UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONEIDA INDIAN NATION OF NEW YORK STATE, THE ONEIDA INDIAN NATION OF WISCONSIN, and THE ONEIDA OF THE THAMES,	)	CIVIL ACTION No. 74-CV-187
Plaintiffs,	)	(LEK/DRH)
and	)	
UNITED STATES OF AMERICA and NEW YORK BROTHERTOWN INDIAN NATION	)	
Plaintiffs-Intervenors,	)	
v.	)	
THE STATE OF NEW YORK, COUNTY OF MADISON, NEW YORK, and COUNTY OF ONEIDA, NEW YORK,	)	(Federal Common Law Claims; Nonintercourse Act Claims)
Defendants.	)	

UNITED STATES' MEMORANDUM IN OPPOSITION TO SUMMARY JUDGMENT

The United States, through its attorney, submits this Memorandum in Opposition to Defendants' Motion for Summary Judgment.

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

1. Plaintiffs' Complaints 2

2. Prior Proceedings 5

3. The Cayuga Decision 6

SUMMARY OF ARGUMENT 7

ARGUMENT 9

Summary Judgment Standard 9

I. Preservation of Claims 10

(1) Laches is applied to remedies, not claims 11

(2) Money damages are not disruptive 11

(3) Laches does not apply to claims brought within the applicable statute of limitations 11

(4) Laches does not apply to the United States 12

(5) Laches requires a showing that Plaintiffs' delay is not excusable 12

(6) Laches requires findings of fact based upon a fully developed record 14

II. The Second Circuit's decision may be read not to foreclose a remedy based on a claim for fair compensation for the value of the lost lands at the time of the transaction 16

1. Nonpossessory claims for relief are available under the Nonintercourse Act 18

2. Requiring a fair price for lost land is appropriate relief for a violation of the Nonintercourse Act 23

3. Cayuga can be read to preserve a fair price claim 27

4. Fair Price Claim and the United States Certiorari Petition in Cayuga 28

CONCLUSION 30

INTRODUCTION

Based on Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266 (2d Cir. 2005), Defendants move for summary judgment and dismissal of this case on the ground of laches. The United States recognizes that Cayuga is now the law of the Second Circuit and binding upon this Court. The United States does, however, preserve its argument that Cayuga was wrongly decided, and here preserves arguments against that decision's application to this case. The United States contends that Cayuga incorrectly applied laches to money damage awards premised upon a present-day possessory right to land acquired in violation of the Nonintercourse Act. Id. at 278. Further, to the extent Cayuga can be understood to (1) alter the laches test to make irrelevant the question of whether the Plaintiffs' delay is unreasonable, or (2) hold that laches can be resolved solely on the pleadings in the context of ancient Indian land claims, the United States asserts it was wrongly decided. A defense of laches presents case-specific factual issues requiring analysis of an historical record spanning over two centuries. A decision on the question of laches here should be supported by a fully developed record, as it was in Cayuga – one that gives weight to the persistent, although futile, efforts over the last two centuries of the Oneidas to seek redress for the loss of their land. Moreover, the United States contends that Cayuga erred in applying laches to the United States.

Also, upon reflection, we have concluded that even applying Cayuga, it is possible that the Second Circuit would find that some relief is still available. Cayuga holds that possessory land claims are potentially subject to laches. While the United States has raised claims for possessory relief, the underlying cause of action is a claim that the State has violated the Nonintercourse Act and federal common law in purchasing Oneida lands. The Supreme Court

has noted that the "Nonintercourse Act . . . does not speak directly to the question of remedies for unlawful conveyances of Indian land." County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 237 (1985) ("Oneida II"). A Nonintercourse Act claim need not necessarily be a possessory land claim, and, indeed, nonpossessory relief may remedy a Nonintercourse Act claim if equitable considerations bar vindication of the Indians' right of possession. Under such limited circumstances, the Court, instead of granting relief on the premise that the original transactions continue to be of no validity in extinguishing the Tribe's right of possession, may accept and give effect to the transactions at a fair price by requiring the State to compensate the Oneidas with any profits it made through its purchase and resale of Oneida lands. Such relief is consistent with the Nonintercourse Act's purpose of ensuring Indians are not defrauded of their lands. Therefore this Court should not grant Defendants' Motion for Summary Judgment.

BACKGROUND

1. Plaintiffs' Complaints

This action is brought by the Oneida Plaintiffs[1/] and the United States to remedy the unlawful purchases by New York State of some 250,000 acres of land secured to the historic Oneida Nation. See Oneida Indian Nation of N.Y. v. New York, 194 F. Supp. 2d 104, 112 (N.D.N.Y. 2002). The adoption of the United States Constitution clarified that Indian affairs were "the exclusive province of federal law." Oneida II, 470 U.S. at 234. Pursuant to this authority, Congress passed the first Nonintercourse Act in 1790, Ch. 33, 1 Stat. 137, which, as

[1/]The Oneida Plaintiffs are the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin, and the Oneida of the Thames.

amended, remains in effect to this day. See Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 668 & n.4 (1974) ("Oneida I").

The lands at issue in this suit were reserved to the Oneida Nation by the United States in the Treaty of Canandaigua of 1794, 7 Stat. 44, and the Nonintercourse Act precluded alienation of these lands without Congressional approval. See 25 U.S.C. § 177; Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 56 (2d Cir. 1994). "Despite Congress' clear policy that no person or entity should purchase Indian land without the acquiescence of the Federal Government, in 1795 the State of New York began negotiations to buy the remainder of the Oneidas' land." Oneida II, 470 U.S. at 232. Although the United States informed New York Governors Clinton and Jay that the Nonintercourse Act forbade the State from purchasing Indian lands without compliance with the Act, New York opted to continue with such transactions. Id. Between 1795 and 1846, New York acquired the land at issue in this litigation in violation of the Nonintercourse Act. As noted by the Second Circuit, "New York's abuse of the Oneidas was not accomplished without protest . . . . especially between 1840 and 1875, and between 1909 and 1965." Oneida Indian Nation of N.Y. v. County of Oneida, 719 F.2d 525, 529 (2d Cir. 1983), *aff'd in part and rev'd in part*, 470 U.S. 226 (1985).

