10-4273-cv

United States Court of Appeals for the Second Circuit

ONONDAGA NATION,

Plaintiff-Appellant,

– v. –

THE STATE OF NEW YORK, GEORGE PATAKI, In His Individual Capacity and as Governor of New York State, ONONDAGA COUNTY, CITY OF SYRACUSE, HONEYWELL INTERNATIONAL, INC., TRIGEN SYRACUSE ENERGY CORPORATION, CLARK CONCRETE COMPANY, INC., VALLEY REALTY DEVELOPMENT COMPANY, INC., and HANSON AGGREGATES NORTH AMERICA,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
Case No. 05-cv-314 - U.S. District Judge Lawrence E. Kahn

BRIEF OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT
REQUIRED BY F.R.A.P. RULE 26.1

Plaintiff-Appellant the Onondaga Nation is a sovereign Indian nation recognized by the United States government. 68 Fed.Reg. 68179, 68183 (2003). The Onondaga Nation has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

Respectfully submitted this 28th day of February, 2012.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Rules

Other Authorities

INTRODUCTION

The Onondaga Nation appeals the decision of the United States District Court for the Northern District of New York of September 22, 2010 dismissing the Nation's action for a declaratory judgment. The District Court held that the claim is "inherently disruptive" and "equitably barred on its face." Relying on *Cayuga Indian Nation v. Pataki,* 413 F.3d 266 (2d Cir. 2005), *cert. denied,* 126 S.Ct. 2022 (2006) (*Cayuga*) and *Oneida Indian Nation v. County of Oneida,* 617 F.3d 114 (2d Cir. 2010), *cert. denied,* 132 S.Ct. 452 (2011) (*Oneida*), the District Court concluded, based solely on the amended complaint and judicially-noticed facts, that the claims of the Onondaga Nation have the "same essential qualities" that this Court found barred the claims in *Cayuga* and *Oneida.* Because the District Court misreads the nature and scope of the Onondaga Nation's claims, and because the District Court failed to determine whether its conclusions were factually supported, the decision should be reversed and remanded for a determination of factual issues.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over the claims of the Onondaga Nation under 28 U.S.C. § 1331 because the claims arise under the federal common law, the Trade and Intercourse Acts of 1790, 1793, 1796, 1802 and 1834, now codified at 25 U.S.C. § 177; the Treaty of Fort Stanwix of 1784

and the Treaty of Canandaigua of 1794. The Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, as the District Court's Memorandum Decision and Order dismissing the case with prejudice is a final decision. The District Court's Memorandum Decision and Order was filed on September 22, 2010. The judgment dismissing the action with prejudice was entered on September 22, 2010. The Onondaga Nation filed its Notice of Appeal on October 20, 2010. By stipulation dated February 23, 2011, the Onondaga Nation dismissed the appeal without prejudice to reinstatement on terms agreed to by the parties, but no later than August 23, 2011. By stipulation dated August 18, 2011, the parties extended the time for reinstatement upon terms agreed to but no later than March 5, 2012. This appeal was reinstated by order of the Clerk of this Court dated November 29, 2011. This Brief is filed pursuant to the Order dated December 15, 2011 extending the time to file the opening brief and joint appendix to February 28, 2012.

ISSUES PRESENTED

1. Whether the Onondaga Nation's claim for a declaratory judgment that New York State violated the Trade and Intercourse Act and that the lands of the Defendants remain the property of the Nation may be determined without a finding supported by admissible evidence that the expectations of the named Defendants

regarding undisturbed land ownership are justified and reasonable under the circumstances.

2. Whether the Onondaga Nation's declaratory judgment claim is disruptive of settled expectations about land ownership when the only relief sought is a non-coercive declaration of underlying title as to the State of New York, two local governments and five corporate Defendants.

3. Whether *Cayuga* and *Oneida* were wrongly decided because they conflict with the Supreme Court's decision in *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985).

STATEMENT OF THE CASE

This case is the most recent step in the centuries-long effort of the Onondaga Nation to obtain redress for the historical injustice caused by New York State's acquisition of the Nation's land in six transactions between 1788 and 1822 in violation of the Trade and Intercourse Act, the Treaty of Fort Stanwix of 1784 and the Treaty of Canandaigua of 1794.

The first paragraph of the complaint states the primary goal of the lawsuit: to "bring about a healing between [the Onondagas] and all others who live in this region that has been the homeland of the Onondaga Nation since the dawn of time." First Amended Complaint For Declaratory Judgment ¶ 1 (Joint Appendix 30-31)(hereafter "JA"). The remedy sought is consistent with that purpose. The

Nation has never sought any remedy and will not seek a remedy that dispossesses, or evicts or ejects their neighbors from their lands. They do not ask for money damages in any form. They do not ask for additional compensation or restitution. They do not ask for rent. They do not ask to be compensated for the environmental damage that flowed from the development of these lands by persons tracing their titles to the State. In fact, no claims of any kind are asserted against any non-corporate private party.

In this case, this Court again confronts the question of whether federal courts will be open to Indian people to litigate these acknowledged claims of injustice on the same terms and according to the same rules applicable to non-Indians. The Onondagas sued only the State, two local governments and five corporate defendants. The narrow focus of this case reflects two purposes: 1) to hold the State of New York, which knowingly violated the Act and the treaties, accountable for its conduct in dispossessing the Onondaga Nation and in causing generations of hardship and disruption of the Onondaga culture and community; and 2) to establish a legal foundation by which those who have polluted and degraded lands adjacent and near to the Onondaga Territory or Reservation can be held responsible for restoring them to environmental health.

From the beginning of this case on March 11, 2005, and before "disruption" became an "equitable consideration" in these cases, *City of Sherrill v. Oneida*

Indian Nation, 544 U.S. 197 (2005) (*"Sherrill"*), the Onondaga Nation has sought a fair and just remedy that does not disrupt the justified expectations of their neighbors regarding the security of their lands. Between 1788 and 1822, New York State expelled the Onondagas from their aboriginal lands. Having suffered for generations the disruption of that illegal act, the Onondagas chose not to seek the same fate for their neighbors.

Consistent with those values, the Onondagas sought for many years to resolve their concerns about land and the environment through direct discussions with the State of New York. Declaration of Tadodaho Sidney Hill at ¶ 33 (JA 160-161); Declaration of Robert T. Coulter at ¶¶ 72-82 (JA 69-71). New York's Governor refused to enter into genuine negotiations until this federal lawsuit was filed. *Id.* In part because the suit was intended to serve as the basis for negotiations, the Onondagas crafted the claims and selected the defendants with great care and precision. Only a declaratory judgment was sought and then only against a small group of defendants, including those whose conduct polluted sacred lands. No individual landowners were named as defendants.

The framing of this suit and the selection of the defendants were not responses to and in fact pre-dated the decisions in *Cayuga* and *Oneida.* This action was filed before *Sherrill* and *Cayuga* were decided. The nature and scope of the suit were devised at the invitation of New York State to implement the goal

of the Onondagas to establish that the taking of their lands violated the treaties and federal law and to lay the foundation for a negotiated resolution among neighbors regarding land rights and environmental restoration.

Federal Protection of Onondaga Nation Land.

The Onondaga Nation is a member of the Haudenosaunee or Six Nations Confederacy. It is the seat of the government of the Confederacy, or the central council fire. Amended Complaint at ¶ 6 (JA 32). As such, the Onondaga Nation historically played a prominent role in the diplomatic relations between the United States and the Six Nations, especially during the early years of the Republic when the State of New York threatened the peace by acquiring Indian lands without the approval of the federal government. The first Trade and Intercourse Act, enacted in 1790, was part of a concerted federal policy to centralize control over Indian land transactions in order to maintain peace on the frontier. *See* F. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts,* pps. 41-550.

Fraudulent land purchases by the State of New York were a principal cause of war and violence in these early years. The Act was thus designed 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 the Congress, and to enable the Government . . . to vacate any disposition of

their lands made without its consent." *Federal Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99, 119 (1960). The Act prohibited purchases of Indian land without the approval of the United States through a treaty negotiated by a federal agent and ratified by the Senate.[1]

The Onondaga Nation and the Six Nations Confederacy understood the Trade and Intercourse Act as an explicit promise from the United States that their lands would be protected against predation by New York State. In 1790, President George Washington explained the purpose of the Act to a delegation of the Six Nations:

> Here, then is the security for the remainder of your lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but will protect you in all your just rights.
>
> If however, you should have any just cause of complaint . . . the federal courts will be open to you for redress . . . .

County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 238 n.8 (1985) (*Oneida II*). President Washington's emphasis on treaties is consistent with the central role such agreements play, then as now, in the relationship between the Onondaga

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[1] Congress re-enacted the Trade and Intercourse Act without substantial changes in 1796, 1799, 1802 and 1834. It is codified at 25 U.S.C. § 177. *County of Oneida v. Oneida Indian Nation,* 414 U.S. 661, 668 n.4 (1974).

Nation and the United States. Treaties define that relationship as one based on mutual respect for the sovereignty and rights of each.

