.

- "[A] judgment that the Oneidas have a right to possession … is the essence of the claim, that's the nature of the cause of action." Id. at 83:10-12.

The supplemental written submissions were to the same effect:

- "The simple and stark fact of this case is this case has *always* been a suit for the enforcement of present and continuing *possessory* rights." Supplemental Memorandum of New York Oneidas at 1 (Roberts Reply Aff. Ex. NN) at 1. See also id. at 2 (characterizing the action as "one based on plaintiffs' current right of possession, …").

- Citing the decisions in the 1970 Oneida action, including the Second Circuit's decision on which the Oneidas rely for the existence of a NIA claim (Oneida Mem. at 6): "[t]hese decisions make absolutely clear that plaintiffs have a current possessory right to the land and that their right to damages stems from that possessory right." Supplemental Memorandum of New York Oneidas at 3 (Roberts Reply Aff. Ex. NN). See also id. at 4.

- "[T]he claim for relief asserted by tribal plaintiffs in [this and every other tribal land claim case] is in essence a claim for possession of the land, not a claim for historically adjusted damages." Supplemental Memorandum of Wisconsin Oneidas at 7 (Roberts Reply Aff. Ex. OO).

In their arguments and written submissions the Oneidas disclaimed any fair compensation claim. Addressing the very cases on which the Oneidas now rely for the existence of such a claim, such as Yankton Sioux Tribe v. United States, 272 U.S. 351 (1926), and United States v. Minnesota, 270 U.S. 181 (1926) (Oneida Mem. at 9-10), which were cited by amicus in opposition to the motion to amend, counsel for the New York Oneidas stated at oral argument:

> [I]t is a fundamental aspect of this case that the eastern claims, in general, and the Oneida claim, in particular, are not claims of the sort the amicus refers to in the Yankton Sioux case which basically holds that the federal government, when it takes land, must compensate the tribes. . . .

March 29, 1999 Transcript at 12-13 (Roberts Reply Aff. Ex. MM).[7]

Plaintiffs did not refashion their claims after Judge McCurn refused to allow them to add a defendant landowner class to the case. Indeed, their amended complaint includes the very same language describing the nature of the action that was set forth in the proposed amended complaint. Compare Amended Complaint at ¶¶ 1, 3 (Roberts Aff. Ex. A) with Proposed Amended Complaint at ¶¶ 1, 2 (Roberts Aff. Ex. F). Nor did the Oneidas change the basic elements of the relief sought. Compare Amended Complaint at 24-26; ¶¶ 42-43 (Roberts Aff. Ex. A) with Proposed Amended Complaint at 28-29; ¶¶ 48-49 (Roberts Aff. Ex. F).

The Oneidas' position during discovery confirms that no fair compensation claim is in the Complaint. Responding to Defendants' interrogatories the Oneidas stated: "The adequacy of payment, the fact of payment or the failure of payment are of no relevance to the liability issues that are the proper focus of current discovery." See Oneidas' Interrogatory Answers at No. 18 (Smith Dec. Ex. 10).[8]

Besides the explicit language of the Complaint and the statements made by the Oneidas in the past, their supposed fair compensation claim rests on a violation of the NIA and is in fact

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[7] In their supplemental memoranda the Oneidas argued that Yankton Sioux and Minnesota (Oneida Mem. at 9) "involve[d] takings by the Federal government [and were] doubly inapposite." Supplemental Memorandum of New York Oneidas at 14-16 (Roberts Reply Aff. Ex. NN). See also id. at 2 (such cases "involv[ed] takings by the federal government to which the [NIA] does not apply [and] in which no [possessory right] was even claimed"). They also argued that Felix v. Patrick, 145 U.S. 317 (1892), now cited by the Oneidas (Oneida Mem. at 16), was irrelevant. See Supplemental Memorandum of Wisconsin Oneidas at 9-10 n.8 (Roberts Reply Dec. at OO).

[8] Rule 8(a) of the Federal Rules does not authorize a court to create an entirely new claim for plaintiffs who have failed to plead it. See Amron v. Morgan Stanley Inv. Advisors, 464 F.3d 338, 343 (2d Cir. 2006) (finding that despite liberal pleading rules of Rule 8, "we stop well short of saying that Plaintiffs bear no burden at the pleading stage"); Dow Jones v. Int'l Sec. Exch., 451 F.3d 295, 307 (2d Cir. 2006) (stating that Rule 8 requires plaintiffs to plead factual allegations to show they are entitled to relief and put defendants on notice of the claims). Notably, Plaintiffs have not sought leave to amend to add their supposed new claim. Having known about their potential fair compensation claim at least since Judge McCurn's decision on the motion to amend in 2000, any such effort to amend now would be inordinately and inexcusably late. See, e.g., Phoenix Racing Ltd. v. Lebanon Valley Auto Racing Corp., 53 F. Supp. 2d 199, 207 (N.D.N.Y. 1999) (Kahn, J.) (denying motion to amend made fifteen months after complaint was filed); Wademan v. Concra, 13 F. Supp. 2d 295, 305 (N.D.N.Y. 1998) (Kahn, J.) (denying motion to amend six months after complaint). In any event, it is clear that the Oneidas cannot replead a viable claim under Cayuga.

possessory.[9] Oneida Mem. at 1, 6. Indeed, the Oneidas backhandedly admit this fact in their opposition papers, acknowledging that a "possessory right technically underl[ies]" their claim. Id. at 22. The NIA does not provide a damage remedy for allegedly "unfair" transactions, as the Plaintiffs imply. See id. at 6-7. It contains no civil remedy provision at all. What it does do, in the words of the Oneidas, is to "declare invalid any sale of Indian land without the consent and approval of the United States." See Amended Complaint at ¶ 21 (Roberts Aff. Ex. A); U.S. Complaint at ¶ 15 (Roberts Aff. Ex. B). See also Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 541-42 (N.D.N.Y. 1977) ("The statute makes no reference to overreaching or fraud or inadequate consideration. By prohibiting all unauthorized dealings with Indians, it cuts off any inquiry into the fairness of such dealings insofar as the validity of the resulting transfer is concerned . . . . That statute declares, without any qualification, that no purchase made in violation of the Act 'shall be of any validity in law or equity'"). Necessarily a claim that rests on a violation of this statute involves a determination that the transactions at issue are invalid.[10] The

[9] The Oneidas blithely assert that "[i]n the Second Circuit there is a right of action under the Act in addition to the common law right of action." Oneida Mem. at 6. The Second Circuit did state that there was such a cause of action but this was an alternative holding. See Oneida Indian Nation v. County of Oneida, 719 F.2d 525, 530-37 (2d Cir. 1983). The Supreme Court affirmed on the basis of a common law claim and expressly did not reach the issue of whether any private right of action was available for violation of the NIA. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 233 (1985) ("Oneida II"). Plaintiffs cite no Second Circuit authority for the proposition that in these circumstances the Second Circuit's alternative holding as to an NIA claim retains precedential value. Cf. Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 45 (2d Cir. 1986) ("[I]f an appeal is taken and the appellate court affirms on one ground and disregards the other, there is no collateral estoppel as to the unreviewed ground"). Similarly, Plaintiffs cite no case law finding that the remedy Plaintiffs currently suggest is available in a NIA claim even if an implied right of action exists. None of the cases cited by the Oneidas as allegedly recognizing a fair compensation damages claim involves the NIA. As discussed in the text, the NIA claim recognized by the Second Circuit was not a fair compensation claim and was clearly possessory in nature. Finally, the State does not concede that the version of the NIA enacted in 1793 and later codified in 25 U.S.C. § 177 applies to the State. The Second Circuit did not reach this argument in its decision in Cayuga, and the State therefore preserves it here. But see Cayuga Indian Nation of New York v. Cuomo, 565 F. Supp. 1297, 1312-15 (N.D.N.Y. 1983) (NIA applies to states, relying on Second Circuit's decision in Mohegan Tribe v. Connecticut, 638 F.2d 612 (2d Cir. 1980)).

