

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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ST. REGIS MOHAWK TRIBE

*Plaintiff,*

-against-

09-CV-0896  
(NPM/GHL)

GOVERNOR DAVID A. PATERSON

and

FRANKLIN COUNTY, NEW YORK

*Defendants.*

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**JOINT REPLY MEMORANDUM OF LAW  
IN SUPPORT OF MOTION TO DISMISS**

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### STATEMENT OF THE CASE

Plaintiff St. Regis Mohawk Tribe (“Plaintiff” or “Tribe”) draws a distinction between a so-called “boundary claim” and a “land claim” and asserts that this action falls into the former category and is not intertwined with the long-pending (and currently stayed) land claim to which it is a party, and that it is not equitably barred from pursuing this action under the principles analyzed in City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) (“Sherrill”). In making this argument, Plaintiff ignores the fact that Sherrill was not a “land claim,” but, in fact, was an action for prospective declaratory and injunctive relief, indistinguishable from this action in that the Oneidas asserted continued tribal sovereignty over lands within the original boundaries of an eighteenth century “reservation” that allegedly had not been disestablished or diminished by Congressional act. The instant motion is based entirely on jurisdictional and jurisprudential grounds, and the Court should decline to address the merits of Plaintiff’s allegation that the boundaries of the 1796 St. Regis Reservation (“1796 Reservation”) have not been diminished.

For the reasons set forth in Point I, this action should be dismissed under the doctrine of laches. For the reasons set forth in Point II, the action should be dismissed because it seeks relief that is subsumed in the already-pending St. Regis Mohawk land claim. For the reasons set forth in Point III, the action is barred by the Eleventh Amendment.

## ARGUMENT

### POINT I

#### **THIS ACTION IS INDISTINGUISHABLE FROM SHERRILL AND MUST BE DISMISSED BECAUSE OF THE DISRUPTIVE CONSEQUENCES OF THE REQUESTED DECLARATORY RELIEF.**

- 1. The relief sought in this litigation is at least as disruptive as that in Sherrill, warranting the application of laches to bar this jurisdictional claim.**

The relief requested by Plaintiff in this action is a declaratory judgment that no act of Congress has reduced the original boundaries of the reservation set forth in the 1796 Treaty between New York State and the Seven Nations of Canada, 7 Stat. 55 (“1796 Treaty”); that the Hogansburg Triangle lies within such bounds; and that “the jurisdiction of the Tribe, the State, and local governments within such tract is governed by federal law, including 25 U.S.C. § 233, as applied to federal Indian reservations.” Complaint, Prayer for Relief. The claimed need for such relief is set forth in the most conclusory fashion: “In the past few years, the State and County have sought to more vigorously enforce their civil laws against the Tribe and its members who live in the Hogansburg Triangle . . . .” Id. ¶ 3. The declaratory relief requested by the St. Regis Mohawk Tribe is more expansive and disruptive than that which was sought by the Oneida Indian Nation of New York (“OIN” or “Oneidas”) in Sherrill. In Sherrill, the OIN held fee title to all lands at issue, so its possessory right to such lands was not in question. In this case, however, Plaintiff seeks a declaratory judgment that it has sovereignty over lands within Hogansburg Triangle under the terms of 25 U.S.C. § 233, irrespective of who might be the current holder of fee title to such lands, on the ground that the lands lie within Plaintiff’s “reservation.” The nature and extent of such tribal sovereignty, according to Plaintiff, would be a matter to be determined later, on a “case-by-case basis,” presumably depending on who holds

fee title and what is the nature of the governmental interest at stake. Plaintiff's Opposition Memorandum of Law ("Opp MOL") at 4, 29-30, & n.15.