The Six Nations relied on treaties to confirm their land rights even before the Trade and Intercourse Act was enacted. In 1784, the Six Nations and the United States, through the Continental Congress, entered into the Treaty of Fort Stanwix. The Six Nations ceded certain lands in the Ohio Valley in return for guarantees that they "shall be secured in the peaceful possession of the lands they inhabit east and north" of a designated boundary line. 7 Stat. 15, Article III. The United States also agreed to "receive [the Onondagas] into their protection." 7 Stat. 15, Preamble.

The United States made additional promises to protect the lands of the Onondaga Nation and the Six Nations in the Treaty of Canandaigua of 1794. 7 Stat. 44. In Article II, the United States acknowledged as the property of the Onondaga Nation the lands reserved in the "treaties" with New York State. Article II further provided that the United States would never claim or disturb the land protected by the Treaty, which land "shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase." Like the Trade and Intercourse Act, this provision expressly denies the State of New York any authority to acquire Onondaga land in the absence of a federal treaty, a prohibition the State would violate repeatedly in the coming decades.

The Treaty is in effect today and the United States continues to make annuity payments to the Six Nations as required by Article VI.

The Trade and Intercourse Act of 1790 and the Treaty of Canandaigua of 1794 are expressions of the fundamental principle that "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Oneida II,* 470 U.S. at 234; *see also Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 557 (1832) ("The treaties and laws of the United States contemplate . . . that all intercourse with [the Indians] shall be carried on exclusively by the government of the union.").

New York State's Violation of Federal Law and Treaties.

In defiance of federal authority, the State of New York embarked on an aggressive land acquisition policy which, as to the Onondaga Nation, resulted in the dispossession of all but approximately 6,900 acres of its aboriginal lands. Declaration of Anthony F.C. Wallace at ¶ 27 (JA 84). New York State knew it was violating federal statutes and treaties. In 1795, during New York's negotiations with various Indian nations to purchase their lands, Secretary of War Timothy Pickering sent Governors Clinton and Jay the opinion of United States Attorney General William Bradford that the Trade and Intercourse Act "was too express to admit any doubt" that the Act prohibited the sale of Indian lands except pursuant to a federal treaty. *Cayuga Indian Nation of New York v. Pataki,* 165 F.

Supp. 2d 266, 334 (N.D. N.Y. 2001). New York State nevertheless continued the negotiations. *See Oneida II,* 470 U.S. at 232 (noting Secretary Pickering's warnings to Governors Clinton and Jay about the requirements of the Act).

New York's acquisition of the bulk of the Onondaga Nation's aboriginal lands is a story of treachery. In virtually every transaction, New York knew that it was dealing with individuals without authority to negotiate about land. Further, New York deceived the Onondagas about the true nature of the transactions, leading the Onondagas to believe that for at least some of the transactions they were leasing, rather than selling, their lands. Declaration of J. David Lehman at ¶¶ 46-60 (JA 217-227). It knew that a land transaction with the Onondaga Nation could have no legal effect under Haudenosaunee or Onondaga law without proper authorization or approval by the Council of Chiefs. It knew well the requirements of the Trade and Intercourse Act and the Haudenosaunee treaties. The land deals were grossly unfair to the Onondagas. For all of the land lost between 1788 and 1822, the Onondagas received only $33,380 in cash, $1,000 in clothing, an annuity of $2,430 and 150 bushels of salt. Declaration of J. David Lehman at ¶ 4 (JA 190). No federal commissioner was present at any of the negotiations. And none was approved by Congress as federal law required. *Id.*

Onondaga Protests of the Loss of Their Land.

Despite the loss of land, there was no Onondaga diaspora, as with many other Indian nations suffering similar dispossession in New York State. The Onondagas have never left their homeland. Declaration of Anthony F.C. Wallace at ¶¶ 24-26 (JA 82-84). They retain strong and enduring legal, political, cultural and religious ties to large portions of their aboriginal homeland. In many ways, they have expressed these connections through consistent protest through generations about their treatment at the hands of New York State. As more fully discussed below, they protested the loss of their lands at every available opportunity and by all available means. They testified before New York State investigative commissions. In 1841, they sought the help of the United States under the Treaty of Canandaigua to stop the flood of non-Indians onto Onondaga lands. They frequently testified in Congress. They took legal action to prevent the extinguishment of their land rights.

The Onondagas' ability to obtain redress for this historic injustice was hampered by challenges unique to Indian nations. Both the federal and state courts were closed to the Onondaga Nation until very recently. Declaration of Lindsay G. Robertson at ¶ 3 (JA 130). This Court ruled as recently as 1929 that federal courts do not have jurisdiction over Indian claims under the Trade and Intercourse Act because such claims do not raise federal questions. *Deere v. St.*

Lawrence River Power Co., 32 F.2d 550 (2d Cir. 1929). That decision was not overturned until 45 years later in *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974). New York State courts also barred suits by Indian nations, ruling that they lacked capacity to sue in the absence of an enabling statute. *See Seneca Nation v. Appleby,* 196 N.Y. 318 (1909). Even if a judicial avenue had been available, problems of poverty, unfamiliarity with the English language and the inability to secure legal counsel would have foreclosed meaningful efforts.

When the possibility of judicial redress arose, shortly after the Supreme Court decided the second *Oneida* case, the Onondagas approached the State of New York to begin discussions about appropriate ways to resolve certain land and environmental issues out of court. Declaration of Robert Coulter at ¶ 72 (JA 69). The State refused to participate in such discussions, at least until the Onondagas filed its claim in federal court. Declaration of Tadodaho Sidney Hill at ¶ 37 (JA 162). The suit was filed on March 11, 2005, and an amended complaint was filed on August 5, 2005.

The narrow scope of the Onondagas' case bears emphasis. The Nation did not seek to certify a defendant class of all landowners within the areas taken by New York in the state agreements. No relief of any kind is sought against any non-corporate private landowner. Rather, the complaint names the State of New York as the original wrongdoer, the County of Onondaga and the City of Syracuse

as governmental entities with land and environmental responsibilities, and five corporate defendants. The corporate defendants are named because they bear principal responsibility for the despoilation and degradation of lands that are particularly important to the Onondagas, including Onondaga Lake, where the Peacemaker united the five Haudenosaunee nations, and Onondaga Creek, which flows into the Onondaga Territory. Naming these defendants reflects a primary purpose of this lawsuit: to establish a legal basis for the environmental restoration of the land adjacent and near to the Onondaga Territory.

The Supreme Court's *Oneida* Cases.

At the time the Onondagas filed this suit, the governing principles were set out in the Supreme Court's decisions in *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974) (*Oneida I)* and *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985) (*Oneida II).* Accepting the Oneidas' characterization of the right of action as possessory in nature, in *Oneida I* the Supreme Court held that a suit alleging violations in 1795 of applicable treaties and the Trade and Intercourse Act presented a federal question for purposes of federal court jurisdiction. The Oneidas based their claims on an "aboriginal right of occupancy," certain federal treaties and the Trade and Intercourse Act, which "put in statutory form [the rule] . . . that extinguishment of Indian title required the consent of the United States. *Id.* at 678. There is no suggestion in the Court's

decision that suits asserting possessory rights of action are the only viable theories under the Act.

In *Oneida II,* the Supreme Court held that Indian nations could maintain a federal common law right of action to vindicate rights to land that had been acquired by the State of New York in violation of the Trade and Intercourse Act. The Court also held that the Oneida Nation's suit was not barred by any applicable state or federal statute of limitations. 470 U.S. at 240-244. The suit was timely under the terms of the Indian Claims Limitations Act of 1982, and it would be inappropriate to borrow a state limitations period when Congress had addressed the timeliness question directly. 470 U.S. at 242-244. Although the Court did not decide the question of whether laches could be applied to these claims, it identified various statutory and doctrinal principles weighing against subjecting the claims to that defense. The Court concluded that "the application of laches would appear to be inconsistent with established federal policy." 470 U.S. at 244-245 n.16. The Court noted, however, that "equitable considerations" might be applied to limit relief available to Indian nations. 470 U.S. at 253 n.27. There was no suggestion in the decision that such considerations could be invoked to bar relief completely.

City of Sherrill.

Several weeks after of the filing of the Onondagas' lawsuit, the Supreme Court decided *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197 (2005). In *Sherrill,* the Supreme Court ruled that the Oneida Nation could not obtain an injunction to bar local government property taxes on lands the Nation had purchased that were located within the Treaty of Canandaigua reservation. The Court found this remedy to be precluded by the "long lapse of time" during which the Oneidas failed to assert "sovereign control" over the purchased lands. 544 U.S. at 216-217. The Court reached this issue even though it was a ground for decision "not discreetly identified" in the parties briefs. 544 U.S. at 214 n.8.