[10] To the extent the U.S. suggests that the NIA claim "does not rest on the premise that the transactions are altogether void" (U.S. Mem. at 17) its position cannot be squared with its own complaint. See, e.g., U.S. Complaint at ¶ 17 (Roberts Aff. Ex. B) ("[E]ach of the above-mentioned agreements was illegal and void ab initio under the Nonintercourse Act"); id. at 16, par. (2) (seeking a determination that "the State of New York's purported

consequence of such a finding is, in the words of the Complaint, that the plaintiff tribes have "a continuing right of title to and possession of the subject lands." Amended Complaint at ¶¶ 48, 58 (Roberts Aff. Ex. A). As counsel for the Wisconsin Oneidas stated at oral argument in 1999: "The transactions were void *ab initio*. It is a legal result of that finding that indicates we have a current claim for relief. . . ." March 29, 1999 Transcript at 89:16-19 (Roberts Reply Aff. Ex. MM). See id. at 88:9-11. See also Oneida, 719 F.2d at 531 ("This statute . . . voided all land transactions in which Indians were a party that were consummated without federal approval."); Oneida, 434 F. Supp. at 548 ("The plaintiffs have established a claim for violation of the [NIA] . . . [P]laintiffs' [New York Oneida] right of occupancy and possession to the land in question was not alienated . . . [t]he State acquired no right against the plaintiffs; consequently, its successors . . . are in no better position").

The implied right of action recognized by the court of appeals in 1983 was quintessentially a possessory claim: "the Oneidas are entitled to enforce the Nonintercourse Act's voiding of the 1795 purchase. . . . Their suit closely corresponds to the common law action for ejectment in which a plaintiff need only establish his right to possession . . . . The Oneidas' claim is based on their present right of possession, . . . and the Counties' liability is premised on their continued occupancy of Oneida land in violation of the Act." Oneida, 719 F.2d at 540.

2. Under *Cayuga* The Oneidas' Claim Is A Disruptive Possessory Claim Subject To Laches

The Oneidas' claims are foursquare with those in Cayuga. As in Cayuga, Plaintiffs here "have asserted a continuing right to immediate possession as the basis of all of their claims . . . ." See Cayuga Indian Nation v. Pataki, 413 F.3d 266, 274 (2d Cir. 2005). The Complaint expressly

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acquisitions of the Subject Lands violated federal law and that the 26 Agreements and Letters Patent Transfers … are void"). See also U.S. Mem. at 21 (Oneida lost land through a series of transactions that are "void").

seeks a determination that the Oneidas have a continuing right of possession of all land in the claim area which has never been extinguished.[11] See Amended Complaint at 24, par. (1) (Roberts Aff. Ex. A)

Under Cayuga, the NIA claims are inherently disruptive and subject to laches. This "disruptiveness is inherent in the claim itself – which asks this Court to overturn years of settled land ownership – rather than an element of any particular remedy which would flow from the possessory land claim." Cayuga, 413 F.3d at 275. See also Oneida, 434 F. Supp. at 530 ("[G]ood faith [of the current owners] will not render good a title otherwise not valid for failure to comply with the [NIA]").

What the Oneidas call a fair compensation claim is not an "alternative" claim (Oneida Mem. at 5); it merely seeks an alternative form of remedy for what is still in essence a possessory claim. The fact that a court could award money damages instead of possession does not change the disruptive nature of the claim. That is exactly what had happened in Cayuga. Judge McCurn there refused to grant ejectment against any defendant, and instead limited the tribal plaintiffs to monetary relief. See Cayuga, 413 F.3d at 277-78 ("The fact that . . . the District Court substituted a monetary remedy for plaintiffs' preferred remedy of ejectment cannot salvage the claim, which was subject to dismissal *ab initio").*

[11] It is equally clear that, like the Cayugas, the Oneidas' preferred remedy has always been recovery of possession of land. The Complaint asks for "declaratory and injunctive relief as necessary to restore Plaintiff Tribes to possessions of those portions of the subject lands to which defendants claim title" (Amended Complaint at 24-25, par. (2) (Roberts Aff. Ex. A)), and leaves no doubt that but for Judge McCurn's denial of their request for leave to amend to add claims against private landowners, the Oneidas would seek to recover possession of the land from such owners as well. See id. at ¶ 2 ("This amended complaint is filed in accordance with the Court's decision and is not a waiver of any rights or claims … [plaintiffs] bring [t]his amended complaint against New York State and Madison and Oneida Counties only, but seek damages and other relief for dispossession of all the subject lands" (emphasis added)). As Judge McCurn noted in his decision on the motion to amend "although the words 'ejectment' or 'eviction' do not appear anywhere in the Oneidas' amended complaint, plainly that is the end result which they hope to obtain through a declaratory judgment." See Oneida Indian Nation v. County of Oneida, 199 F.R.D. 61, 68 (N.D.N.Y. 2000).

Just as in Cayuga, the monetary relief the Oneidas request is in lieu of recovery of the land itself. See Oneida Mem. at 7 ("Equity's bar to restoration of the land and equity's provision for fair compensation are two parts of the very same rule"); see also id. at 1; U.S. Mem. at 2. The Oneidas' description of the rationale for awarding such damages – to compensate the Tribe for loss of land when "it is inequitable to invalidate a land transaction and restore land to a plaintiff" (id. at 29) – is the same rationale relied on by Judge McCurn in fashioning the monetary relief awarded in Cayuga in lieu of possession. See Oneida Indian Nation, 199 F.R.D. at 90 (describing his earlier decision in Cayuga Judge McCurn noted that having found that ejectment "may be unavailable or impractical as too disruptive or unfair" the court there opined that "as an alternative 'historically adjusted monetary damages' could be awarded"). Both the damages granted by Judge McCurn and the damages suggested by Plaintiffs are "premised upon the preclusion of possessory relief." U.S. Mem. at 28.

There is no basis for arguing that Cayuga "may be read to preserve a remedy based on a claim for fair compensation for the value of the lost land." U.S. Mem. at 8. Contrary to the U.S.' position, in dismissing the Cayugas' trespass claims (U.S. Mem. at 28), the court of appeals held that all claims predicated "upon plaintiffs' possessory land claim" were barred. Cayuga, 413 F.3d at 278. Since the relief Plaintiffs now state they seek is predicated on a possessory land claim, it comes within the Cayuga rule. There is no principled difference between an award of the current value for land awarded in substitution of a right of possession and the historic value of land given in lieu of the same right of possession. A damages award based on the value of the land at the time of the challenged transactions is no less disruptive than an award of damages based on current market value because, in both cases, the determination

that is the basis for liability – the invalidity of the challenged transaction – calls into question current title, which makes the claim disruptive under Cayuga.