In 1974, the New York Oneidas ("OIN") and the Oneida Indian Nation of Wisconsin brought this suit against the Counties of Oneida and Madison, New York. See Oneida Indian Nation of N.Y. v. County of Oneida, N.Y., 199 F.R.D. 61, 66 (N.D.N.Y. 2000). The case lay dormant for 25 years while a "test case" involving very similar legal issues but a much smaller area of land was litigated. See id. at 65-66. In the test case, the Supreme Court held that the Oneidas could maintain a federal common law cause of action to vindicate their rights to land

acquired in violation of the Nonintercourse Act. Oneida II, 470 U.S. at 233-36. Moreover, the Court held that the Tribes' suit (which had been filed in 1970) was not barred by any applicable statute of limitations. Id. at 240-44. While declining to rule definitively on the availability of a laches defense (because the defendants had abandoned that defense on appeal), the Court identified various considerations weighing against recognition of such a defense, see id. at 244-45 & n.16. The Court left open the possibility, however, that "equitable considerations" might "limit the relief available to" the Tribes if and when the case proceeded to final judgment. See id. at 253 n.27.

In this case, the United States intervened as a plaintiff in 1998, and the State of New York was joined as a defendant in 2000. See Oneida, 199 F.R.D. at 69-70. At the same time that the Court joined the State as a defendant, it also made clear that private land owners residing in the land-claim area could not be joined as defendants and that no relief of any kind would be available from them. See id. at 94-95.[2]

The United States participates in this litigation on its own behalf to enforce federal law and the Treaty of Canandaigua, as well as on behalf of the "historic Oneida Nation and/or any or all of the historic Oneida Nation's present-day successors-in-interest." United States' Second Amended Complaint-in-Intervention ¶¶ 7-8. The United States' Complaint-in-Intervention raises claims against and seeks relief from only the State, the party that initially acquired the Oneida lands in violation of federal law and unlawfully and unfairly profited from that violation. See

---

[2]The Court also permitted the Thames Band of Canada to intervene as a plaintiff. See Oneida, 199 F.R.D. at 69-70. Subsequently, the Court granted intervention to an entity calling itself the New York Brothertown Indian Nation. See Oneida Indian Nation of N.Y. v. New York, 201 F.R.D. 64 (N.D.N.Y. 2001).

U.S. Compl. ¶ 2. The United States alleges that the State acquired the bulk of the Oneida Reservation in violation of the Nonintercourse Act and federal common law. See U.S. Compl. ¶¶ 15, 21. The Complaint asserts two claims. The first, a federal common law trespass claim, alleges that the State has "interfered with [the] Oneida Nation's enjoyment of its rights to the Subject Lands under federal law and caused trespasses to the Subject Lands that originated with the State's illegal transactions." Id. ¶ 23. The second claim alleges New York violated the Nonintercourse Act by acquiring the Oneida lands and transferring them to third parties. Id. ¶ 26. For relief, the Complaint requests (1) a declaratory judgment that the Oneidas have the right to occupy the subject lands; (2) monetary and possessory relief against the State of New York; and (3) "such other relief as this Court may deem just and proper." Id. at Wherefore Clause ¶¶ 1-6.

The Oneida Plaintiffs' Complaint challenges the same transactions as the United States' Complaint, and raises (1) a federal common law claim; (2) a Nonintercourse Act claim; and (3) a claim under the Treaty of Canandaigua. Oneida Compl. ¶¶ 40-62. The Oneidas bring their claims against the State, as well as the Counties of Oneida and Madison. Oneida Compl. ¶¶ 13-15. The Oneidas describe the relief they seek in greater detail than the United States, requesting, among other things, declaratory and injunctive relief, money damages, and the "disgorgement of the value of . . . benefits" the State received "from its purported purchases and sales of the subject lands." Id. at Wherefore Clause ¶¶ 1-8, ¶ 6.

2. Prior Proceedings

On March 29, 2002, this Court ruled on a number of motions, including in pertinent part Plaintiffs' motion to strike affirmative defenses. Oneida Indian Nation of N.Y. v. New York, 194 F. Supp. 2d 104 (N.D.N.Y. 2002). The Court struck one of Defendants' counterclaims and

several of their affirmative defenses, including the defense of laches, explaining that "[i]n light of the extensive law rejecting the laches . . . defense[] in Indian land claims, the Court finds that Defendants' defense[] of laches [is] insufficient as a matter of law." Id. at 124. Discovery proceeded on the issues that remained live in the wake of the Court's order.

Discovery was bifurcated into liability and damages phases. See Order, May 9, 2003 (Docket No. 484) (setting forth schedule for liability phase expert discovery); Order, Sept. 10, 2002 (Docket No. 433) (liability document discovery schedule). Discovery is complete in the liability phase, with expert reports having been exchanged and expert depositions having been conducted. The Court stayed further proceedings to facilitate settlement and, subsequently, in light of the Second Circuit's ruling in Cayuga. See Motion Hearing, May 6, 2005 (Docket No. 569); Order, Sept. 23, 2005 (Docket No. 575). In the wake of Cayuga, Defendants have now moved for summary judgment on the ground that this action is barred by laches.

3. The Cayuga Decision

Cayuga involved a 1795 and 1807 transaction in which New York acquired the Cayuga Indian reservation. The district court held that these acquisitions violated the Nonintercourse Act, Cayuga, 413 F.3d at 268, and that the defense of laches was unavailable, Cayuga Indian Nation of N.Y. v. Cuomo, 771 F. Supp. 19, 23 (N.D.N.Y. 1991). Based on a number of equitable considerations, including laches, the district court determined that ejectment was not an available remedy. See Cayuga Indian Nation of N.Y. v. Cuomo, No. 80-CV-930, 1999 U.S. Dist. LEXIS 10579 (N.D.N.Y. July 1, 1999).[3] The district court also weighed numerous equitable

[3] The district court emphasized that, nevertheless, the Cayugas "are entitled to relief for the past two centuries during which they have been deprived of their homeland," and, indeed, its invocation of laches was premised upon the availability of other adequate relief. Cayuga, 1999

considerations, including laches, in awarding prejudgment interest. Cayuga Indian Nation of N.Y. v. Pataki, 165 F. Supp. 2d 266, 356-58 (N.D.N.Y. 2001). The Second Circuit reversed, relying on City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005), holding that plaintiffs' ejectment claim was a possessory land claim subject to the defense of laches, and that plaintiffs' money damages claims were predicated upon the ejectment claim and thus also subject to laches. Cayuga, 413 F.3d at 278. "Taking into account . . . the findings of the District Court in the remedy stages of [the] case," the Second Circuit concluded that "plaintiffs' claim is barred by laches." Id. at 268. Further, while recognizing that laches "traditionally" does not apply to the United States, the Second Circuit found that the United States' claims were also barred by laches. Id. at 278-79. The United States filed a petition for certiorari, which was denied. See United States v. Pataki, 126 S. Ct. 2021 (2006).