The Court concluded that certain facts gave rise to "equitable considerations" that barred the injunctive remedy the Oneidas sought: 1) most of the Oneidas have resided elsewhere since the middle of the 19th century; 2) the "distinctly non-Indian character" of the area and its inhabitants; 3) the Oneidas long delay in seeking relief; and 4) the long history of sovereign control over the lands by the State of New York and its political subdivisions. 544 U.S. at 202. The Court gave great weight to the general principle that in cases where a party seeks to challenge sovereign authority over land, the "settled expectations" of those affected are "prime considerations." 544 U.S. at 218. Although the Court referred to the doctrines of laches, acquiescence and impossibility, it did not apply

them to the Oneidas' claimed remedy, crafting instead the general principle that "the passage of time can preclude relief." 544 U.S. at 217, 221 (the facts here "*evoke* the doctrines of laches, acquiescence, and impossibility.") (emphasis added). As to laches, for example, the Court did not apply the traditional elements of the doctrine, and failed to note that the City of Sherrill had not sought review of this Court's denial of leave to amend its answer to assert a laches defense. *Oneida Indian Nation v. City of Sherrill,* 337 F.2d 139, 168-169 (2d Cir. 2003).

Perhaps recognizing the distinction between a case involving sovereign authority and one involving land titles, the Court in *Sherrill* was careful to note that it was not disturbing its holding in *Oneida II* that a federal common law cause of action existed to vindicate aboriginal land rights violated in 1795 by the State of New York. 544 U.S. at 221. The Court repeated the statement from *Oneida II* that the application of the doctrine of laches to an action for damages would be "novel," but concluded that, in the context of reassertion of Indian sovereignty over land after a 200 year hiatus, a similar "novelty" is not presented. 544 U.S. at 221 n.14.

Cayuga

Although *Sherrill* was a tax immunity case, in *Cayuga* a divided panel of this Court relied on it to overturn a trespass damages award against the State of New York for violations of the Trade and Intercourse Act. The majority read

Sherrill as holding that "in appropriate circumstances," Indian land claims based on the Trade and Intercourse Act can be subjected to equitable defenses, such as laches: "Based on *Sherrill,* we conclude that the possessory land claim alleged here is the type of claim to which the laches defense can be applied." 413 F.3d at 268, 273. Although this Court acknowledged that the *Sherrill* standard is imprecise, it nonetheless extended it to "disruptive Indian land claims more generally" because of the "broadness" of the Supreme Court's statements regarding the disruptive nature of a change in sovereign control over the lands involved in that case. 413 F.3d at 274 (recognizing that the Supreme Court did not identify a "formal standard" for when equitable defenses would apply).

This Court found the disruptive nature of the claim in *Cayuga* to be based on the fact that it sought to vindicate possessory interests and that it "has always been one sounding in ejectment." *Id.* ("Plaintiffs have asserted a continuing right to immediate possession as the basis of all their claims, and have always sought ejectment of the current landowners as their preferred form of relief."). This Court found that the scope of the remedy the Cayugas sought was extraordinarily far-reaching. According to this Court, the Cayugas sought possession of a "large swath of New York" and the ejectment of "tens of thousands of landowners." 413 F.3d at 275. This Court applied an equitable defense–laches–to an action at law–ejectment–because "ordinary common law principles" applicable elsewhere

do not apply to federal Indian law, which is "unusually complex and confusing." 413 F.3d at 276.

Although this Court purported at times to apply the common law equitable defense of laches to the Cayugas' ejectment action, it did not apply the traditional elements of that defense. Rather, it relied exclusively on the factors the Supreme Court found in *Sherrill* to bar the Oneidas sovereignty claim: 1) many generations of non-Indians have developed the area; 2) most of the Cayugas have resided elsewhere since the middle of the Nineteenth Century; 3) the distinctly non-Indian character of the area; 4) the distance from 1805 to the present; and 5) the Cayugas' long delay in seeking "equitable relief." 413 F.3d at 276. There is no discussion in the decision about whether the obstacles preventing the Cayugas from filing suit earlier excused their delay, whether the defendants were prejudiced in their ability to defend the case, whether the State had "unclean hands" or whether the balancing of equities favored one party over the other, which are elements of the laches defense.[2] *See generally Galliher v. Cadwell,* 145 U.S. 368 (1892). Further, this Court relied on earlier District Court evidentiary proceedings to make its factual findings about the development of the claim area by non-Indians and its resultant "non-Indian" character, movement of the Cayuga people away from the

[2] This Court dismissed the findings of the District Court that the Cayugas were not responsible for the delay on the ground that such findings were made in the context of a claim for prejudgment interest. 413 F.3d at 279.

claim area, and the justifiable expectations of the non-State defendants to the claim. This Court ruled that possessory Indian land claims may be subject to a defense based on these equitable considerations, but noted that the question of whether the standard for dismissal has been met is left to the District Court. 413 F.3d at 278 (possessory claims are not per se barred by laches, but a District Court *"could"* dismiss for that reason) (emphasis added).

Oneida.

After the Defendants' motion to dismiss the Onondagas' claim was argued in the District Court, this Court decided *Oneida Indian Nation v. County of Oneida,* 617 F.3d 114 (2d Cir. 2010). This Court rejected both the Oneidas' claims "sounding in ejectment, trespass or related possessory theories of injury" and a purportedly nonpossessory claim that the State of New York was liable for paying "unconscionable consideration" to the Oneidas in the purchases of their lands. In response to the Oneidas' argument that the defendants have failed to establish the traditional elements of the laches defense, this Court took the theory one step further and decided that no such showing is required for the equitable bar to apply. Rather, laches was nothing more than "a convenient shorthand for the equitable principles at stake in this case," however "imprecise" the term may be from the perspective of an Indian litigant required to respond to this defense. 617 F.3d at 127. In this Court's reworking of the applicable law, the *Sherrill* equitable

defense "drew upon laches and other equitable doctrines" derived from "general principles of federal Indian law and federal equity practice" that this Court did not identify. 617 F.3d at 128 (internal citations omitted). According to this Court, *Cayuga* applied "not a traditional laches defense, but rather distinct, albeit related, equitable considerations that it drew from *Sherrill.*" *Id.*

The Oneidas' purportedly nonpossessory claim was rejected because New York State's sovereign immunity barred its assertion and because the *Sherrill/Cayuga* equitable defense may be applied to bar "any ancient land claims that are disruptive of significant and justified societal expectations that have arisen as a result of a lapse of time during which the plaintiffs did not seek relief." 617 F.3d at 135. This Court found that the "dispositive question" is not whether the claim and remedy seek to vindicate a right of possession, but rather whether the claim is "inherently disruptive." 617 F.3d at 136. Under this expansive reading, the *Sherrill/Cayuga* laches-related equitable considerations defense is "potentially applicable" to all ancient Indian land claims "that are disruptive of justified societal expectations." *Id.*

The District Court's Decision.

The Defendants moved to dismiss the Onondagas' declaratory judgment claims for failure to state a claim upon which relief could be granted under Fed. R. Civ. Proc. Rule 12(b)(6). Relying on *Sherrill* and *Cayuga,* they raised the

affirmative defenses of "laches, acquiescence and impossibility." Because the Defendants relied on disputed facts outside the pleadings, the Onondaga Nation filed a contingent motion for a continuance pursuant to Fed. R. Civ. Proc. Rule 56 (f) in order to be afforded a reasonable and full opportunity to conduct discovery and develop evidence in the event the District Court converted the motion to one for summary judgment.

In response to the motion to dismiss, the Onondaga Nation then submitted more than 900 pages of expert witness and percipient testimony and exhibits. As relevant here, the Nation established the following undisputed facts:

- There was no unreasonable delay in filing suit because neither the State nor federal courts were open to hear such claims until relatively recently; because under state law, Indian nations even today may lack capacity to sue in the absence of authorizing statutes; and because the Onondagas were hampered by poverty, the inability to obtain legal representation that was not appointed for them or controlled by the State, and the lack of proficiency in the English language;
- The Onondagas have never left their homeland in New York State;
- The efforts of the Onondagas and others of the Six Nations to assert their land claims received widespread publicity and were generally known among the residents of the claim area, the corporations located there, and state, local and municipal governments;

- Both the State of New York and the federal government discouraged the Onondagas from pursuing a resolution of their claims in court, but rather encouraged and promoted diplomatic efforts;
- The Onondagas maintain cultural connections to all of the lands that were taken by the State of New York in the unapproved transactions and much of this land retains its "Indian character;"
- The State has unclean hands because it knew that it was negotiating land purchases with individuals not authorized by the Onondaga Nation or Haudenosaunee to do so; because it knew the land acquisitions violated the Trade and Intercourse Act; and because the State committed fraud and deception by leading the Onondagas to believe they were leasing their land;
- The filing and prosecution of this lawsuit have not caused disruption in the real estate market in upstate New York; and
- The Onondaga Nation has cooperative relationships with State agencies and local governments in the claim area with regard to matters of environmental protection, transportation, education and cultural resource protection, which illustrates the Nation's continuing government-to-government relations and presence in the area.