Nor does the argument that the court could shape a judgment that does not threaten to have any disruptive or prejudicial effect on the community (Oneida Mem. at 21) distinguish the proposed monetary remedy advanced by Plaintiffs from the monetary award in Cayuga. In denying ejectment entirely, and granting the Cayugas a monetary award against the State only, the district court in Cayuga held in substance that the Cayugas' possessory rights could "not be effectuated … other than as to damages." Id. at 22. See Cayuga Indian Nation v. Cuomo, Nos. 80-cv-930, 80-cv-960, 1999 WL 509442 at *23-24 (N.D.N.Y. July 1, 1999) (finding that recovery of possession through ejectment would not be permitted as to any defendant and that "monetary damages" would serve as an adequate substitute).[12] The court of appeals nonetheless held that both possessory and monetary relief were barred. The additional terms listed by Plaintiffs (Oneida Mem. at 22) do not call for any different conclusion here.

Finally, the U.S.' bald assertion that a fair compensation claim somehow "avoids any disruptive consequences to the current possessors of Oneida land and resolves this longstanding land claim with finality – unlike a dismissal on laches grounds, which would leave title questions unresolved" (U.S. Mem. at 9, 11) – does not withstand scrutiny. A judgment dismissing the claim on the basis of laches is final, as it bars any further claims by the Oneidas or the U.S. based upon the challenged transactions or the Oneidas' claimed possessory interest in the land claim area. And, in contrast to a decision granting relief in favor of Plaintiffs, a dismissal on laches grounds is not disruptive at all. Such a dismissal bars the claims *ab initio*, while an award of

[12] The intent and clear import of Judge McCurn's ruling was that the Cayugas would not be able to "effectuate" their possessory rights in the future. Notably the court refused to defer a decision on ejectment despite the Cayugas' proposal that they would not seek to evict but would seek other, lesser forms of relief. See Cayuga, 1999 WL 509442 at *17.

damages (whether based on the value of the land at the time of the original transactions or at trial) is disruptive because it rests on an affirmative determination that the challenged transactions were invalid and failed to extinguish the Oneidas' possessory interest.[13]

The application of Cayuga to the type of damages claims now preferred by Plaintiffs is supported by Judge Platt's recent decision in Shinnecock Indian Nation v. New York, No. 05-2887, 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2006). As in this case, the plaintiff in Shinnecock purported to assert a claim for violation of the NIA. Like the Oneidas here, the Shinnecock did not name all of the current owners of the land allegedly transferred in violation of the NIA, and sought damages from the named defendants as to land owned by non-parties to the lawsuit. The remedies requested included disgorgement by the original purchaser of the land (the Town of Southampton) of "the value of the benefits received" by the town for each purchase, including the benefits received on resale. Id. at *5. The court nonetheless dismissed all of these claims on the basis of Cayuga. See id. at *6 ("Further, because the rest of the plaintiffs' claims are 'predicated entirely upon plaintiffs' possessory land claim,' they are also dismissed").[14]

3. The U.S. Has Admitted The Second Circuit's Decision Applied With Full Force To The Oneidas' Claims

The U.S. has conceded that Cayuga is dispositive of the claims in this case. It argued that one of the reasons the Supreme Court should grant certiorari in Cayuga was that the Second

[13] The suggestion that the court can "accept and give effect to" the transactions (U.S. Mem. at 2) by awarding damages measured by the value at the time of the transactions but not by awarding current market value is unsupported by authority or common sense. In both cases the court's judgment denies recovery of possession, but by determining that the possessory right was never extinguished creates uncertainty as to title.

[14] Judge Platt's decision refutes the argument that the court in Shinnecock "never considered a non-possessory fair compensation claim such as is advanced here." Oneida Mem. at 10 n.2. The Court found that a claim for disgorgement of money based upon a violation of the NIA is, in fact, possessory under Cayuga. Shinnecock, 2006 WL 3501099 at *5-6. The U.S.' effort to distinguish Shinnecock is no more persuasive. U.S. Mem. at 15 n.7. As demonstrated above, Plaintiffs' claims are in fact possessory. Moreover, in this case, as in Shinnecock, the request for disgorgement by the Oneidas is not limited to profit on resale but also seeks to recover all benefits from the purchase and sale of land and benefits received "as a result of their illegal possession of parts of the land." See Amended Complaint at 26, par. (6) (Roberts Aff. Ex. A).

Circuit's decision sounded the death knell for Indian land claims in New York. "The decision below deprives the Cayugas and similarly-situated Tribes of *any* remedy for the State's unlawful acquisition of their lands." See U.S. Petition for Cert. at 12 (Miskinis Aff. Ex. 3) (emphasis in original). Citing this action, among others, the U.S. then noted that "[t]he court of appeals' apparent intent is to terminate all of these pending cases . . . . If left unreviewed, the court's decision will render superfluous the substantial expenditures of time and resources consumed in the lawsuits up to this point; it will leave the United States and the affected Tribes without any remedy for violations of law . . . that rendered the State's purchases invalid under the terms of the Trade and Intercourse Act. . . ." Id. at 29 (emphasis added).

The U.S.' current effort to distance itself from its clear (and correct) acknowledgment of the effect of Cayuga on this case is singularly unpersuasive. The U.S. was aware of so-called fair compensation damages as an alternative means of monetary damages at the time it submitted its petition for certiorari. U.S. Mem. at 29. Its only explanation for the complete reversal of its position since then is that "the Solicitor General did not focus on the distinction." Id. Petitions for certiorari are presumably fashioned by the Solicitor General's office with great care. Indeed, in Cayuga the U.S. obtained an extension of time in which to file a petition to allow for further evaluation of its position. At the time, it advised the Supreme Court that both "the Department of Justice and the Department of the Interior" are "currently considering legal and practical ramifications of the court of appeals' decision" and stated that additional time was needed to allow "further consultations" regarding "the decision whether to file a petition for a writ of certiorari." See U.S. Request for Extension at 4 (Roberts Reply Aff. Ex. PP). Under the circumstances, the suggestion that the U.S. did not "focus" on what it was saying in the Cayuga petition for certiorari has a distinctly hollow ring. The arguments advanced now by the Plaintiffs

should be seen for what they are – a desperate, last ditch effort to avoid the obvious and admitted effect of Cayuga on this case.

B. The Oneidas' Claims Are Barred By Laches

1. The Defendants' Laches Defense Can And Should Be Applied On A Summary Judgment Motion

Plaintiffs contend that laches cannot be determined in the context of a summary judgment motion. Oneida Mem. at 2, 22; U.S. Mem. at 14-15. That argument flies in the face of the content of the laches rule set forth in Cayuga as well as the actual decision in that case.

a. Plaintiffs' Attempt to Avoid the Laches Standard Set Forth in *Cayuga* Is Meritless

Under Cayuga this court does not have to weigh independently whether the Oneidas "unnecessarily delayed" in asserting their claim or whether that "unreasonable" delay caused "unfair prejudice." See Oneida Mem. at 13-14; U.S. Mem. at 16. The court in Cayuga adopted the specific set of criteria articulated in Sherrill for use in applying laches to disruptive Indian land claims such as those presented here. Those factors are: (1) whether the transaction took place in the late eighteenth and early nineteenth centuries; (2) whether most of the tribe has resided elsewhere since the middle of the nineteenth century; (3) whether generations have passed during which non-Indians have owned and developed the area; (4) whether the area has long had a distinctly non-Indian character; and (5) whether the Tribes and the U.S. long delayed in seeking judicial relief. See Cayuga, 413 F.3d at 277; Sherrill, 544 U.S. at 202-03. The question for this court is whether those criteria are present, and, as demonstrated in defendants' moving papers, the answer is a clear yes. See Def. Mem. at 17-19. Neither the Oneidas nor the U.S. make any serious effort to dispute this point. (Plaintiffs' responses to Def. 7.1(a)(3) Stat. are summarized in Appendix I.)