SUMMARY OF ARGUMENT

Although Cayuga is now the law of this Circuit, the United States asserts that it was wrongly decided, and herein preserves objections to its application in this case. Cayuga interpreted Sherrill as applying laches to bar historic land claims that are "possessory" in nature. Sherrill, however, did not apply equitable considerations to bar entire claims. Rather, Sherrill addressed the "appropriateness of the relief," finding that the unilateral revival of tribal sovereignty after a two-hundred-year hiatus constituted disruptive relief. 544 U.S. at 214.

U.S. Dist. LEXIS 10579, at *98; id. at *78-82 (determining that money damages will adequately compensate the Cayugas). The district court emphasized that "[l]aches was only one of several factors which this court considered in deciding whether or not ejectment was a viable remedy in this case; it was not the determinative factor." Cayuga Indian Nation of N.Y. v. Pataki, 188 F. Supp. 2d 223, 257 (N.D.N.Y. 2002).

Sherrill, therefore, provides no support for a finding that all relief premised upon a possessory land claim – even non-possessory relief like money damages – is barred by laches.

Cayuga errs on four other grounds as well, and therefore should not apply in this case. First, trespass damages or other monetary relief against the State – such as the relief sought in Cayuga and this case – is not disruptive and should not be barred as disruptive pursuant to Sherrill. Second, laches does not apply to claims brought within the applicable statute of limitations. This land claim, as well as the one at issue in Cayuga, was filed within the Congressionally-mandated statutory limitations period. Third, the United States is not subject to laches when acting in its sovereign capacity, as the Supreme Court has long held the United States acts when it asserts treaty rights on behalf of tribes. Finally, Cayuga wrongly alters the typical laches analysis by making irrelevant the question of whether the plaintiffs' delay is excusable. This is particularly relevant here, where a court has ruled that the Oneidas had, over the last two centuries, diligently sought redress for the loss of their reservation in violation of the Nonintercourse Act.

Even if the Second Circuit's decision in Cayuga applies to these facts, that decision may be read to preserve a remedy based on a claim for fair compensation for the value of the lost lands at the time of the transaction. Such relief is not premised upon a right of possession of the subject lands, and thus does not run afoul of Cayuga's holding that relief premised upon a *possessory* right is disruptive and therefore subject to laches. If equitable considerations preclude vindication of the Oneidas' rights to the lands unlawfully acquired by the State, then the Oneidas should at least receive adequate compensation for the lands lost. Such compensation is best measured by the price New York demanded from third-party purchasers for those lands,

rather than by the price New York contrived to pay to the Oneidas. Requiring fair compensation furthers one purpose of the Nonintercourse Act, which is to assure that Indians were not defrauded in the sale of their lands. Such a claim 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. This Court, therefore, should deny Defendants' Motion for Summary Judgment.

ARGUMENT

Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where the pleadings and discovery materials "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the moving party has met its initial burden of demonstrating the absence of a genuine issue of material fact, the non-moving party must set forth specific facts demonstrating a genuine issue in order to defeat the motion. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

Summary judgment is inappropriate where inadequate discovery has occurred on the subject of the motion. See Fed. R. Civ. P. 56(f). "Rule 56(f) allows a party faced with a motion for summary judgment to request additional discovery, and the Supreme Court has suggested that such a request be granted when the nonmoving party has not had an opportunity to make full discovery." B.F. Goodrich v. Betkoski, 99 F.3d 505, 523 (2d Cir. 1996) (quotation omitted). "The nonmoving party must have had the opportunity to discover information that is essential to

his opposition to the motion for summary judgment." Hellstrom v. U.S. Dep't of Veterans Affairs, 201 F.3d 94, 97 (2d Cir. 2000) (quotation omitted).

I. Preservation of Claims

Defendants' Motion is premised entirely upon Cayuga, which interpreted Sherrill as mandating application of laches to bar historic land *claims* that are "possessory" in nature. See Cayuga, 413 F.3d at 277. Nothing in Sherrill, however, suggests that equitable considerations could be applied to bar entire *claims*. Sherrill focused on the "appropriateness of the relief" sought, rather than on the nature of the claim, and concluded that equitable considerations barred the unique declaratory and injunctive relief specifically sought by the Tribe because of the "disruptive practical consequences" of the relief in the "present and future." Sherrill, 544 U.S. at 214, 219. The Supreme Court specifically found that the unilateral revival of tribal sovereignty after a two-hundred-year hiatus constituted disruptive relief. See id. at 202-03. Sherrill made explicit that "the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in Oneida II." Id. at 221. Accordingly, Sherrill provides no support for a finding that any relief premised upon a possessory land claim – even *non*-possessory relief like a money judgment based on the current value of the land for which the Tribe has a right of possession, or an award of trespass damages – is barred by laches.

The United States asserts that Cayuga was wrongly decided. However, the United States' petition for certiorari was denied, see United States v. Pataki, 126 S. Ct. 2021 (2006), and accordingly, Cayuga is now the law of this Circuit and binding upon this Court. The United States accordingly asserts the following objections to Cayuga, as it may be applied to this case, with the purpose of preserving them for possible review on appeal:

(1) *Laches is applied to remedies, not claims.* Laches and other equitable considerations are properly applied to remedies, not to the underlying claim itself. See Sherrill, 544 U.S. at 213 ("The distinction between a claim or substantive right and a remedy is fundamental.") (internal quotation omitted). This Court should focus, like the Supreme Court did in Sherrill, on the "appropriateness of the relief," not on the nature of the underlying claim, in determining whether and what relief is available for the claims before this Court. Id. at 214.

(2) *Money damages are not disruptive.* Monetary relief – whether in the form of trespass damages, damages for the current market value or for the fair rental value of the lands, or other forms – is not in itself disruptive, especially when awarded against the State as the original wrongdoer and not against other parties who trace their title to the State. It therefore should not be barred as an available form of relief for the claims raised here, particularly because the State profited from its violation of the Nonintercourse Act. Monetary damages, in fact, would provide final resolution to this land claim without disrupting settled expectations of ownership, governance or sovereignty in the claim area.