None of these facts was contested by the Defendants with expert or percipient witnesses or other evidence. Shortly before oral argument of the

motion to dismiss, the Court denied the Nation's Rule 56(f) motion, stating that "it does not intend to convert Defendants' motions to dismiss into motions for summary judgment at this time." Docket No. 95, September 21, 2009.

The District Court (Kahn, J.) dismissed the claims with prejudice based on the allegations of the complaint and certain judicially-noticed facts. The Court concluded that *Sherrill, Cayuga and Oneida*[3] "foreclose any possibility that the Onondaga Nation's action may prevail." (JA 251). The Court focused on two declarations that it believed the Onondagas sought to include in the judgment: 1) that the State land transactions were void; and 2) that the "land conveyed by those agreements remains the property of the Nation." *Id.* The Court discounted the fact that the Onondagas sought declaratory relief against only the named defendants, and sought no relief of any kind against the many thousands of landowners holding titles traceable to the State's acquisitions. Nevertheless, the Court concluded that the Nation's claims "represent the type of inherently disruptive action which *Cayuga* instructs is barred under *Sherrill*'s formulation of a laches defense." *Id.* The Court found that, despite the small number of defendants named, "the declaratory relief sought would apply to all land conveyed by the challenged treaties." (JA 252). This meant, the Court concluded, that the

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[3] The parties were not given an opportunity to brief the relevance of *Oneida* before the District Court issued its decision.

"settled expectations of current-landowners" would be "dramatically upset." *Id.* The Court ignored the suggestion of the Onondagas that the provisions of the declaratory judgment could be shaped to avoid disruption to whatever expectations the landowners were later proven to have justifiably developed.

As for the facts to support these conclusions, the Court found the Onondagas' action shared the "same essential qualities" of *Cayuga* and *Oneida.* (JA 252). The Court identified the long passage of time from the original wrong and the filing of the action; the non-Indian development of the area; and New York State's "sovereign control" over the land as either facts that could be judicially noticed or facts that are "self-evident." (JA 253). The Court's sole support for the ultimate factual conclusion that these considerations gave rise to "the creation and maintenance of long-settled expectations" was a single citation to *Cayuga. Id.*

Because the Court believed the Defendants' motion could be resolved solely with reference to the complaint, judicially noticed facts or what it termed "self-evident" considerations, the Court denied the Nation's request for discovery and further factual development. The Court found dismissal was "mandatory," which rendered further factual development "inappropriate and superfluous." *Id.* The Court reached this conclusion without the benefit of briefing from the parties regarding the relevance of *Oneida* to the Onondagas' claims. By ignoring the

Onondagas' argument – supported by over 900 pages of evidence – that the facts of the Onondaga case did not support application of the *Sherrill/Cayuga/Oneida* equitable defense, the District Court committed clear error. Its ruling should be reversed.

SUMMARY OF ARGUMENT

The District Court erred by: 1) finding without factual support that unidentified landowners had justified expectations that the Onondaga Nation would not challenge the unlawful New York State land deals; 2) failing to give the Onondagas adequate opportunity to develop and present evidence relevant to the "disruption of justified expectations" equitable defense; 3) improperly taking judicial notice of disputed facts; 4) failing to accept the allegations of the Onondagas' complaint as true; 5) ignoring the Onondagas' evidence that their long history of public protest in many fora concerning the loss of their lands means that the named Defendants could not have had justifiable expectations that the State's unlawful acquisition of Onondaga land would never be challenged; 6) misconstruing the requested declaratory judgment as disruptive of the expectations of the named Defendants; and 7) improperly judging disruption from the perspective of thousands of landowners who were not sued in this action.

STANDARD OF REVIEW

This Court reviews the District Court's dismissal of the Onondaga Nation's claims under Fed. R. Civ. Proc. 12 (b)(6) under a *de novo* standard. The reviewing court should "take as true all of the allegations in the plaintiff's complaint and draw all inferences in favor of the plaintiff[]." *Weixel v. Bd. of Educ. Of City of New York,* 287 F.3d 138, 145 (2d Cir. 2002) (citation omitted). Dismissal is appropriate only if it appears beyond all doubt that the plaintiff can prove no set of facts in support of the claim which would entitle it to relief. *Curto v. Edmundson,* 392 F.3d 502, 503 (2d Cir. 2004) (internal quotation marks omitted).

ARGUMENT

I. The District Court Erred in Assuming that the Onondaga Nation's Claims Would Disrupt Justified Expectations of the Defendants.

In *Oneida,* this Court distilled the *Sherrill/Cayuga* equitable defense into two elements: 1) the length of time that has passed between the loss of the land and the filing of the suit; and 2) whether the claim disrupts "justified" and reasonable expectations of the defendants that their land titles will not be disturbed. Purporting to apply these elements, the District Court dismissed the Onondagas' declaratory judgment action on the basis of the judicially-noticed fact that non-Indians have populated and developed the land subject to the claim. From this conclusion, the Court decided that "justified expectations" about the

Onondaga claim have arisen, a factual determination the Court simply assumed to be true; no evidence of facts or any kind are cited or found in this record.

The District Court erred by denying the Onondaga Nation an adequate opportunity to develop and present evidence relevant to whether the expectations of the Defendants were justified under the circumstances. In addition, the District Court erred in taking judicial notice of facts that were subject to reasonable dispute.

A. The District Court Wrongly Deprived the Onondaga Nation of the Opportunity to Develop and Present Facts Relevant to Justifiable Expectations

The Onondagas submitted voluminous evidence regarding their treatment at the hands of New York State in land transactions; their efforts to assert violations of the Trade and Intercourse Act and the treaties; and their persistent protests of the loss of their land from 1788 to the present. This evidence was submitted in response to Defendants' arguments that the *Cayuga* laches defense barred the claims, as it related principally to the reasonableness of the delay in filing suit. The District Court treated this evidence as irrelevant, on the ground that this Court's reformulation of the applicable equitable defense in *Oneida* meant it was not necessary for the Defendants to prove the traditional elements of laches. The District Court dismissed the claim before the Onondagas were given a full

opportunity to develop and present evidence demonstrating that there could be no justified expectations under these unique circumstances. This is reversible error.

This element of the *Oneida* equitable defense has two factual aspects. First is the question of whether the named Defendants had expectations at all about whether the Onondagas would ever assert the land rights violated by the State of New York. If so, the second aspect is the ultimate factual question of whether such expectations were "justified" under the circumstances.

That these Defendants may have either facilitated development of the land or developed it themselves is not dispositive of this question, as the District Court suggested. To say that development of the lands gave rise to "settled expectations" of unchallenged ownership assumes the very fact at issue. There was no evidence in the record directly linking occupation and development of the subject land to justified expectations. Neither *Cayuga* nor *Oneida* supply the factual basis for this link. The District Court cannot simply assume that fact to be true nor can it find that fact without affording the Onondagas a reasonable opportunity to develop and present evidence on the issue.

Particularly with regard to the corporate Defendants, who the complaint alleges have systematically polluted and degraded the lands, it cannot be assumed that this kind of "development" could give rise to justified expectations that the Onondagas would never again assert their rights to environmentally healthy lands.

To hold otherwise would create a powerful incentive for holders of disputed title to degrade the land in order to demonstrate a justified expectation regarding their ownership.

Whether the named Defendants have developed such expectations will turn on whether they knew or reasonably should have known about the efforts of the Onondagas to protest the loss of their lands and to assert their rights. These are purely factual questions that cannot be resolved through unsupported assumptions about what the State, the local governments and corporate defendants may have expected from the passage of time alone. These questions should be resolved through the traditional methods of factual development, including discovery, the presentation of evidence and findings by the trier of fact.

B. The District Court Erred By Taking Judicial Notice of Disputed Facts.

The District Court took judicial notice of the fact that the "contested lands" are "predominantly non-Indian today" and have "experienced significant material development by private persons and enterprises as well as by public entities." (JA 253). In addition, the Court asserted, without reference to judicial notice or any other method to ascertain facts, that New York State has exercised "sovereign control over the subject land" between the signing of the "challenged treaties" and the filing of this suit. *Id.* These facts, the District Court found, allowed the

"creation and maintenance of long-settled expectations concerning land ownership. *Id.* Because the Onondagas did not have an adequate opportunity to contest these assumptions, and because these claims are not subject to judicial notice, the District Court committed reversible error.

This Court reviews a district court's decision to take judicial notice under an abuse of discretion standard. *Staeher v. Hartford Financial Services Group, Inc.*, 546 F.3d 406, 424 (2d Cir. 2008). Rule 201of the Federal Rules of Evidence sets out the applicable standard: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The facts at issue here fall far short of this standard.

The Onondagas cannot contest the fact that there are non-Indians now living within the areas that were the subject of the State land transactions, and the District Court's judicial notice of that fact was proper. However, there are a number of factual questions related to the development of the land by the named Defendants that are not proper subjects of judicial notice. The questions of whether and to what extent the named Defendants have "developed" the land and whether such development constitutes improvements which equity should acknowledge are not the kinds of factual issues for which judicial notice is proper.