Instead they engage in a misguided, indirect attack on the Cayuga rationale. Thus, the Oneidas criticize Defendants for contending that the "reasons for delay [in filing suit] are irrelevant" (Oneida Mem. at 14; see also Def. Mem. at 17-19), but that is the holding of Cayuga, as the U.S., at least, admits. See U.S. Mem. at 8 ("Cayuga wrongly alters the typical laches analysis by making irrelevant the question of whether the plaintiffs' delay is excusable").[15] The arguments advanced by the Oneidas – that the tribe sought redress from the state and federal governments by non-judicial means (Oneida Mem. at 3) and was not in a position to file an action in court until the 1970's – were also made in Cayuga. See Def. Mem. at 25-26 (discussing lower court finding in Cayuga that Cayugas were not responsible for delays in filing suit and that the Cayugas had petitioned state and federal government for relief for decades).[16] They are also arguments the New York Oneidas advanced to the Supreme Court in Sherrill. See infra 17-18.

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[15] The Oneidas' assertion to the contrary notwithstanding, under Cayuga it is the length of time elapsed and not the "reasonableness" or "unreasonableness" of the delay from the Oneidas' point of view (Oneida Mem. at 18) that is significant. Regardless of when, or in what phase of the case, the district court in Cayuga determined that the Cayugas' delay was not unreasonable (id. at 20 n.6), the Second Circuit ruled as a matter of law that delay alone – of the same magnitude that is present here – coupled with the other factors set out in Sherrill was unreasonable and barred the Cayugas' claims. As noted below, the Supreme Court's decision in Sherrill, which addressed the New York Oneidas and the claim area in this case, is to the same effect. See infra p. 17-18. In light of the clear meaning of Cayuga (and Sherrill) the assertion that the court of appeals "did not hold however that the reasons for delay are irrelevant" is frivolous. Oneida Mem. at 20 n.6. As a result, there is no requirement that Defendants' Rule 7.1(a)(3) Statement list as a disputed fact that the delay was "unreasonable." See id. at 14.

[16] Defendants dispute the Oneidas' assertion that they were precluded from suing in federal court prior to 1970. See Oneida Mem. at 18; Oneida 7.1(a)(3) Resp. ¶ 1. As early as 1823, the Supreme Court held that tribes had the capacity to sue in federal court. As the Second Circuit explained in Oneida, 719 F.2d at 530:

> Although the case [Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823)] involved a title dispute between non-Indians, the Court subsequently interpreted the case to stand for the general principle 'that an action in ejectment could be maintained on an Indian right to occupancy and use…. This is the result of the decision in Johnson v. M'Intosh.' Marsh v. Brooks, 49 U.S. (8 How.) 223, 232, 12 L. Ed. 1056 (1850).

See also id. at 534 n.9 ("Although suits by tribes may have been rare, the reasons for this were cultural, not legal…."). According to the Second Circuit, Congress also believed at an early juncture that tribes could bring actions to enforce the NIA in federal court. See id., at 532-33 (citations and fn. omitted); id. at 536 (discussing effect of 1822 amendment to the NIA, 3 Stat. 682, 683 (1822)). Thus, the Oneidas did not lack capacity to sue in federal court to pursue a claim of violation of the NIA and their federal common law possessory rights. The fact that such a suit might have been unsuccessful is not an excuse for not filing the action.

As the district court found in Shinnecock, in rejecting an argument that laches should not apply to the tribe's claim because the tribe "had objected to the [alleged taking] . . . and that institutional barriers prevented [it] from having a forum to subsequently vindicate its rights," "similar arguments did not preclude the Second Circuit in Cayuga from denying plaintiffs' request for relief." See Shinnecock, 2006 WL 3501099 at *5.

The related arguments that "[c]laims generally are not barred by laches if brought within a statute of limitations" (Oneida Mem. at 19) and that the factors cited by Cayuga and Sherrill were considered by Congress when it adopted 28 U.S.C. § 2415 (id. at 20), do not assist Plaintiffs.[17] In Cayuga the court squarely held that laches can bar an ancient Indian land claim "even where such claim is . . . within the statute of limitations." See Cayuga, 413 F.3d at 273.

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[17] In Cayuga, both the United States and the tribal plaintiffs asserted, in their respective petitions for certiorari, that the Second Circuit's decision was erroneous because it conflicted with the provisions of 28 U.S.C. § 2415. See U.S. Petition for Cert. at *21-25 (Miskinis Aff. Ex. 3), Cayuga Petition for Certiorari filed in Cayuga Indian Nation v. Pataki, No. 05-982, 2006 WL 283980 at *16-28 (Feb. 3, 2006). In opposing the grant of certiorari, the State argued, *inter alia*, (and hereby adopts the argument) that:

> The statutes of limitations established in section 2415 do not apply to 'an action to establish the title to, or right of possession of, real or personal property.' 28 U.S.C. § 2415(c)…. Not surprisingly, in Sherrill, this Court did not find it necessary even to discuss whether section 2415 evinced a congressional policy barring the Court's application of laches, acquiescence and impossibility.
>
> The absence of a federal statute of limitations does not preclude the laches defense. Where Congress intends to bar laches as a defense to Indian claims it has said so…. Nor is there any indication that in enacting or amending section 2415, Congress intended to revive ancient Indian claims seeking possession of or title to land that were barred by laches over a century before. See Oneida II, 470 U.S. at 271-72 (Stevens, J., dissenting) (§ 2415[c] merely reflects an intent to preserve the law as it existed on the date of enactment).
>
> …[T]his Court has held that laches may bar actions that are otherwise within the statute of limitations. See Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946) ("[a] suit in equity may fail though 'not barred by the act of limitations'"….) Accordingly, even if section 2415 applied and this action was timely brought under that section, the court of appeals' holding that laches nevertheless bars the claims fits squarely within this Court's holdings.

State's Opposition to Certiorari filed in United States v. Pataki, No. 05-982, 2006 WL 937526 at *19-21 (Apr. 7, 2006). As this Court is well aware, the Supreme Court denied the petitions for certiorari. Even assuming, however, that the limitations period set forth in Section 2415(a) applied to the Oneidas' claim, the fact a claim covered by the statute did not "accrue for limitations purposes" until 1966 (Oneida Mem. at 19) does not affect laches. Surely, the Oneidas are not suggesting that prior to 1966 they had no claim.

The court of appeals was also aware of Section 2415, which it discussed in its opinion. See id. at 279; see also id. at 281 (Hall, J., dissenting).