(3) *Laches does not apply to claims brought within the applicable statute of limitations.* Laches is not a defense against a claim brought within the period of the applicable statute of limitations. United States v. Mack, 295 U.S. 480, 489 (1935); see also United States v. Milstein, 401 F.3d 53, 63 (2d Cir. 2005) ("[I]t is well established that, as a general rule, laches is not a defense to an action that is filed within the applicable statute of limitations, nor is it available against the United States.") (citations and brackets omitted). Congress determined the time-frame within which the United States and Tribes could bring suit on ancient Indian claims like this one with the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, 96 Stat. 1976

(1982). The 1982 Act established a detailed scheme which entrusted to Executive Branch officials the task of identifying and listing valid Indian claims.[4] Thus, the holding in Cayuga is contrary to the express will of Congress in two respects: (a) by applying laches, it disregards the statute through which Congress precisely defined the circumstances under which damages claims concerning Indian lands will be treated as time-barred; and (b) by barring such claims, Cayuga in effect extinguishes Indian title despite the express language of 25 U.S.C. § 177.

(4) *Laches does not apply to the United States.* The United States is not subject to laches when acting in its sovereign capacity. The United States participates in this suit in its sovereign capacity in two respects: to enforce the Act of Congress and Treaty that secured these lands to the Oneidas, and to effectuate the protections those measures were intended to afford to the Oneidas. See Heckman v. United States, 224 U.S. 413, 437 (1912); United States v. Minnesota, 270 U.S. 181, 194 (1926).

(5) *Laches requires a showing that Plaintiffs' delay is not excusable.* To the extent Cayuga holds that Indian land claims such as these may be dismissed on the ground of laches without regard to whether or not Plaintiffs' delay is excusable, the United States asserts that it was wrongly decided. Cayuga elaborated a number of equitable considerations to be applied to

---

[4]The Oneida claim is listed as a 28 U.S.C. § 2415 claim. See 48 Fed. Reg. 13698, 13920 (March 31, 1983). For such a listed claim, the Act's express statutory limitations period is not triggered unless and until the Secretary formally determines that the claim is not suitable for litigation and/or submits a proposed legislative resolution to Congress. See id.; Oneida II, 470 U.S. at 243. Moreover, Congress expressly determined that possessory claims for land have *no* statute of limitations. See 28 U.S.C. § 2415(c). The United States' and Oneida Plaintiffs' complaints were filed within the Congressionally-mandated statutory limitations period. See 28 U.S.C. § 2415. Even if a claim did not appear on the Secretary's list, Congress provided that such claims were "deemed to have accrued on the date of enactment of this Act" – July 18, 1966. 28 U.S.C. § 2415(g).

land claims, which focus on the length of time between the wrong and the bringing of suit in the context of changes in the character of the lands over that time. See Cayuga, 413 F.3d at 277. These factors emphasize the second prong of a laches inquiry (in situations, unlike here, where the laches doctrine properly applies): the prejudice to the Defendant. These factors neglect a crucial aspect of the first prong: whether the Plaintiffs' delay is reasonable. The established doctrine of laches, in contrast, provides that "[a] party asserting the equitable defense of laches must establish both plaintiff's *unreasonable* lack of diligence under the circumstances in initiating an action, as well as prejudice from such a delay." King v. Innovation Books, 976 F.2d 824, 832 (2d Cir. 1992) (emphasis added).

Defendants do not address whether the Oneidas' delay was reasonable, although showing it to have been unreasonable would be their burden under a normal laches analysis. The district court in the test case made clear that the Oneidas have not slept on their rights or acquiesced in the loss of their lands:

> Despite these conditions of poverty and illiteracy, and although their attempts to redress grievances were totally futile, the Oneidas did protest the continuing loss of their tribal land. These efforts were not documented prior to 1909. However, expert witnesses testified that between 1840 and 1875 the Oneidas often attempted to petition the federal government. . . . On one occasion, in 1874, a group of Oneidas travelled from Wisconsin to Albany, New York and consulted with a private law firm. All of these efforts were to no avail. Between 1909 and 1965, the Oneidas contacted the federal government innumerable times in connection with land claims and other grievances.

Oneida Indian Nation of N.Y. v. County of Oneida, 434 F. Supp. 527, 536-37 (N.D.N.Y. 1977) (citations omitted). Based on an evidentiary hearing at which experts presented testimony in the

test case, the court found that the Oneidas "never acquiesced in the loss of their land, but have continued to protest its diminishment up until today." Id. at 541.[5]

(6) *Laches requires findings of fact based upon a fully developed record.* Defendants assert this case is ripe for summary judgment even though laches involves factual questions and this Court's previous holding made inapplicable – indeed, specifically precluded – the type of discovery necessary for the Court to address the defense. See Oneida, 194 F. Supp. 2d 104, 123-24 (N.D.N.Y. 2002). The Second Circuit has explained that "[t]he equitable nature of laches necessarily requires that the resolution be based on the circumstances peculiar to each case." Tri-Star Pictures, Inc. v. Leisure Time Productions, 17 F.3d 38, 44 (2d Cir. 1994). "The inquiry is a factual one," id., and accordingly generally requires discovery to create a complete factual record that will enable the Court to ascertain if laches apply.[6] See id. ("The record is not so clear that we can conclude with certainty that the injunctive relief sought . . . is foreclosed by laches."); see also New York v. Shinnecock Indian Nation, 400 F. Supp. 2d 486, 496 (E.D.N.Y. 2006) (denying motions for summary judgment because "the extent of the impact of the 'disruptive' claims, the nature of the Indians' present titles and possibly the length of the delay and the question of

---

[5] With regard to the first prong of a laches query, Judge McCurn in Cayuga characterized defendants' argument that "because at the time both the Cayugas and the United States were aware of the 1795 and 1807 treaties, . . . wait[ing] almost two hundred years to commence this lawsuit is inexcusable" as "overly simplistic." Cayuga, 1999 U.S. Dist. LEXIS 10579 at *84-85.

[6] If this land claim did not involve the claims of the United States or the rights of Indians who, unlike non-Indians, faced considerable obstacles in seeking redress, see Joseph William Singer, Nine-tenths of the Law: Title, Possession & Sacred Obligations, 38 Conn. L. Rev. 605 (2006), the situation regarding the need for discovery might be different. See Robins Island Pres. Fund, Inc. v. Southold Dev. Corp., 959 F.2d 409 (2d Cir. 1992).

laches, and appropriate remedies . . . . are factual and legal determinations which may only be resolved at a trial").[7]

Regardless of whether Cayuga authorizes such a divergence from the doctrine of laches, this Court should require the parties to develop a full and complete factual record for review by the Second Circuit. This Court, therefore, should not decide that laches bars any claims or relief without allowing the parties a meaningful opportunity for discovery and the preparation of expert testimony summarizing and analyzing facts relevant to a defense of laches. Accordingly, this Court should order a continuance to permit expert discovery on the question of laches in order, at a minimum, to create a record for purposes of appeal.