Moreover, the extent to which the State of New York benefitted from its wrongful acts, and, in a balancing of equities, should not be allowed to escape liability through assertion of an equitable defense are questions that should be determined after full factual development.

There was no evidence submitted to the District Court regarding the kind of development generated by Defendants the State of New York, the City of Syracuse, and the County of Syracuse or the extent to which that development contributed to justified expectations regarding Onondaga rights to the area. As a result, there was no factual basis on which the District Court could reasonably conclude that Defendants have "justified expectations" about their land. The only evidence on this issue in the record below is that the corporate Defendants through more than 100 years of occupation have degraded the land and water through the dumping of toxic wastes and mining operations that have caused billions of dollars in damages. Declaration of Joseph Heath at ¶ 51-58 (JA 185-188). The District Court ignored this evidence.

Even if the District Court's broad generalizations about the existence of private and public development in the area can be construed as "facts," the Onondagas vigorously contest the ultimate fact of "justified societal expectations" relied upon by the District Court. As a result, this fact is not the proper subject of judicial notice.

As this Court has noted, "[j]udicial notice of a disputed fact should not ordinarily be taken as the basis for dismissal of a complaint on its face. The better course is to conduct an evidentiary hearing at which the plaintiff may have its 'day in court' and, through time-honored methods, test the accuracy of defendants' submissions and introduce evidence of its own." *Oneida Indian Nation of New York v. State of New York,* 691 F.2d 1070, 1086 (2d Cir. 1982) (internal citations omitted).

C. The District Court Erred By Failing to Accept the Allegations of the Onondagas' First Amended Complaint As True for Purposes of the Motion to Dismiss.

It is axiomatic when considering a motion to dismiss under Rule 12(b)(6) that a district court must accept the allegations of the non-moving party as true and draw all inferences in the light most favorable to the non-moving party. *In re NYSE Specialists Sec. Litigation,* 503 F.3d 89, 95 (2d Cir. 2007). Under Rule 12(b)(6), a court may dismiss a complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorenma NA,* 534 U.S. 506, 514 (2002).

Here, the Onondagas, the non-moving party, alleged in their First Amended Complaint that the corporate Defendants degraded the subject land through pollution and mining operations. First Amended Complaint at ¶¶ 13-16 (JA 34-35). The Complaint further alleged that the "Onondaga Nation has strongly and

persistently protested in various forms and in a wide variety of fora New York State's taking of the Nation's land and exercising jurisdiction over the Nation land in violation of the Trade and Intercourse Act, the Treaty of Canandaigua, the Treaty of Fort Stanwix and the U.S. Constitution." *Id.* at ¶ 45 (JA 43). Further, the Complaint alleged that the subject land "became populated and developed by non-Indians over the persistent protests of the Onondaga Nation and the Haudenosaunee," and that the State and other Defendants "have at all times known or had reason to know of the Nation's assertions of ownership and the Nation's protests concerning the takings of the Nation's land." *Id.* at ¶¶ 50, 52 (JA 44). The Complaint cites one example of the efforts of the Onondagas to protest the loss of their land, a request in 1841 that the United States Government stop the "flood of non-Indian settlers into the Nation's land by enforcing the promises made in the Treaty of Canandaigua." *Id.* at ¶ 50 (JA 44). The Complaint alleges generally that the Onondaga Nation has taken action to protect the lands "from degradation, impairment or destruction." *Id.*at 49 (JA 44).

The District Court erred by failing to accept these allegations as true. Moreover, the District Court failed to draw the obvious inference from these facts: that in light of the long history of Onondaga protest and complaint about the loss of their lands, any expectations of the Defendants that their lands would never be disturbed cannot be justified. The District Court was required to accept as a fact

that the State and other Defendants knew of the Onondagas' efforts to keep their claims alive and to put non-Indians on notice that the Onondagas had not accepted the loss of their lands through the unlawful transactions with the State. The most favorable inference for the non-moving party on this motion is that no "justified expectations" could arise under these circumstances. It was error for the District Court to fail to make that inference.

II. The District Court Erred in Disregarding the Evidence of the Onondaga Nation That Demonstrated that the Named Defendants Could Not Have Had Justifiable Expectations Regarding Their Land Tenure.

In support of their motion to dismiss on the basis of a laches-related equitable defense, the Defendants relied on facts outside the Onondagas' First Amended Complaint. In response, the Onondagas submitted extensive evidence in the form of declarations from expert witnesses and percipient witnesses. Because *Cayuga* was the governing law at the time the motion was briefed and argued, the Onondagas focused on proving that they did not unreasonably delay and that they protested the loss of their lands by all available means.

In *Oneida*, this Court explained that the new equitable defense is not a traditional laches defense. Rather, it has essentially two elements: 1) the long passage of time; and 2) the disruptive nature of the claim as measured by interference with the justified and settled expectations of the Defendants that the

Indian nation will not challenge their land ownership. As noted, the Onondagas did not have an adequate opportunity to submit evidence on the second prong of the *Oneida* standard, because the District Court issued it ruling without affording the opportunity for either briefing or the submission of evidence. Nonetheless, the record as developed by the Onondagas in response to the laches defense contained sufficient undisputed evidence regarding the expectations of the Defendants to preclude dismissal for failure to state a claim. As demonstrated below, the evidence shows that the Defendants' expectations almost certainly could not have been justified in light of the efforts of the Onondagas to protest the loss of their lands. The District Court committed reversible error by resolving this issue on a motion to dismiss and by failing to consider this evidence and its legal significance under the *Oneida* standard.

Assuming they held this belief, the named Defendants could not have been justified in believing that the Onondagas would allow the loss of their land to go unremedied. Any such suggestion is belied by the history and presence of the Onondagas and the Haudenosaunee in New York State. The Onondagas have maintained an enduring public presence throughout the claim area, but especially in and around Onondaga Lake, Onondaga County and the City of Syracuse, where the named Defendants hold their lands. The Onondaga Nation is the central council fire of the Haudenosaunee Confederacy, which is comprised of the

Mohawk, Oneida, Cayuga, Seneca and Tuscarora Nations located throughout upstate New York. The citizens of the member nations of the Haudenosaunee live throughout its aboriginal lands in the State. Declaration of Tadodaho Sidney Hill at ¶ 4 (JA 153). The great majority of the citizens of the Onondaga Nation continue to live in their homeland and, unlike the Oneidas, have not "moved elsewhere." *Oneida,* 617 F.3d at 127. The citizens of the Onondaga Nation continue to use their traditional homeland for purposes of hunting, fishing, and medicinal and cultural plant gathering. The area, and in particular the health of the natural world, have always been important to the Onondaga Nation. Hill Declaration at ¶¶ 12 (JA 155), 15-21 (JA 156-157). Onondaga Lake, which is located within the land that is the subject of this action, is especially important to the Nation, because it is the location of the formation of the Haudenosaunee and many Nation citizens lived there and relied on its resources for survival. Hill Declaration at ¶ 15 (JA 156). The centrality of Onondaga Lake to the culture and history of the Onondaga people is widely known, and there is no basis on which anyone could reasonably or justifiably believe the Onondaga Nation would give up its right to challenge New York State's fraudulent acquisition of it.

Had the District Court afforded the Onondagas the opportunity to develop the facts, the full story of the Onondaga Nation's efforts to protest the loss of their lands and to seek redress could have been presented. However, even the facts in

the record undermine any conclusion that the Defendants had justified expectations about their land ownership. Immediately following the State land transactions, the Onondaga Nation and the Haudenosaunee repeatedly and vigorously protested the validity of the State's purported acquisition. Declaration of J. David Lehman at ¶¶ 5 (JA 190), 7 (JA 192), 10 (JA 195), 14 (JA 198), 30 (JA 207), 60 (JA 227); Declaration of Anthony F.C. Wallace at ¶¶ 31 (JA 86), 42 (JA 89-90). The Onondagas sought federal assistance, requesting, for example, that federal Indian agent Israel Chapin accompany them to a meeting with New York State Governor Clinton to protest the state purchase of 1793. Lehman Declaration at ¶ 30 (JA 207).

The United States promised to protect the Onondagas against the State's avarice for their lands, a promise the Onondagas relied on for many years. Lehman Declaration at ¶¶ 34 (JA 209-210), 37 (JA 211-212); Wallace Declaration at ¶ 48 (JA 92). The Onondaga and Haudenosaunee frequently called on Congress and the President to investigate the fraudulent State transactions. Lehman Declaration at ¶¶ 24 (JA 204), 27 (JA 205-206), 28 (JA 206), 32 (JA 208-209). In 1802, a delegation of Haudenosaunee chiefs, including the Onondagas, met with Secretary of War Henry Dearborn to discuss redress for New York State's violations of Haudenosaunee land rights and federal law. The meeting resulted in the issuance of an executive order from President Jefferson confirming Onondaga

(and Seneca) title to "all lands claimed by and secured" to them by "Treaty, Convention or deed of conveyance or reservation." The 1802 Executive Order has never been revoked. Lehman Declaration at ¶ 41 (JA 214-215).