So also, the Oneidas claim that Defendants' reliance on the factors cited in Cayuga rather than "unfair prejudice" is somehow inconsistent with pre-Sherrill decisional and statutory law is without merit. Oneida Mem. at 14-15. The factors cited by Defendants are the factors relied on in Cayuga as the basis for dismissing the Cayugas' claim. The Cayuga court did not require any separate consideration of "unfair prejudice" to the State or private parties before dismissing the Cayugas' claims. Oneida Mem. at 20-21.[18] The Oneidas' argument that the Cayuga/Sherrill factors do not consider prejudice resulting from delay (id. at 21) is just a dispute with the Second Circuit's ruling. In the same vein, the argument that an award of monetary relief will not cause prejudice (id. at 22) ignores the fact that it is the disruptive nature of the underlying claim that the court of appeals found significant.[19]

Strikingly, the arguments made to the Supreme Court in support of the New York Oneidas' petition for rehearing in Sherrill acknowledge that the rule stated in Sherrill and followed in Cayuga does not require any independent evaluation of "unreasonable" delay or "undue" prejudice. The New York Oneidas stated in Sherrill that under the laches argument made by the City of Sherrill (and accepted by the Court) the "Oneidas' [claimed] tax immunity was defeated . . . simply by the passage of time and changes in the area." See Oneida Indian Nation of New York's Petition for Rehearing, City of Sherrill v. Oneida Indian Nation, No. 03-

[18] In effect Sherrill and Cayuga have determined that to the extent prejudice is required in the context of a disruptive Indian land claim the existence of the enumerated factors demonstrates prejudice as a matter of law.

[19] The contention that the alleged absence of an adverse effect on real estate prices belies any prejudicial effect is yet another disagreement with the court's ruling, but is not a basis for opposing Defendants' motion. There was no showing in Cayuga that the monetary award in Cayuga caused an adverse effect on real estate prices or prevented homeowners from obtaining title insurance. As noted above (supra at 10-11), the fact that the court could specifically find that Plaintiffs are not entitled to "effectuate" the "possessory right technically underlying" their claim (Oneida Mem. at 22) does not distinguish this case from Cayuga.

855, 2005 WL 959687 at *2 (2d Cir. April 25, 2005) ("OIN Pet."). They also argued at length (as they do here) that the reasons the Oneidas had not sued earlier were relevant and the action should have been remanded for further proceedings on that issue. See id. at *3-5 (discussing the failure of the court to consider whether Oneidas could have brought suit earlier, and noting the finding by the district court in Cayuga that the Cayugas were not responsible for delay). Further, they argued that barring the suit before it on the grounds of laches was inconsistent with federal policy. See id. at *5-7 (application of laches by court was inconsistent with federal policy embodied in 28 U.S.C. § 2415). With respect to the issue of prejudice, the New York Oneidas asserted that in rejecting the Oneidas' claim of "tax immunity without a factual record on the 'prejudice' component of traditional laches doctrine, the Court necessarily announced a doctrine of prejudice as a matter of law." See id. at *8.

In short, Plaintiffs' dispute is not with Defendants' arguments; it is with the holdings of Cayuga and Sherrill. As much as Plaintiffs may not like it, Cayuga (which applied the holding of Sherrill) is the law of this Circuit and is controlling. See Anderson v. Recore, 317 F.3d 194, 201 (2d Cir. 2003) ("We will follow a precedent from this circuit unless a Supreme Court decision or an en banc holding of this court implicitly or explicitly overrules the prior decision"); World Wrestling Entm't v. Jakks Pacific, Inc., No. 04-8223, 2006 WL 851152, *11 (S.D.N.Y. Mar. 31, 2006) ("[T]his Court cannot ignore binding Second Circuit precedent, unless it is expressly or implicitly overruled"); United States v. Russotti, 780 F. Supp. 128, 131 (S.D.N.Y. 1991) ("[I]t is axiomatic that a district court cannot simply take a position contrary to that of its circuit court. . . . "). If the Oneidas believe the Cayuga decision was inconsistent with prior decisions in the circuit on laches, or improperly imposes an absolute time bar in contravention to 28 U.S.C. § 2415, those are arguments for an appellate court, not this Court.

b. No Further Proceedings Are Necessary Before Dismissal Of Plaintiffs' Claims

There is no rule that the doctrine of laches can be applied only after an evidentiary hearing, as the Oneidas and the U.S. argue. See Oneida Mem. at 2, 13-15; U.S. Mem. at 14-16. Cases within the Second Circuit have not hesitated to dismiss claims based on laches in the context of a motion for summary judgment. See Robins Island Pres. Fund, Inc. v. Southold Dev. Corp., 959 F.2d 409, 423-24 (2d Cir. 1992) (affirming summary judgment on the basis of laches when "it requires no strenuous debate to conclude" that there was unreasonable delay and undue prejudice); Byron v. Chevrolet Motor Div., No. 93-1116, 1995 WL 465130 *7-10 (S.D.N.Y. Aug. 7, 1995) (finding plaintiff's complaint was barred by laches on motion for summary judgment).[20]

More fundamentally, the unmistakable import of Cayuga is that Indian land claims such as those of the Oneidas' can be dismissed before trial. The Oneidas contend that the court of appeals really did not mean it when it said that the Cayugas' claim was "subject to dismissal *ab initio*" and that the district court could properly dismiss the case on the basis of laches if "the Cayugas filed their complaint today." See Oneida Mem. at 15-16; Cayuga, 413 F.3d at 277-78. No amount of deconstruction of the court's language can change the inescapable meaning of the

[20] The cases cited by Plaintiffs do not establish a "black-letter rule" that a case cannot be disposed of on the basis of laches on a summary judgment motion, and do not support denial of summary judgment in this case. Oneida Mem. at 15 n.3. In Ikelionwu v. United States, the Second Circuit reversed a laches dismissal because there were disputed issues of fact. 150 F.3d 233, 237 (2d Cir. 1998). Here, the relevant facts cannot be disputed. DeSilvio v. Prudential Lines, Inc., 701 F.2d 13 (2d Cir. 1983), overturned a grant of summary judgment because it disagreed with the district court's assessment that plaintiff's own conduct excused the delay. Here, of course, the Second Circuit has determined as a matter of law that the reasons offered by the Oneidas do not excuse delay. Larios v. Victory Carriers, Inc., 316 F.2d 63 (2d Cir. 1963), is inapposite, as it turned on whether the district court's "mechanical" application of the state statute of limitations period to determine laches was erroneous. In any event, the Second Circuit expressly acknowledged that "there may be cases where the plaintiff's evidence as to excuse of the delay is so insubstantial that the court need not call on the defendant to come forward with evidence of prejudice." Id. at 67. See also Tri-Star Pictures, Inc. v. Leisure Time Productions, B.V., 17 F.3d 38, 44 (2d Cir. 1994) (Oneida Mem. at 14) (upholding denial of summary judgment on laches issue because "[t]he record is not so clear that we can conclude with certainty that the injunctive relief sought . . . is foreclosed"). None of the cases cited, of course, applied the multi-factor test set forth in Cayuga and Sherrill.

decision. The U.S., at least, have acknowledged the import of Cayuga in its statements to the Supreme Court: "The necessary implication of the court of appeals' decision . . . is that this and other tribal land suits should have been dismissed at the outset." U.S. Request for an Extension at 4 (Roberts Reply Aff. Ex. PP).