Defendants read the Second Circuit's ruling in Cayuga as mandating dismissal on the pleadings, regardless of the nature of the relief sought, based on the following sentence from the opinion: "To frame this point a different way: if the Cayugas filed this complaint today, exactly as worded, a District Court would be required to find the claim subject to the defense of laches under Sherrill and *could* dismiss on that basis." Cayuga, 413 F.3d at 278 (emphasis added). Cayuga "require[s]" the Court to consider whether possessory land claims are subject to laches, but holding that a defense *can* bar a claim does not mean that a defense *must* bar such a claim. For the foregoing reasons, it would be appropriate for the Court to allow discovery and to make

---

[7] But see Shinnecock Indian Nation v. New York, 05-CV-2887, 2006 U.S. Dist. LEXIS 87516 (E.D.N.Y. Nov. 28, 2006) (dismissing Indian land claim alleging violation of the Nonintercourse Act on Rule 12(b)(6) motion). Plaintiffs in Shinnecock sought disgorgement of profits, but disgorgement was premised upon a continuing right of possession and included, for example, tax revenues derived from the lands. See id. at 10. By contrast, the United States' request for a fair price for lost lands here does not implicate profits made by the State or others from possession of the lands after the illegal sale occurred. Moreover, the Shinnecock are not a federally recognized tribe, so any holding regarding its land claim should be limited to the facts in that case.

any necessary factual findings in order to ensure an adequate record for review by the Second Circuit.

Finally, questions of fact are raised by the second prong of a laches inquiry: whether Defendants are prejudiced and whether the claims are disruptive. Discovery would be appropriate to determine, for example, whether the monetary remedies sought against the State have adversely affected the claim area.[8]

II. The Second Circuit's decision may be read not to foreclose a remedy based on a claim for fair compensation for the value of the lost lands at the time of the transaction.

According to the Nonintercourse Act, bargains made in violation of the Act are void. While it may no longer be possible to undo the effects of the State's illegal bargains, or, if Cayuga stands, to fully compensate the Oneidas for the present value of the lands and any

---

[8] Contrary to Defendants' assertion, Judge McCurn did not conclude in Oneida, 199 F.R.D. 61 (N.D.N.Y. 2000), that laches could be addressed in the absence of an evidentiary hearing. Judge McCurn, instead, decided the Plaintiffs' motions to amend their complaints to, among other things, join private land owners in the claim area as defendants. See id. at 95. Judge McCurn applied the impossibility doctrine, which in this case required consideration of "practical concerns as to the impossibility of restoring Indians to lands formerly occupied by them." Id. at 92. The findings necessary to support the Court's ruling barring ejectment of private landowners were of a commonsensical nature, based on pragmatic concerns, rather than a controverted historical record. See id. at 92. Thus, from a practical standpoint, it would have been virtually impossible for the Court to render relief requiring "displacement of vast numbers of private landowners." Id. The question of whether the Plaintiffs' delay in bringing suit was excusable was not at issue.

Additionally, in a footnote, Defendants suggest without demonstrating that the Supreme Court's conclusions in Sherrill preclude relitigation of laches here under the doctrine of collateral estoppel. Defs. Brief at 20 n.12. Given that the United States was not a party to Sherrill, collateral estoppel cannot apply to the United States. See Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 731 (2d Cir. 1998). In any event, non-mutual collateral estoppel does not apply to the United States. See United States v. Mendoza, 464 U.S. 154, 162 (1984), and that doctrine therefore would not bar the United States' claim against the State of New York, which was not a party in Sherrill.

present-day trespass premised on a current right of possession that survived the State's purchases, there is the question of whether this Court has the authority to reform the past transactions to make them consistent with the Nonintercourse Act's aim of ensuring that Indians are fairly compensated for lands that were purchased from them. In other cases where a possessory right cannot be vindicated due to equitable considerations, courts have required monetary compensation for the value of the land lost, and thereby in effect confirmed the underlying sale of the lands. See United States v. Minnesota, 270 U.S. 181, 206 (1926) (holding that with regard to lands patented to the State in derogation of the rights of Indians, the "United States is entitled to a cancellation of the patents as to these lands, unless the state has sold the lands, and in that event is entitled to recover their value").

The United States similarly requests fair compensation here, if remedies premised on a current right of possession are barred. Such fair compensation could be measured by the difference between what the State forced the Oneidas to accept for their lands and what the State in turn acquired from third party purchasers of those same lands. Such relief has the added equitable benefit of ensuring that the State is not rewarded for its unlawful purchase from the Oneidas since it, in effect, would require disgorgement of any profits made through the illegal undertaking. Moreover, by accepting the transactions as final and effectuating them in accordance with the purposes of the Nonintercourse Act in this manner – rather than fashioning a remedy on the premise that the transactions are altogether void and the Oneidas maintain a current right of possession – this Court, if affirmed by the Second Circuit, would provide a judicial resolution to this longstanding land claim that would not implicate anyone's current title to or right to possession of lands within the boundaries of the original Oneida Reservation.

As explained below, the United States was of the view when it filed its certiorari petition seeking review of the Second Circuit's decision in Cayuga that that decision would effectively foreclose all claims and forms of relief by and on behalf of New York Tribes based on transactions such as these. On further reflection, however, it is possible that the Second Circuit would not read its Cayuga decision to bar the sort of fair compensation relief described here, which is not premised on – and indeed is inconsistent with – a present right of possession.

1. Nonpossessory claims for relief are available under the Nonintercourse Act.

The Nonintercourse Act prohibits the "purchase, grant, lease, or other conveyance of lands" without federal approval. 25 U.S.C. § 177. As the Supreme Court has noted, the Act does not "speak directly to the question of remedies for unlawful conveyances of Indian land." Oneida II, 470 U.S. at 237. The Act, however, provides that no unlawful conveyances "shall be of any validity in law or equity." 25 U.S.C. § 177. Thus Congress intended the Indians' right of possession to survive a land transaction in violation of the Act, and possessory land claims are appropriate under the Act. However, if laches bars relief premised on a current right of possession, relief for a violation of the Act may focus on the terms of the illegal transaction itself instead of on recovery of the lost land, so as to require a fair price for the lands that were acquired without the federal approval that was intended to ensure that a fair price would be paid. Such compensation would not vindicate any possessory right – indeed, it would be premised on an inability to do so, and an acquiescence in and acceptance of the transaction as a result.