The history of the efforts of the Onondaga Nation to assert their land rights and claims against the State of New York also negates any inference that expectations of no legal consequence from the takings could have been justified. While there were periods of time during this history that no legal action was taken, that stemmed principally from the fact that neither the federal nor State courts were open to hear these kinds of claims until 1974. Declaration of Lindsay G. Robertson. ¶¶ 44-49 (JA 149-151). The lack of legal action at these times did not reflect any corresponding decision by the Onondaga Nation to acquiesce in the illegal taking of its lands, and Defendants have provided no evidence to suggest it. Federal question jurisdiction was not established until 1875, and this Court and the Supreme Court thereafter determined that suits under the Trade and Intercourse Act did not present federal questions. *Deere v. State of New York,* 22 F.2d 851 (1927), *aff'd,* 32 F.2d 550 (2d Cir. 1929); *Taylor v. Anderson,* 234 U.S. 74 (1914).

The *Deere* case was brought by a member of the Mohawk Nation, a constituent member of the Haudenosaunee. The Onondagas were intimately involved in the planning of the case. Although the *Deere* case was lost, the deliberations around the planning and filing of the case received widespread

notice and coverage in New York newspapers throughout the State. Declaration of Robert E. Bieder at ¶¶ 41-47 (JA 118-120) (e.g. coverage in *New York Times* on December 7, 1924). Professor Bieder concluded that "[t]here can be little doubt, because of the rather extensive news reporting about the Six Nation's land claim, that the New York State government and the public at large was familiar with the land rights claims of the Six Nations and the Onondaga Nation." Bieder Declaration at ¶ 47 (JA 120). Any reasonable observer would have aware of the determination of the Haudenosaunee nations to assert their land claims and rights. *Deere* remained applicable law preventing Indian Nations from bringing claims in this circuit until 1974, when the Supreme Court ruled in *Oneida I* that such jurisdiction existed.[4]

As for state courts, until very recently the rule under New York law was that Indian nations lacked capacity to sue in the absence of a special authorizing statute. Robertson Declaration at ¶¶ 7-15 (JA 131-136). In addition, New York State courts required the appointment of attorneys for Indian nations as the exclusive means by which legal actions could be brought to assert Indian interests and claims. *Jackson ex dem Van Dyke v. Reynolds,* 14 Johns. 335 (1817). In 1806, the Onondagas petitioned the State for the appointment of an attorney. The

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[4] Diversity jurisdiction was not available as a basis of federal jurisdiction because complete diversity of citizenship would have been lacking. Declaration of Lindsay G. Robertson at ¶ 45 (JA 149).

person appointed, Ephraim Webster, not only failed to file any claims on the Onondagas' behalf, he acted as an interpreter during the land negotiations that led to the State acquisitions of 1817 and 1822. The Onondagas complained to Governor DeWitt Clinton that Webster had deceived them, but the Governor refused to replace him. Robertson Declaration at ¶¶ 15 (JA 135-136), 17-18 (JA 136-137).

The State exerted tight control over any attorney it appointed for the Onondagas. In 1843, the Legislature refused to authorize the prosecution of legal actions as part of the attorney's duties and subjected him to specific direction of the Governor. Robertson Declaration at ¶ 24 (JA 139-140).

The efforts of the Onondagas to resist the intrusions of the State into the lands and sovereignty of the Onondaga Nation are also relevant to the question of whether the Defendants had reasonable expectations the Onondagas would stand by while the State took their lands. The best example of this is from the period 1849 to 1918, during which the State and federal governments sought to destroy Onondaga culture and assimilate them into the body politic of non-Indian New Yorkers. In 1849, the State adopted legislation calling for the "partition of tribal lands." This was a state version of the federal General Allotment Act, enacted in 1887. The Onondagas fiercely resisted partition and allotment, because they saw that individually held land would eventually be subjected to state taxes, to

foreclosure and to transfer to non-Indians. "Bit by bit the reservation would be sold off; the Onondaga people would become landless and . . . without their traditional government, community and identity." Declaration of Robert E. Bieder at ¶¶ 5 (JA 105), 6 (JA 105-106), 9 (JA 106), 10 (JA 107). The Onondaga publicly and strongly resisted legislative efforts to allot their lands during this period. Declaration of Robert E. Bieder at ¶¶ 7-19 (JA 106-112). No one with knowledge of these efforts could justifiably conclude that the Onondagas would not take every available opportunity to protect their land and assert their claims.

Since 1920, New York State and the public generally have been on notice that in actions brought by the United States, the courts could find that Indian land transfers in violation of the Trade and Intercourse Act have no legal effect. *United States v. Boylan,* 165 F. 165 (2d Cir. 1920); Bieder Declaration at ¶ 21 (JA 112). The publicity surrounding this decision and the subsequent State commission established to investigate the question of the validity of the State's title are facts relevant to the question of justifiable expectations today. In response to the *Boylan* decision, the State created the New York State Indian Commission, for the purpose of "examin[ing] the history, the affairs and transactions" between the State and Indian nations. Bieder Declaration at ¶ 25 (JA 114). The Commission met with the Onondagas at its Territory on August 16-17, 1920. The Nation's statements at the meeting show its continuing belief that it was under the "legal

protection" of the federal government, and that New York State had no jurisdiction over the Nation. Bieder Declaration at ¶¶ 27-29(JA 114-115), 31 (JA 115). The Commission's report, which was widely disseminated, concluded that the Haudenosaunee nations are still the owners of all the territory that was "ceded to [them] at the close of the Revolutionary War." Bieder Declaration at ¶ 37 (JA 116-117) (quoting Everett Commission Report at 319-320).

Following the *Deere* decision, the Onondagas turned to Congress for relief. In 1929, the Onondagas, along with the Mohawks, Oneidas, and Cayugas, submitted a petition to Congress that asserted their claims against the State for taking their lands in violation of federal laws and treaties. The petition states that "every foot of the land bought from the . . . .Onondagas was illegally obtained in absolute contravention to the laws of Congress, to the United States Constitution and to the treaties." Bieder Declaration at ¶59 (JA 123-124). (Printed as part of the hearing record for S. Res. 79 at pages 4869-4875). The petition further states that "the Six Nations Confederacy vigorously protested to the Federal Government through the years so that no statute of limitations can run against them; that the law of laches does not apply to people who have no power to sue." *Id.*

In 1948, when Congress was considering bills to extend civil and criminal jurisdiction over Indian lands in New York State, the Onondagas used the occasion to again protest the taking of their lands. Onondaga Nation Chief George

Thomas, Tadodaho of the Haudenosaunee, testified that "[t]he claims that we have against the State of New York are enormous, probably one of the biggest cases in the whole history of Indian relations, . . . and we all point to this fact that we have this tremendous claim." Bieder Declaration at ¶ 66 (JA 126-127). The Onondagas opposed the bills because "it would hamper the transactions of the negotiations for a settlement of these claims if we transfer jurisdiction" to the State. *Id.* at ¶ 67 (JA 127).

Consistent with the Onondagas' preference for a negotiated resolution of their land rights claims, when the Supreme Court established federal court jurisdiction for these claims in 1974, the Onondaga Nation moved quickly to explore the possibility of such discussions. A Haudenosaunee Lands Committee was formed and it met with counsel for the President in 1976 and 1982 to explore the issue. The Nation sent a letter to the President in 1989 making a similar request. Declaration of Robert T. Coulter at ¶¶ 12 (JA 56), 13 (JA 56), 17 (JA 57), 56 (JA 66). Although efforts to commence negotiations with the federal government were not successful, the effort demonstrates the Onondagas' commitment to seek redress for the loss of their lands.

During the 1970s and 1980s, the Onondaga Nation was forced to defend its land claims in various court actions. Declaration of Robert T. Coulter at ¶¶ 30-49 (JA 60-65). For example, a claim for damages was filed against the United States

in the Indian Claims Commission by individuals who purported to represent the Six Nations, and the judgment in that claim threatened to extinguish the Onondaga Nation's claim. The Nation was forced to sue and it later refused to accept the monetary award. *Id.* at ¶¶ 33 (JA 61), 34 (JA 61).

In addition to these efforts, the Onondaga Nation in 1995 began a public education effort to inform potentially affected landowners about the facts of the Onondaga claim and the Nation's desire to find a resolution that did not disrupt or harm their neighbors. Coulter Declaration at ¶¶ 87-90 (JA 72-73); Hill Declaration at ¶¶ 22 (JA 157), 23 (JA 157-158), 40 (JA 163). The filing of the claim brought positive responses and support among the non-Indian community in the claim area. There was no disruption of the Nation's harmonious relations with Onondaga County, the City of Syracuse or the Nation's neighbors. Declaration of Joseph Heath at ¶¶ 8-34 (JA 169-178). The public response to the Nation's lawsuit in general has been one of support for the legitimacy of the claim and the goals of rehabilitation of the Nation's land from decades of degradation. *Id.*

On this record, it was error for the District Court to dismiss the Onondaga Nation's claim at the pleadings stage for disruption of the "justifiable expectations" of the named Defendants that the Onondagas would accept the historic loss of their lands without seeking redress in some form. This issue should be decided on a fully-developed factual record.