In support of their argument, Plaintiffs seriously mischaracterize the decision. The court of appeals was not relying on the district court's exercise of discretion as to whether laches would bar the claim. It is plain from the opinion that the court of appeals reached an independent decision that the claims had to be dismissed:

> We conclude that the present case must be dismissed because the same considerations that doomed the Oneidas' claim in Sherrill apply with equal force here…. We thus hold that the doctrine of laches bars the possessory land claim presented by the Cayugas here.

Cayuga, 413 F.3d at 277. The court then went on to note that the district court had "explicitly agreed with this assessment." Id. The court's language makes clear that the presence of the factors cited in Sherrill warranted dismissal. This point is further confirmed by the court's statement later on the same page that "the considerations identified by the Supreme Court in Sherrill mandate that we affirm the District Court's finding that the possessory claim is barred by laches." Id. (emphasis added). The court of appeals affirmed the result in the district court as to ejectment based on the Sherrill factors, not based on the district court's exercise of discretion.

In arguing that the Second Circuit's decision to affirm the district court denial of ejectment "does not imply that a contrary finding would be an abuse of discretion" (Oneida Mem. at 15), Plaintiffs also ignore that the district court had only addressed the question of whether the remedy of ejectment would be available. It had refused to dismiss the tribe's possessory claims for monetary relief on the basis of laches. The decision to dismiss all claims on the basis of the facts contained in the record was made by the court of appeals as a matter of

law, not in the exercise of discretion. If the exercise of discretion had been required the court of appeals would undoubtedly have remanded for further proceedings. It did not. See Cayuga, 413 F.3d at 280 (finding "no need to remand . . . for a determination on the laches question"). The unmistakable rule that emerges from Cayuga is that the presence of the same factors that existed in Cayuga requires dismissal. There is no dispute that these factors are present here, and, indeed, none of the Plaintiffs even suggests that here is one. In short, Cayuga is both controlling and directly on point.

Sherrill itself also supports a decision on laches in the context of the pending motion without the need for further discovery. [21] As the Oneidas asserted in the petition for rehearing to the Supreme Court in Sherrill there was no discovery on laches in the trial court in that case and consequently "no record on laches was developed." OIN Pet., 2005 WL 959687 at *1. See also id. at *3 (referring to purported need for "factual development below"). The Supreme Court nonetheless applied equitable doctrines – including laches – on the basis of the public record, without discovery or an evidentiary hearing.

That Sherrill involves several equitable doctrines (laches, acquiescence and impossibility), but Cayuga only specifically discusses laches (Oneida Mem. at 16-17, 26 n.5) hardly assists Plaintiffs. Cayuga found that the Supreme Court's decision had "broad" effect (Cayuga, 413 F.3d at 274) and dismissed on the grounds of laches "because the same

[21] The statement made by Defendants in opposition to the motion to strike the defense of laches (Oneida Mem. at 14) does not assist Plaintiffs. That statement predated Cayuga and Sherrill, which establish that claims such as the Oneidas' can and should be dismissed as a matter of law. Moreover, Plaintiffs' reliance on the statement is ironic at best. In response, the Oneidas argued that since laches was not available (in their view) under the case law, the defense could be struck without discovery or further proceedings (Reply Memorandum on Motion to Strike at 11-12 (Roberts Reply. Aff. Ex. QQ)); and the court in fact granted the motion. Plaintiffs can hardly now object to a grant of summary judgment in Defendants' favor when the case law is clear that their claims are barred by laches.

considerations that doomed the Oneidas' claim in Sherrill apply with equal force here." Id. at 277.[22]

The Oneidas ignore entirely the decision of Judge McCurn in this case finding that laches and related equitable doctrines could be applied at the pleading stage without the need for discovery or any other additional proceedings. See Oneida, 199 F.R.D. at 92 (refusing to "allow amendment and await further litigation" before deciding that laches and impossibility precluded claim against non-state defendants; decision rested on "commonsense observation" and reasons that were "self-evident").[23]

Notably, the only district court that has to date applied the Second Circuit's ruling in Cayuga to an Indian land claim – the court in Shinnecock – dismissed all claims on a Rule 12(b)(6) motion, finding that one of the "principles" set forth in Cayuga was that "equitable defenses can be applied at the pleading stage to dismiss disruptive possessory land claims." Shinnecock, 2006 WL 3501099 at *3.

c. The Counties Are Not Collaterally Estopped From Asserting Laches Or Other Equitable Delay-Based Defenses

"[C]ollateral estoppel is an equitable doctrine, not a matter of absolute right." PenneCom B.V. v. Merrill Lynch & Co., 372 F.3d 488, 492 (2d Cir. 2004). In applying collateral estoppel, courts "must be mindful of the realities of the litigation." Johnson v. Watkins, 101 F.3d 792, 795

[22] In light of the explicit language of Cayuga, the Oneidas' contention that "[a]lthough Cayuga referred to Sherrill's 'equitable considerations,' it did not dispose of the case on the basis of them" (Oneida Mem. at 17) is baseless. What "makes no sense" (Oneida Mem. at 17 n.5) is the Oneidas' argument that "Sherrill's equitable considerations [do not] bar the Oneida land claim." Id. Like so much of their opposition, the Oneidas' position on this point is nothing more than an indirect attack on the Cayuga and Sherrill decisions.

[23] The decision cannot be distinguished, as the U.S. attempts to do, by claiming that Judge McCurn only applied the "impossibility" doctrine, and the "findings necessary to support the Court's ruling … were of a commonsensical nature, based on pragmatic concerns, rather than a controverted historical record." U.S. Mem. at 16 n.8. The concerns underlying Judge McCurn's decision were consistent with those stated in Sherrill and Cayuga. Indeed, the decision was cited with approval and discussed at some length by the Supreme Court in Sherrill. See Sherrill, 544 U.S. at 209-10. Further, there is no contested historical record here as to the relevant facts.

(2d Cir. 1996). The "realities of the litigation" here are that applying collateral estoppel to foreclose the Counties' laches defense would be both inequitable and unwise.

The predicate for the asserted estoppel is the litigation in Oneida II, 470 U.S. 226, which involved a claim for approximately $16,000 for two years of rent owed on 800 acres of land. By contrast, the Oneidas' current claim for possession (recently relabeled a claim for "fair compensation") to more than 250,000 acres of land is substantially different and carries enormous potential consequences for the people and governments of New York. Collateral estoppel has been defeated where, like here, there are sharp factual distinctions between the cases and issues of great public importance are at stake. See Envtl. Defense Fund v. EPA, 369 F.3d 193, 201-03 (2d Cir. 2004).

The Oneidas' reliance on collateral estoppel is also inappropriate because of the changed legal climate following Sherrill. In 2002 this Court struck the Counties' laches defense and summarized the then-current state of the law as follows:

> Courts analyzing Indian land claim actions have consistently rejected the use of delay-based defenses. The law on this issue overwhelmingly supports striking Defendants' laches and adverse possession defenses as legally insufficient.