Precedent exists for such relief. For example, Congress, through the Indian Claims Commission Act, 60 Stat. 1049 (1946), allowed Indian *claims* based on lost lands to be litigated, but provided only compensatory damages for the value of the land at the time of sale as the

remedy for successful claims. See Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455, 1467 (10th Cir. 1987) ("This restriction as to remedy represents a fundamental policy choice made by Congress out of the sheer, pragmatic necessity that, although *any* and *all* accrued claims could be heard before the [Indian Claims] Commission, land title in 1946 could not be disturbed because of the sorry injustices suffered by native Americans in the eighteenth, nineteenth, and early twentieth centuries.") (emphasis in original). A commentator, approvingly quoted by the Tenth Circuit in Navajo, noted: *"By restricting the remedy, the Act forced the Indian to accept a post factum sale."* Navajo, 809 F.2d at 1467 (quoting Note, Indian Breach of Trust Suits: Partial Justice in the Court of the Conqueror, 33 Rutgers L. Rev. 502, 516-17 (1981)) (emphasis in original).

Precedent also exists outside the context of the Indian Claims Commission. In United States v. Minnesota, 270 U.S. 181 (1926), Indian land had been mistakenly conveyed to Minnesota, which in turn had conveyed much of it to good faith third party purchasers. The Court explained that "the patenting [of the land] was contrary to law and in derogation of the rights of the Indians," and determined by way of remedy that "the United States is entitled to a cancellation of the patents as to these lands, unless the State has sold the lands, and in that event is entitled to recover their value." Id. at 206. Similarly, in Yankton Sioux Tribe of Indians v. United States, 272 U.S. 351 (1926), the Supreme Court redressed the infringement of a Tribal right to land with monetary compensation that resulted, in effect, in a post factum sale of the land. There the Court found that the Yankton Sioux Tribe had fee title to a tract of land in possession of the United States and, as for a remedy, concluded that "since the Indians are the owners of it in fee, they are entitled to just compensation as for a taking under the power of

eminent domain." Id. at 359. Moreover, in Felix v. Patrick, 145 U.S. 317 (1892), the Court emphasized the distinction between an Indian plaintiff's right to land and the relief that could be afforded to remedy the infringement of that right. In Felix, the plaintiffs, heirs of an Indian who, they alleged, had been defrauded of scrip allowing her to locate and patent land, were denied recovery of a tract of land acquired by use of the scrip. See id. at 325-26. Although the scrip had been acquired from the Indian in violation of a statute providing that "no transfer or conveyance of such scrip should be valid," id. at 325, due to the passage of time, the land located by the scrip, though originally "wild," was now part of "one of the most thriving and rapidly growing cities of the west." Id. at 334, 318. The Court held that the plaintiffs' claimed right to the land did not necessarily entitle them to the relief sought – possession of the land. See id. at 332-35. The Court explained that "justice requires only what the law, in the absence of the statutory limitation, would demand, the repayment of the value of the scrip, with legal interest thereon." Id. at 334.[9]

A fair price remedy can be provided either at law or in equity. Where equity precludes undoing the illegal transactions and returning the land, a court at law may, in effect, reform the contract to require compensatory damages in the amount of what was lost through the improper bargain. See Hume v. United States, 132 U.S. 406, 413 (1889) ("[I]f the express contract were void, the defendant might nevertheless be held in general *assumpsit*, upon the implied contract to

---

[9] The Felix plaintiffs did not receive any relief. The Court was not satisfied "that she did not receive full value for the scrip" when she conveyed it, and, in any event, found it "improbable" that anything could be proved about "the nature of the original transaction." Id. at 333. None of the cases cited above involved the Nonintercourse Act, and therefore they do not support the Second Circuit's holding that possessory claims seeking to remedy Nonintercourse Act violations are subject to laches. They instead provide examples of the Supreme Court substituting compensatory remedies when possession when return of Indian lands is not possible.

pay for property received from the plaintiff and retained."). In Hume, the Court voided a contract as unconscionable, but provided under a theory of implied contract that damages should be awarded to compensate the party for the actual value of the property that changed hands pursuant to the contract. Id. at 414-15. Without such reformation, one party would have been unjustly enriched by the other's performance under the void contract.

This manner of proceeding is generally consistent with the way in which courts redress the loss of property that has been conveyed to a good faith, third-party purchaser. See Townsend v. Vanderwerker, 160 U.S. 171, 182 (1895) ("The American cases are also to the effect that, where the defendant has only partially disabled himself from carrying out the contract, the plaintiff may be entitled to a specific performance so far as it can be enforced, and may receive compensation in damages for the deficiency."). In Townsend, the Supreme Court approvingly cited Kempshall v. Stone, 5 Johns. Ch. 193 (N.Y. 1821), where a contract for sale of land could not be enforced because "the lands having passed into the hands of a bona fide purchaser without notice," leaving the plaintiff with a remedy "at law for compensation in damages." Id. at 181. Thus, at law, where an entitlement to real property cannot be vindicated through possession, courts may order compensatory damages for the value of the lost property at the time of the transaction.

In this case, the Oneidas have lost their lands through a series of transactions that are void under the Nonintercourse Act. If their lands cannot be returned, general remedial principles would permit the Court to award the Oneidas compensatory damages in an amount equal to the value of the lands at the time of the unlawful sale. The measure of damages can be ascertained

by calculating the difference between what New York paid for the lands and the price the State required from third party purchasers of those same lands when it sold them.

A similar remedy would be available in equity, although in equity the court would require disgorgement of the money by which the wrongdoer was unjustly enriched by the illegal transaction to provide restitution to the injured plaintiff, instead of reforming the contract or providing compensatory damages for injuries resulting from the void transaction. A federal court is presumed to have at its disposal all equitable powers to fashion relief in such a way to do justice and enforce the Congressional policy underlying a statutory enactment. "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes. As this Court long ago recognized, there is inherent in the Courts of Equity a jurisdiction to give effect to the policy of the legislature." Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 291-92 (1960) (internal quotation omitted). A court looks to the language of the statute to determine if the scope of available remedies in equity ha been clearly limited, and "this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). See also Conboy v. AT&T Corp., 241 F.3d 242, 255 (2d Cir. 2001).