III. The District Court Erred in Concluding That the Onondaga Nation's Claims Are Disruptive.

The District Court ruled that the Onondagas' claims "represent the type of inherently disruptive action which *Cayuga* instructs is barred under *Sherrill*'s formulation of a laches defense." (JA 251). The Court acknowledged that the Onondagas do not seek possession or damages based on a possessory interest, but it concluded nonetheless that "[i]t is indisputable that these claims [are] possessory in nature and sound[] in ejectment," placing them at the "center of the range of claims barred under *Cayuga.*" (JA 252). The District Court fundamentally misconstrued the nature and scope of the Onondagas' claims. As a result, it was error to conclude these claims are disruptive within the meaning of *Cayuga.*

It has been clear from the filing of the complaint that the Onondagas make no claim nor seek any remedy that is predicated on a possessory interest. The Onondaga Nation has never sought any remedy and has disclaimed any intention of ever seeking a remedy that would dispossess, evict or eject their neighbors from their lands. The Nation seeks no money damages in any form or based on any legal theory. It does not seek additional compensation for what it was paid by the State or restitution for what was lost. Rather, the Nation seeks a simple declaration that New York violated the Trade and Intercourse Act in its wholesale

taking of Nation lands and that, as a result, formal legal title to property held by the named Defendants in this suit remains with the Nation.

Because a declaration of title could have disruptive consequences, the Onondagas specifically asked the District Court to include provisions in the declaratory judgment that would avoid such consequences. The Nation proposed, as examples, providing that injunctive relief would be prohibited or stipulating that the declaration does not create clouds on the titles of the named Defendants. Plaintiff's Supplemental Memorandum in Opposition to Motions to Dismiss at 9, Docket No. 84. The District Court ignored these suggestions.

At this stage of the case, the threshold question is straightforward: whether the Onondaga Nation is entitled to a declaratory judgment of any kind under the facts alleged in the complaint. The District Court, as requested by the Onondagas, was free to fashion a declaratory judgment that the Act was violated while including provisions in the judgment that ensure no undue disruption to the tenure of the named Defendants. A district court may grant any relief to which the plaintiff is entitled, whether or not it was sought in the prayer for relief. *Powell v. National Board of Medical Examiners,* 364 F.3d 79, 86 (2d Cir. 2004).

A suit seeking a declaration of title under these unique circumstances is not an inherently disruptive action justifying dismissal. The District Court's ruling is tantamount to saying that any suit that implicates title to land is necessarily

possessory or "sounding in ejectment." That is not the law. In construing the Trade and Intercourse Act, the Supreme Court has distinguished between ownership and possession: The Act is intended to "prevent the unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States." *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 119 (1960) (emphasis added). The Act fully protects Indian interests in land whether or not the Indian nation seeks to vindicate a possessory interest. "[T]he Act applies to any title or claim to real property, including nonpossessory interests. . . ." *Tonkawa Tribe of Oklahoma v. Richards,* 75 F.3d 1039, 1045 (5th Cir. 1996).

The distinction between title to land and possession of it is well established. *See, e.g., Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261 (1997) (Justice O'Connor concurring). Justice O'Connor acknowledged that the law could easily accommodate circumstances where state officials could retain formal legal title, while at the same time being deprived of the right to possession: "A court could find that [state] officials had no right to remain in possession, thus conveying all the incidents of ownership to the plaintiff, while not formally divesting the State of title." 521 U.S. at 291. There is no logical or legal reason why the converse could not also be true: a state could be divested of title but allowed to remain in possession and retain all other rights to the property. Indeed, legal arrangements

in which one party retains title and the other possession are not uncommon, such as leasing relationships, or a debtor in possession who has been divested of title in bankruptcy proceedings.

That the Onondaga Nation and the State of New York may peacefully hold titles to the same land without disruption one to the other may be an example of this Court's observation that in federal Indian law "doctrines and categorizations applicable in other areas do not translate neatly to these claims." *Cayuga* at 276. The Supreme Court's first pronouncement on the nature of the interest of Indian nations in their lands established a seemingly unorthodox bifurcation of title, in which the United States had a kind of underlying, naked fee title to land owned, occupied and used by Indian nations. *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543 (1823); *see also, Beecher v. Wetherby,* 95 U.S. 517, 525 (1877); *Sherrill,* 544 U.S. at 213 (by purchasing land on the real estate market, Oneidas sought to unite aboriginal title and fee title).

Although the United States asserts an abstract underlying fee title, Indian nations in legal effect hold complete ownership rights. *United States v. Alcea Band of Tillamooks,* 329 U.S. 40, 46 (1946) ("As against any but the sovereign, original Indian title was accorded the protection of complete ownership."). The Indian nations' interest has been characterized as a "perpetual right of occupancy" that is "as sacred as the fee simple of the whites" and valid legal title against all

but the United States, which asserts a right to extinguish that title. *Mitchel v. United States,* 34 U.S. 711, 746, 756 (1835).

If the federal courts can find a way to harmonize a federalized fee title and Indian title, then surely a similar accommodation can be found to enable the Onondaga Nation to seek limited redress today for the historic loss of their lands at the hands of New York State. Neither *Cayuga* nor *Oneida* required the District Court to confine its analysis to "categorizations applicable to other areas" of the law. Because Onondaga title and the State's title can peacefully co-exist, the Onondaga's claims are not inherently disruptive. The District Court applying principles of equity can and should find a way to do justice by accommodating both.

It does not necessarily follow that if the Onondaga land transactions are invalid, then the Nation has a right to possession, especially when it has expressly and unequivocally disclaimed any intention of seeking a possessory remedy now or in the future. It is not necessary for a court to affirm possessory interests in adjudicating a declaratory judgment claim under the Trade and Intercourse Act and the Treaty of Canandaigua. The Trade and Intercourse Act contains no remedial provision. *Oneida II,* 470 U.S. at 237 (the Act "does not speak directly to the question of remedies for unlawful conveyances of Indian land."); *see also, Skokomish Indian Tribe v. United States,* 410 F.3d 506 (9th Cir 2005) (Tribe had

cause of action against State and third parties to enforce treaty provisions through equitable relief).

The discreet relief sought here is underscored by the fact that declaratory judgments are not coercive. A declaratory judgment is "merely a declaration of legal status and rights; it neither mandates nor prohibits action." *Perez v. Ledesman,* 401 U.S. 82, 184 (1971). A declaratory judgment is designed to clarify and settle unresolved legal relations or to afford relief from uncertainty and insecurity. *Broadview Chem. Corp. v. Loctite Corp.,* 417 F.2d 998, 1001 (2d Cir. 1969). Although a declaratory judgment "may be persuasive, it is not ultimately coercive; noncompliance may be inappropriate, but it is not contempt." *Perez v. Ledesman,* 401 U.S. at 125-126. The principal purpose of a declaratory judgment is to recognize the right of the plaintiff even though no immediate enforcement is sought. *Textron Lycoming Reciprocating Engine Division v. United Automobile, Aerospace, Agricultural Implement Workers of America International Union,* 523 U.S. 653, 660 (1998).

A declaratory judgment is a suitable remedial vehicle for the Onondaga Nation to achieve its goals. A declaration that the Trade and Intercourse Act and federal treaties were violated will not require nor invariably lead to coercive orders against the Defendants. It will not upset land titles of those landowners who are not sued. As to the named Defendants, a declaratory judgment will

provide the first step toward an amicable resolution of the land rights question. It will lead to healing an historic wrong. It will provide the legal foundation for discussions with the State about resolving land and environmental issues confronting the Onondaga Nation. Since the time New York State acquired Onondaga land, there has been uncertainty about the legality of the State's actions. A declaratory judgment in this action will remove that uncertainty and provide a path for clarifying relations between the State, its citizens and the Nation.

A declaratory judgment played a similar catalytic role in the Maine Indian Land Claims Settlement Act of 1975. In that case, two Indian nations obtained a declaratory judgment that they and their lands were covered by the protective provisions of the Trade and Intercourse Act. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 388 F. Supp. 649 (D.C. Me. 1975), *aff'd,* 528 F.2d 370 (1st Cir. 1975). The Indian nations did not seek any coercive relief, yet the judgment provided the basis for negotiations that led to a resolution of their claims five years later. Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721 et seq. The declaratory judgment provided long-term certainty and clarity with regard to the key unresolved legal issue in the case. Similarly, a declaration here would provide the essential foundation for a fair, just and permanent resolution of the historic wrong suffered by the Onondaga Nation and would not cause undue disruption.

IV. The District Court Erred in Concluding that a Declaratory Judgment Would Necessarily Disrupt the Expectations of Thousands of Defendants.