Oneida Indian Nation v. New York, 194 F. Supp. 2d 104, 123-24 (N.D.N.Y. 2002) (citations omitted). Sherrill "dramatically altered the legal landscape" by recognizing the viability of equitable delay-based defenses to Indian land claims. Cayuga, 413 F.3d at 273. This substantial change in the law defeats preclusion here. See, e.g., Commissioner v. Sunnen, 333 U.S. 591, 600 (1948) ("[S]upervening decision cannot justly be ignored by blind reliance upon the rule of collateral estoppel"); Spradling v. City of Tulsa, 198 F.3d 1219, 1222-23 (10th Cir. 2000) (collateral estoppel applies "only in cases where controlling facts and law remain unchanged").

Leading commentators have written that "issue preclusion often may be carried too far" where the issue reappears in the context of substantially different legal principles or carries

substantially different consequences. WRIGHT, MILLER & COOPER, 18 Federal Practice and Procedure § 4424 at 641 (2d ed. 2002). That is the situation here. The Court, accordingly, should not preclude the Counties from asserting equitable delay-based defenses.

2. There Is No Need For Discovery

Plaintiffs complain that "there has been no discovery concerning laches" and that they are "entitled to such discovery." Oneida Mem. at 13, 22; U.S. Mem. at 14-15. That contention is both misleading and misdirected. First, if there was a lack of discovery, that was the result of Plaintiffs' own action in moving to strike the laches defense. Second, discovery would serve no purpose because all relevant facts under Cayuga/Sherrill have already been admitted and established. See Appendix I. Third, it is fundamental that a party cannot defeat a summary judgment motion merely by claiming that it has not had discovery. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 251 (2d Cir. 1985) ("A bare assertion that evidence to support a fanciful allegation lies within the exclusive control of the defendants, and can be obtained only through discovery, is not sufficient to defeat a motion for summary judgment"); Contemporary Mission, Inc. v. U.S. Postal Serv., 648 F.2d 97, 107 (2d Cir. 1981) ("An opposing party's mere hope that further evidence may develop prior to trial is an insufficient basis upon which to justify the denial of the motion"). It must also show that the discovery would be necessary to oppose the motion. Gualandi v. Adams, 385 F.3d 236, 245 (2d Cir. 2004) (analogizing Rule 54 to Rule 12 motion and denying request for discovery when party "failed to show how the information they hoped to obtain from this discovery would bear on the critical issue . . ."); Nat'l Union Fire Ins. Co. v. Stroh Cos., Inc., 265 F.3d 97, 117 (2d Cir. 2001) (holding that district court can properly refuse to allow additional discovery based on speculation as to what potentially could be discovered).

No such showing has been – or can be – made here. The Oneidas do not claim that they have not had access to documents on the subjects enumerated on page 22 of their memorandum. In fact, as reflected in their opposition papers, Plaintiffs had extensive discovery relating to the challenged transactions and the history of the Oneidas and the claim area after the transactions. More importantly, what steps short of judicial action the Oneidas undertook "to vindicate their rights," the alleged "absence of prejudice from the timing of suit," and the "state's [alleged] unclean lands," are irrelevant. Oneida Mem. at 22.[24] None of those alleged "facts" set forth in the Oneidas' memorandum goes to the Cayuga/Sherrill factors—as to which the facts are established (see Appendix I)—and therefore those alleged "facts" have no application to the Defendants' laches defense.

Under any fair reading of Cayuga the doctrine of laches is applicable to the Oneidas' claims as a matter of law. See Cayuga, 413 F.3d at 274. There is no obligation to spend further judicial resources and time investigating a claim that should be dismissed as a matter of law under recent Supreme Court and Second Circuit precedent. See also Oneida, 199 F.R.D. at 92-93 (extending the litigation beyond the pleading will not provide greater "insight – either factually or legally – [but will] only needlessly prolong[ ] the . . . litigation").

C. The Unclean Hands Argument Is Specious

Nor can unclean hands serve as a vehicle for Plaintiffs to avoid dismissal on the ground of laches. The plaintiffs in Cayuga and Shinnecock alleged that the defendants had engaged in exactly the same sort of "misconduct" as the Oneidas allege here – e.g., knowing and intentional

[24] Although the U.S. asks for discovery it concedes that the discovery sought is irrelevant. See U.S. Mem. at 8 (Cayuga makes "irrelevant the question of whether the plaintiffs' delay is excusable"). The U.S. goes on to suggest that even if the issues on which Plaintiffs request discovery are irrelevant because of Cayuga the court should nonetheless allow discovery "at a minimum, to create a record for purposes of appeal." U.S. Mem. at 15. Given the ample references in their opposition papers to the "facts" as to which they purportedly need discovery (Oneida Mem. at 12-22), the Plaintiffs are plainly in a position to put forward whatever arguments are appropriate on appeal.

violation of the NIA, intentional purchase of the land at a fraction of its value, and the misuse of unequal bargaining power.[25] See Cayuga, 413 F.3d at 268-69; Shinnecock, 2006 WL 3501099 at *1. In Cayuga, the district court had made a determination (vigorously disputed by the State) that the facts "demonstrate[d] all too vividly that the State did not act in good faith toward the Cayuga at the time of the 1795 and 1807 Treaties. . . " See Cayuga Indian Nation v. Pataki, 165 F. Supp. 2d 266, 358 (N.D.N.Y. 2001). The district court also found that "[g]iven the State's knowledge of the Non-intercourse Act by 1807 [the time of the second Cayuga land transaction], the State certainly cannot be said to have acted innocently when it failed to comply therewith." See id. at 353 ("There is evidence in the record . . . which easily supports a finding that the State acted in bad faith regardless of whether or not a federal commissioner was present").[26] The Second Circuit directed entry of judgment in favor of the state in that case despite these findings.

The Oneidas are simply wrong in suggesting that since the Second Circuit did not expressly mention "unclean hands" when it dismissed the claim before it, the Oneidas can avoid dismissal by invoking the same type of alleged misconduct raised by the Cayugas under that label. Oneida Mem. at 23. None of the cases they cite support that conclusion.[27] The court in

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[25] Defendants deny Plaintiffs' allegations of wrongdoing but do not address the substance of those allegations here because they do not have any bearing on Defendants' entitlement to summary judgment.

[26] In addition, Judge McCurn found that the 1795 statute under which the State negotiators were empowered to buy land from the Oneidas, Onondagas and Cayugas at 50 cents an acre but to resell it at $2.00 per acre demonstrated "the State's obvious profit motive -- a profit which was to be had at the expense of the Indians . . . . Bluntly put, the State cannot be said to have acted in good faith with respect to the Cayugas when it forged ahead with the 1795 Act, putting its own financial gain above all else." Cayuga, 165 F.Supp. 2d at 331. See also id. at 347. So also, the Shinnecocks asserted that "the defendants used illegal means to take the subject lands, and willfully authorized the illegal sale of such lands to third parties" (see Shinnecock Opposition Memorandum at 4 (Roberts Reply Aff. Ex. RR); that the transaction was "an old-fashioned opportunistic land-grab" (id. at 11); and was accomplished through fraud. Shinnecock, 2006 WL 3501099 at *6.