The Nonintercourse Act does not contain a "comprehensive scheme of remedies" that might limit remedies to those expressly stated. Conboy, 241 F.3d at 255. Accordingly, the full range of equitable remedies, including disgorgement and restitution, are at this Court's disposal to do justice and to ensure that the purposes of the statute are fulfilled with respect to transactions that were covered by the statute. "[T]he Supreme Court has upheld the power of the Government

without specific statutory authority to seek restitution, and has upheld the lower courts in granting restitution, as an ancillary remedy in the exercise of the courts' general equity powers to afford complete relief." S.E.C. v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1307 (2d Cir. 1971). Besides deterring further wrongdoing by preventing the wrongdoer from profiting from his actions, disgorgement also is a means of providing compensation or restitution to the victim. See S.E.C. v. World Gambling Corp., 555 F. Supp. 930, 934 (S.D.N.Y. 1983).[10]

2. Requiring a fair price for lost land is appropriate relief for a violation of the Nonintercourse Act.

The "general rule" regarding remedies is "that all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies." Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 68 (1992). Providing the Oneidas with compensation equal to the actual value of the lands the State purchased in violation of the Nonintercourse Act comports with the Act's goal of ensuring that Indians are not defrauded through unregulated and contrived sales of their lands outside federal supervision.

The United States Complaint requests that this Court award "appropriate monetary relief" against the State of New York for all lands in the claim area. U.S. Compl. at Wherefore Clause ¶¶ 2 (lands in claim area to which State holds title), 4 (lands in claim area to which State no longer retains title). Further, the United States has sought "such other relief as this Court may

---

[10] Disgorgement and restitution are very similar, if not the same, remedy. See S.E.C. v. Cavanagh, 445 F.3d 105, 118 (2d Cir. 2006) ("Thus, if one equity court compelled 'restitution' of wrongly gained assets while another ordered 'disgorgement' and a third held that cheating trustees must 'make good the trust' from which they stole, the remedies may have been identical.").

deem just and proper."[11] Id. ¶ 6. The remedy of fair compensation for lands lost to the Oneidas in violation of the Nonintercourse Act is fairly included in the United States' Complaint. The Tribal Plaintiffs, moreover, have requested such relief explicitly. See Oneida Complaint ¶ 3 (requesting "disgorgement of the amounts by which defendants have been unjustly enriched by reason of illegal taking of the subject lands"); id. at Wherefore Clause ¶ 6 (requesting "disgorgement of the value of . . . benefits" the State received from its illegal actions, including "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").

The Supreme Court, in Oneida II, considered whether and to what extent remedies were explicitly specified under the Nonintercourse Act. It concluded that the "Act . . . does not speak directly to the question of remedies for unlawful conveyances of Indian land." Oneida II, 470 U.S. at 237. The Court noted that Section 8 of the 1793 statute – the provision that eventually became 25 U.S.C. § 177 – "contains no remedial provision," and "does not address directly the

---

[11] Fed. R. Civ. P. 54(c) provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Rule 54(c) confirms the broad power of the federal courts to provide a plaintiff with whatever relief is appropriate, regardless of whether that relief was sought in the complaint. Thus, omissions in the prayer for relief do not prevent the federal courts from redressing meritorious claims. Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 65-66 (1978); Pension Benefit Guar. Corp. v. Dayton Tool & Die Co., 14 F.3d 1122, 1126 (6th Cir.), cert. denied, 513 U.S. 816 (1994); Ring v. Spina, 148 F.2d 647, 653 (2d Cir. 1945).

problem of restoring unlawfully conveyed land to the Indians." Id. at 238-39.[12] Accordingly, this Court must "presume the availability of all appropriate remedies." Gwinnett, 503 U.S. at 66.

"In framing . . . remedies . . ., courts must act primarily to effectuate the policy of the [statute] and to protect the public interest while giving necessary respect to the private interests involved." Porter, 328 U.S. at 400; Mitchell, 361 U.S. at 292 (equity courts are "to provide complete relief in the light of statutory purposes"). The "obvious purpose" of the Nonintercourse Act has been described by the Supreme Court as "to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, acting as parens patriae for the Indians, to vacate any disposition of their lands made without its consent." Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960).

The primary purpose of the Nonintercourse Act is to protect Indian lands by voiding sales of those lands made without consent of the United States. 25 U.S.C. § 177. The Act also ensures fair compensation to Indians by requiring that agents of a state "propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State" only at a "treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same." Id.[13] While

---

[12] The Court explained: "The relevant clause of § 8 provides simply that 'no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution . . . .' 1 Stat. 330." Oneida II, 470 U.S. at 238.

[13] The Act did not prohibit sales of Indian lands altogether; it just ensured, via federal oversight of such sales, that the Indians would not be coerced or swindled. As President George Washington explained to a Seneca chief, the statute provided "security for the remainder of your lands. No

the statute declares that purchases of Indian land without approval of the federal government shall not "be of any validity in law or equity," id., it "does not speak directly to the question of remedies for unlawful conveyances of Indian land." Oneida II, 470 U.S. at 237. Considerations, such as subsequent settlement and development of land acquired in violation of the Act, may call into question some remedies such as restoration of the land to the injured Tribe. In such cases, an award of fair compensation for the lost lands ensures that, if the illegal transaction cannot be undone or if remedies cannot be awarded premised on a present-day right of possession, at least the Tribe will have received the fair price for those lands that the protections of the Nonintercourse Act were intended to secure. Correspondingly, because such a remedy accepts and gives effect to the transaction, albeit for fair consideration, the remedy – far from calling current title and possession into question, with the ensuing disruption – is inconsistent with that premise and thus essentially confirms the status quo and reinforces repose.

Indeed, as the Supreme Court noted, while the 1793 version of the Act gave the President authority to remove illegal settlers from Indian lands, such authority was "apparently . . . intended only to give the President discretionary authority to preserve the peace." Id. at 239 n.11. Given the delicate nature of the relations between settlers and Indians on the frontier, the Act gave the federal government latitude in determining how to redress violations of Indian property rights in order to ensure the Act's goal of preserving the peace was not compromised by a mechanical enforcement of Indian property rights regardless of the social costs.

State, nor person, can purchase your lands, unless at some public treaty, held under authority of the United States . . . ." Oneida II, 470 U.S. at 237 n.8.