With regard to the scope of the Onondaga Nation's claims, the District Court found the claims to be disruptive principally because "the declaratory judgment would apply to all land conveyed by the challenged treaties, despite the Onondaga naming a limited set of defendants." (JA 252). This conclusion is inconsistent with the allegation of the Onondagas' complaint, contrary to the disruptiveness standard of *Cayuga* and *Oneida,* and wrong as a matter of law.

The Onondagas named as defendants only the State of New York, two local governments and five corporations. Although the acreage covered by the State transactions is extensive, the Onondaga Nation confined the case to the lands held by the named Defendants. It did not seek an adjudication of its rights vis-a-vis every private individual holding land that was the subject to the State land treaties. The Nation did not seek to certify a defendant class of landowners that would be bound by the decision. None of the Defendants argued that absent landowners are necessary parties who have to be joined for the action to go forward. Nor would such arguments have likely succeeded. *See, e.g., Museum of Modern Art v. Schoeps,* 549 F. Supp.2d 543, 549 (S.D. N.Y. 2008) ("The Second Circuit repeatedly has explained that where a party seeks simply to adjudicate its rights as

against a particular claimant but not finally allocate title [among other claimants], it is not necessary to join other claimants.") (citations omitted).

The First Amended Complaint made it clear that this action seeks to adjudicate only the interests in land held by the named defendants, and no others. Paragraph 20 unequivocally states that "[t]he precise areas at issue in this action are those parcels within the aboriginal area described in which defendants claim an interest." It was error for the District Court to judge disruptiveness from the perspective of thousands of absent landowners who had not been sued.

The scope of the Onondagas' suit is in stark contrast to *Cayuga* and *Oneida.* In *Cayuga*, the Cayuga Nation sought a declaration of title to "all of the land in the Original [64,000 acre] Reservation" and further sought an injunction "[r]estoring the plaintiffs to immediate possession of all portions of the subject land claimed by any defendant or member of the defendant class and eject any defendant claiming their chain of title through . . . the New York State treaties." *Cayuga* 413 F.3d at 269 (quoting complaint). As this Court noted, the Cayuga sought ejectment of "tens of thousands of landowners" and possession of a "large swath of New York." *Id.* at 275. No such draconian relief is requested by the Onondagas.

In *Oneida,* although the district court denied the Oneidas' request to name 20,000 landowners as defendants, it did grant their request to expand the claims

and scope of relief against the named defendants to encompass "250,000-some acres" taken by the State in the earlier treaties. *Oneida*, 617 F.3d at 120. The Oneidas also sought to eject the current landowner defendants. The scope of relief sought by the Onondagas is vastly different. *Cayuga* and *Oneida* do not describe the circumstances of the Onondaga claims.

The District Court ignored the fundamental principle that a landowner not party to the case will not be bound by the judgment, and, as a result, his or her rights in the land held will not be affected. Because the Onondagas' suit was in the nature of an *in personam* action, the question of whether any relief would be available against unnamed private landowners in the areas covered by the State land transactions was not before the District Court. *See Nevada v. United States,* 463 U.S. 110, 143-144 (1983) (quiet title action generally is an *in personam* action). As this Court has noted, "[o]rdinarily a judgment in an ejectment or quiet title action will not affect the interests of others than the parties or those in privity with them. Such actions do not operate *in rem* upon the land itself and therefore principles of collateral estoppel by judgment are not implicated." *Oneida Indian Nation of Wisconsin v. State of New York,* 732 F.2d 261, 265 (2d Cir. 1984); *see also United States v. City of Las Cruces,* 289 F.3d 1170, 1187 (10th Cir. 2002) (a declaration of superior title will not be binding on parties not joined to the action).

V. The Onondaga Nation Reserves the Argument that *Cayuga* and *Oneida* Were Wrongly Decided.

This Court's decisions in *Cayuga* and *Oneida* are the law of the circuit and binding on the District Court and this Court. Nonetheless, the Onondaga Nation respectfully submits that *Cayuga* and *Oneida* were wrongly decided. The Onondaga Nation hereby preserves this argument for en banc or Supreme Court review.

In *Oneida II* the Supreme Court held that Indian nations may bring suit for violation of their rights to land protected by federal treaty and the Trade and Intercourse Act. 470 U.S. at 236. The Court invoked two centuries of precedent confirming that "Indians have a federal common-law right to sue to enforce their aboriginal land rights." *Id.* at 235. The Court held that while equitable considerations might impact the nature of the relief available to the Oneidas, such considerations did not bar the claims altogether. *Id.* at 253 n.27.

The *Sherrill* Court expressly declined to overrule *Oneida II* on this point, holding 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*." *Sherrill*, 544 U.S. at 221. The Court took special care to emphasize the distinction between the viability of a claim for relief and the availability of a particular remedy: "The substantive questions whether the plaintiff has any right or the

defendant has any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is." *Sherrill*, 544 U.S. at 213, *quoting* D. Dobbs, Law of Remedies § 1.2, p. 3 (1973)(internal quotation marks omitted). It was the particular relief requested, not the Oneidas' underlying claim to the land, that the *Sherrill* Court rejected. *Id.*

The *Sherrill* court's preservation of *Oneida II*'s holding comports with the intent of Congress as expressed in the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, 96 Stat. 1966, 1976 (codified as amended at 28 U.S.C. § 2415). That statute provides that the United States may sue on behalf of Indian nations to vindicate their federally-protected rights to lands and establishes that, in the case of claims to title or right of possession, no statute of limitations applies to bar such claims. 28 U.S.C. § 2415(c). By enacting this statutory scheme, Congress expressed its considered judgment that claims for title or possessory rights – including Indian nation claims against New York State – are viable and should not be time-barred. *See, e.g.*, 123 Cong. Rec. 22,165 (daily ed. July 11, 1977). The Act precludes the application of equitable considerations based on the passage of time to bar liability for such claims.

Because *Oneida II* held that Indian nations may sue for violations of their treaty-protected land rights, and because *Sherrill* expressly declined to disturb that

holding, this Court erred in interpreting *Sherrill* to require dismissal of the Cayuga and Oneida land claims. Each of those cases involved suits virtually identical to the suit at issue in *Oneida II.* In each case, the District Court carefully crafted relief to avoid undue disruption to the defendants. *Cayuga Indian Nation v. Cuomo*, Nos. 80-CV-930, 80-CV-960, 1999 U.S. Dist. LEXIS 10579 (N.D.N.Y. July 1, 1999) (denying relief deemed overly disruptive); *Oneida Indian Nation v. State of New York*, 2007 WL 1500489 (N.D.N.Y. May 21, 2007) upholding claims found to be nondisruptive).

The *Sherrill* court's concern with "disruption" was based on the remedy the Oneidas sought, not on the Oneidas' underlying claim that treaties and federal law protected their rights to their ancestral lands, *Sherrill*, 544 U.S. at 219-220. *Sherrill* does not support this Court's conclusion in *Cayuga* and *Oneida* that the land claims themselves are barred. Further, Congress has provided by statute that claims to Indian land rights of title or possession should not be time-barred. Because Congress has spoken and because Supreme Court precedent supports the viability of claims under the Trade and Intercourse Act , *Cayuga* and *Oneida* were wrongly decided.

Further, *Cayuga* and *Oneida* are inconsistent with *Sherrill* because they failed to take into account the disruption and hardship caused by New York State's unlawful conduct. Under the general principles of equity and federal Indian law

which *Sherrill* espoused, the equitable circumstances of both parties should be considered and balanced. Although this Court considered alleged disruption to the State of New York and non-Indian landowners, no consideration was given to the countervailing equities of the Indian parties, and in particular the terrible disruption they suffered at the hands of New York State. The loss of Onondaga land has deprived them of traditional hunting, fishing and gathering activities, and access to cultural sites and burial sites. The lands of the Onondaga Nation have been polluted and degraded, which the Nation has largely been powerless to stop because others control those lands. When courts exercise their equitable discretion, they are required to apply "a principle of balancing various ethical and hardship considerations." Dan B. Dobbs, 1 *Law of Remedies* 91 (2d ed. 1993).

CONCLUSION

Prior to this Court's decisions rejecting Indian land claims for possession, ejectment, and trespass damages, the Onondaga Nation filed this action to establish that New York State violated the Trade and Intercourse Act and that the Nation retained interests in the land taken by the State. The Onondagas' suit is different. The Onondagas designed this lawsuit to minimize disruption to their neighbors by naming only the principal wrongdoer, two local governments and five corporations that had polluted culturally significant lands. The Onondagas were concerned about disruption long before this Court adopted a new equitable

defense that elevated that factor to prime consideration. It must be acknowledged that the culture and society of the Onondagas were profoundly disrupted by the dispossesion of their lands at the hands of New York State. Any fair and reasonable equitable defense would take into account such considerations in the balancing of equities. The Onondagas ask simply that the federal courts be open, as President George Washington promised, to redress this historic injustice. Honoring the treaties and giving life to the Trade and Intercourse Act are the first steps to the healing the Onondaga Nation seeks.

For the foregoing reasons, the decision of the District Court should be reversed.

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Respectfully submitted,

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