[27] Bein v. Heith, 47 U.S. 228 (1848), did not address laches. In Stone v. Williams, 891 F.2d 401 (2d Cir. 1989), the court merely indicated that defendants' misconduct should be considered in evaluating the factors otherwise relevant to a laches defense. The Second Circuit's decision in Cayuga, of course, indicates that the type of wrongdoing alleged by Plaintiffs does not preclude the application of laches to Plaintiffs' claim. Hermes Int'l v. Lederer de Paris Fifth Ave., 219 F.3d 104 (2d Cir. 2000), applied a rule specific to trademark infringement claims – "that laches is not a defense against injunctive relief when the defendant intended the infringement." Id. at 107. The

Cayuga was articulating equitable principles which governed the application of laches to possessory Indian land claims like those presented here. By deciding that such claims are barred where the equitable factors listed by the court are present despite the alleged existence of misconduct by defendants, the court necessarily determined that such misconduct did not preclude application of laches to the claims here.

The plaintiff in Shinnecock argued, as the Oneidas do here, that the misconduct of the defendants in acquiring the land barred application of laches by reason of the doctrine of unclean hands. Shinnecock Opposition Memorandum at 4-5 (Roberts Reply Aff. Ex. RR). Contrary to the Oneidas' claim that the issue was "not addressed in Shinnecock" (Oneida Mem. at 23), Judge Platt clearly rejected the argument. See Shinnecock, 2006 WL 3501099 at *5 ("[T]he Nation claims that the 1859 Transaction was executed by fraudulent means and threats of intimidation. But even assuming, arguendo, the veracity of this statement, we do not reach a different conclusion. Equitable considerations bar plaintiffs' claims irrespective of their viability").

D. The Oneidas' Request To Have This Court Disregard *Cayuga* Is Unavailing

Instead of advancing relevant arguments under the guiding rule of law, Plaintiffs argue in a hypothetical universe where Cayuga is subject to attack. In a variety of ways, direct and indirect, Plaintiffs argue that Cayuga was wrongly decided. Cayuga, however, is the law of this Circuit and is controlling. The Supreme Court has denied the petitions for certiorari, and courts within the Second Circuit are bound to follow the Second Circuit's decision. See supra at 18.

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case does not say, as the Oneidas allege, that any "[i]ntentional statutory violation" bars consideration of laches. Oneida Mem. at 23. Cayuga clearly rejects any such rule in the context of cases involving Indian possessory land claims, as do other cases cited by Plaintiffs. See Felix, 145 U.S. at 334 (cited in Oneida Mem. at 1, 10) (applying equitable principles to bar recovery of possession despite fact that defendants acquired land owned by an Indian "in violation of the letter and policy of the law").

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court grant summary judgment dismissing, with prejudice, the Tribal Plaintiffs' Amended Complaint, the United States' Amended Complaint-in-Intervention, and the Brothertown's Amended Complaint-in-Intervention, in their entirety.

Dated: Albany, New York
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Appendix I

1. Although Plaintiffs dispute that the Oneida Indian Nation "ceded" the land there is no dispute as to the date of the challenged transactions, which concluded in 1846.[1] Compare Def. Rule 7.1(a)(3) Stat. at ¶¶ 2, 3 with Oneida 7.1(a)(3) Resp. at ¶¶ 2, 3 and U.S. 7.1(a)(3) Resp. at ¶¶ 2, 3.

2. The Plaintiffs admit that after the challenged transaction "non-Indians occupied and developed the land."[2] Compare Def. Rule 7.1(a)(3) Stat. at ¶ 4 with Oneida 7.1(a)(3) Resp. at ¶ 4 and U.S. 7.1(a)(3) Resp. at ¶ 4. See also Oneidas' Interrogatory Answers at No. 18 (Smith Dec. Ex. 10) ("It is not disputed that the Oneidas lost possession of all but a very small part of the Oneida reservation").

3. The Plaintiffs do not dispute that "[s]ince the mid-nineteenth century the majority of Oneida Indians have lived outside the claim area." Compare Def. 7.1(a)(3) Stat. at ¶ 8 with Oneida 7.1(a)(3) Resp. at ¶ 9 and U.S. 7.1(a)(3) Resp. at ¶ 8.

4. The Oneidas "admit[ ] that the population of the claim area has been predominately non-Indian since the mid-nineteenth century." Compare Def. 7.1(a)(3) Stat. at ¶ 9 with Oneida 7.1(a)(3) Resp. at ¶ 9. See U.S. 7.1(a)(3) Resp. at ¶ 9.

5. The Oneidas fail to respond to the Defendants' statement that since the mid-nineteenth century the claim area has been non-Indian in character, but the U.S. admits it.

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[1] The Oneidas quibble with the exact amount of acres still in Oneida hands after the challenged transactions, but that issue is of no consequence. The action relates only to land transferred by the challenged transactions. Amended Complaint at ¶¶ 1-3, 13 (Roberts Aff. Ex. A) Moreover, although the Oneidas claim that "hundreds" of acres of land were still in Oneida hands after 1846, they do not dispute that as a result of later Oneida transactions all but a handful of acres had been transferred to non-Indians by the early 20th century.

[2] The Oneidas "deny" that Oneidas ceased to live in the "area", but they do not contend that the Oneidas continued to live on land that was subject of any of the challenged transactions after such transaction and none of the record cited supports such a contention. The fact that some Oneidas continued to live in the area (Oneida 7.1(a)(3) Resp. at ¶ 4) is irrelevant. See Sherrill, 544 U.S. at 211; Shinnecock, 2006 WL 3501099 at *5.

Compare Def. 7.1(a)(3) Stat. ¶ 9 with Oneida 7.1(a)(3) Resp. ¶ 9 and U.S. 7.1(a)(3) Resp. ¶ 9. The Supreme Court, of course, cited the "distinctly non-Indian character of the [Oneida claim] area and its inhabitants" as a basis for its decision in Sherrill. See Sherrill, 544 U.S. at 202.

6. It is also undisputed that between 1791 and 1827 the Brothertown entered into a series of transactions, which they seek to challenge in this action, and after such transactions the Brothertown withdrew from the claim area. Compare Def. 7.1(a)(3) Stat. at ¶¶ 6, 7 with Oneida 7.1(a)(3) Resp. at ¶¶ 6, 7 and U.S. 7.1(a)(3) Resp. at ¶¶ 6, 7. The Brothertown did not file a response to Defendants' Rule 7.1(a)(3) statement and therefore the items in the Defendants' statements are deemed undisputed as to the Brothertown. See Local Rule 7.1(a)(3) ("Any facts set forth in the Statement of Material Facts shall be deemed admitted unless specifically controverted by the opposing party").

7. Plaintiffs admit that the United States has known of the challenged transactions for a long time and that no action was initiated by the U.S. with respect to any land covered by the Treaty of Fort Schuyler until Boylan and the 32 acres of land in dispute in Boylan is not at issue here. Compare Def. 7.1(a)(3) Stat. at ¶¶ 10, 11 with Oneida 7.1(a)(3) Resp. at ¶¶ 10, 11 and U.S. 7.1(a)(3) Resp. at ¶¶ 10, 11. The U.S. did not intervene in this case until 1998. U.S. Complaint (Roberts Dec. Ex. B).

8. The Oneidas admit that the first judicial action taken by the Oneidas that related to the challenged transaction was the ICC act filed against the U.S. in 1951; and that no such action was initiated by the Oneidas or the Brothertown against the State, counties or local governments with respect to any of the challenged transactions until 1970. Compare Def. 7.1(a)(3) at ¶ 12 Stat. with Oneida 7.1(a)(3) Resp. at ¶ 12 and U.S. 7.1(a)(3) Resp. at ¶ 12.