3. Cayuga can be read to preserve a fair price claim.

The Second Circuit did not state that any requested relief for a violation of the Nonintercourse Act with respect to transactions such as those at issue here is per se disruptive and subject to equitable defenses like laches. If that had been the case, there may have been no reason for the Court of Appeals to separately analyze each proposed remedy. The Second Circuit first analyzed the "ejectment claim," which it concluded to be inherently disruptive because it "would call into question title to over 60,000 acres of land in upstate New York." Cayuga, 413 F.3d at 275. The Court then considered other types of relief sought: "Although we conclude that plaintiffs' ejectment *claim* is barred by laches, we must also consider whether their other *claims*, *especially their request for trespass damages in the amount of the fair rental value of the land for the entire period of plaintiffs' dispossession*, are likewise subject to dismissal." Id. at 278 (emphasis added).

In its analysis of available relief, the Second Circuit was guided by the question whether the relief was premised upon a continuing right of possession of the land:

> Inasmuch as plaintiffs' trespass claim is based on a violation of their constructive possession, it follows that plaintiffs' inability to secure relief on their ejectment claim alleging constructive possession forecloses plaintiffs' trespass claim. In other words, because plaintiffs are barred by laches from obtaining an order conferring possession in ejectment, no basis remains for finding such constructive possession or immediate right of possession as could support the damages claimed.

Id. Because plaintiffs' request for trespass damages necessarily implied that plaintiffs have a right to possess the land, the Second Circuit held that it too was subject to laches.

Whether this Court were to characterize the fair price remedy as one at law for compensatory damages or in equity for disgorgement and restitution, it does not necessarily

implicate the same concerns that the Court articulated in Cayuga. Cayuga concluded that what it characterized as a "possessory land claim," i.e., the relief sought of "possession of a large swath of central New York State and the ejectment of tens of thousands of landowners – is indisputably disruptive." Id. at 275. Unlike those proposed remedies, requiring the State to compensate the Oneidas with a fair price for their lands does not involve actual possession of land or seek the ejectment of current landowners, nor is the remedy predicated upon a present-day right to possession. Indeed, such relief is premised upon the *preclusion* of possessory relief, and, in effect, provides for a post factum sale of the lands whereby the title of the present landholders is quieted by judicial resolution of this case.[14/]

4. Fair Price Claim and the United States Certiorari Petition in Cayuga

When the United States filed its certiorari petition seeking review of the Second Circuit's decision in Cayuga, the government was of the view that the apparent intent of the Second Circuit was to terminate all of the suits based on similar transactions in violation of the Nonintercourse Act that were then pending in federal court in New York, including this one, and

---

[14/]The defendants in Cayuga had proposed the value of the land at the time of the transactions as the proper measure of damages if monetary relief was to be awarded, but the district court did not adopt that approach. The Second Circuit referred to that remedy and the defendants proposal of it in Cayuga, 413 F.3d at 271, but did not specifically address whether it would also fall within the scope of its laches discussion if the remedy was not premised on a current right of actual or constructive possession. And the district court in Cayuga did not have an opportunity to address it in the wake of the Court of Appeals' decision because the Court summarily entered judgment. See Cayuga, 413 F.3d at 280. Further, because the claim for a fair price looks to the adequacy of the consideration paid for the land and not to its present value, it is not clear that such a claim would be viable if, in fact, the State had adequately compensated the Tribe either at the time of the unlawful purchase or later. The Cayuga Nation petitioned the State for additional compensation for its lands in 1906, resulting in a settlement for $247,600 with the establishment of trust having $433,000 in 1972. See Cayuga Indian Nation of N.Y. v. Cuomo, 667 F. Supp. 938, 945-46 (N.D.N.Y. 1987); People ex rel. Cayuga Nation v. Comm'rs of the Land Office, 207 N.Y. 42 (1912).

that the Cayuga decision would leave the United States and the affected Tribes without any effective remedy. The United States so informed the Supreme Court in its certiorari petition and reply brief at the petition stage in urging the Supreme Court to grant certiorari to review the Second Circuit's decision. See U.S. Cert. Pet. 12-13, 28-29; U.S. Reply Br. 1, 10.

The Second Circuit's decision in Cayuga referred to the fact that the State and the other defendants in that case had argued that "damages should be limited to the loss suffered by the Cayugas at the time of the treaties, as measured by the difference between the value received by the Cayugas and the fair market value of the lands at that time." 413 F.3d at 271. That was not, however, the ultimate basis for the district court's damages award, which was instead based on the current value of the land and trespass damages. While the government was aware of that possible alternative measure of damages at the time the certiorari petition was filed, the Solicitor General did not focus on the distinctions discussed above in the underlying basis for such remedy – particularly that a fair compensation remedy would not be considered "possessory" in the sense that it is not premised on a current right of the Oneidas to actual or constructive possession of the land. This alternative approach, therefore, is not "disruptive" in the sense of calling into question the validity of the title and right of possession of current owners or occupants of the land, but rather it accepts the transactions, gives effect to them by providing for the fair compensation that the Nonintercourse Act was intended to secure, and thereby furthers both the purposes of the Act and the interest in repose.

The Second Circuit might nevertheless conclude that such a remedy is "possessory" in a broader sense, in that it depends on the existence of a violation of the Nonintercourse Act, which provided that purchases without the necessary approval by the United States "shall be of no

validity in law or equity." On the other hand, once the distinctive aspects of the fair price remedy – particularly its ability to further the interest in repose – are now brought into focus, it is possible that the Second Circuit would not read its Cayuga decision to foreclose such a remedy. Accordingly, and because as discussed above that remedy has an established basis in the law of remedies, we are now reluctant to construe Cayuga to foreclose such a remedy without furnishing this Court with an opportunity to consider the bases for distinguishing it from the situation before the Second Circuit in Cayuga, and perhaps to furnish the Second Circuit with a similar opportunity to consider those bases for distinguishing the fair compensation remedy or (if necessary) to modify the rule of Cayuga to accommodate it. The United States does not lightly advance this theory following the filing of the certiorari petition and reply brief in the Supreme Court in Cayuga, but after extensive consideration, we have concluded that this is an appropriate way to proceed.

CONCLUSION

In light of the foregoing, we respectfully ask that this Court deny Defendants' Motion for Summary Judgment.

DATED this 14th day of December, 2006.

Respectfully submitted,

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

/S/
STEVEN MISKINIS
Indian Resources Section
Environment and Natural Resources Div.
United States Department of Justice P.O. Box 44378
Washington, D.C. 20026-4378
(202)305-0262
FAX (202)305-0271

DAVID MORAN
THOMAS BLASER
Of Counsel
Attorney Advisors
Division of Indian Affairs
Department of the Interior