Contrary to Plaintiff's representations, Sherrill was not a "land claim." Opp MOL at 23-25. Sherrill was a jurisdictional claim addressing real property taxation. In its effort to recharacterize the plainly jurisdictional nature of the claim that was presented in Sherrill, Plaintiff goes so far as to add a bracketed self-serving "spin" on the Court's holding, indicating that "[t]he Court considered the specific question of 'whether "equitable considerations" should limit the relief available to the Oneida [for its land claim].'" Opp MOL at 25 (emphasis added). This is a whole-cloth mischaracterization of the import of Sherrill. The Sherrill decision addressed only the tax immunity issue that was then before the Court, and did not purport to determine any issues presented in the long-pending Oneida Nation Land Claim, which was then before Judge Kahn and is currently before the Second Circuit.

Plaintiff also apparently reads the Second Circuit's holding in Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005) ("Cayuga"), as somehow limiting the holding in Sherrill to Indian land claims (Opp MOL at 25-26) when the clear holding of both cases would belie such a construction: "[T]he broadness of the Supreme Court's statements indicates to us that Sherrill's holding is not narrowly limited to claims identical to that brought by the Oneidas, . . . but rather, . . . apply to 'disruptive' Indian land claims more generally." Cayuga, 413 F.3d at 274. Moreover, "[w]hile the equitable remedy sought in Sherrill -- a reinstatement of Tribal sovereignty -- is not at issue here, this case involves comparably disruptive claims," which the Court in Cayuga reasoned should be treated "like the tribal sovereignty claims in Sherrill." Id. at 274-75. Clearly, the Second Circuit recognized that it was *expanding*, not *limiting*, the holding in Sherrill, when it applied laches principles to bar a possessory Indian land claim. The Second

Circuit then determined that the “present case must be dismissed because the same considerations that doomed the Oneidas’ claim in Sherrill apply with equal force here.” Id. at 277.

Plaintiff claims that Sherrill is distinguishable from this case because this case allegedly does not arise from a historic wrong that allegedly occurred in the earliest days of the Republic, but purportedly is based on State and municipal exercise of governmental authority in the Hogansburg Triangle “[i]n the past few years.” Opp MOL at 29 (quoting Complaint ¶ 3). This supposed distinction does not survive scrutiny. As in the case at bar, the relief requested in Sherrill by the OIN was forward-looking, in that it sought a declaratory judgment and injunctive relief confirming that such lands were exempt from real property taxes. As in this case, the relief requested in Sherrill by the OIN was based on relatively recent events -- that is, the City of Sherrill’s effort to impose and collect taxes on lands that the OIN had recently purchased on the open market within the bounds of its historic reservation. It was the OIN’s disruptive claim of sovereignty over such parcels -- which was inherent in the claimed tax-exempt status of such lands -- that caused the Supreme Court to apply equitable principles, including laches, to dismiss the action. Sherrill, 544 U.S. at 221.

The Supreme Court noted that “[g]enerations have passed during which non-Indians have owned and developed the area that once composed the [OIN’s] historic reservation.” Id. at 202. Here, Plaintiff contends that Indians comprise a significant segment of the private landowners who hold freely-alienable fee title to lands within the 2000 acres bounded by the Hogansburg Triangle; however, Plaintiff simply ignores Defendants’ contention that the relief requested in this case would sow untold confusion and doubt as to the jurisdictional status of the remaining 10,000 acres that lie within the boundaries of the 1796 Reservation but outside the current

bounds of the Akwesasne Reservation. As in Sherrill, Plaintiff herein did not seek to regain possession of its “reservation” lands by court decree until the 1980’s. Id. at 216 (noting that over this long lapse of time, the OIN “did not seek to revive their sovereign control through equitable relief in court”).

Even though all of the relief requested by the OIN was forward-looking and was based on recent efforts by the City of Sherrill to levy taxes on the Nation’s property, the Court in Sherrill focused on the long history of state and local governance over the area. Id. (“The relief OIN seeks . . . is unavailable because of the long lapse of time, during which New York’s governance remained undisturbed, and the present-day and future disruption such relief would engender”); id. at 202 (explaining that “[f]or two centuries, governance of the area in which the properties are located has been provided by the State of New York and its county and municipal units”); *see also id.* at 214 (stating that “[t]he appropriateness of the relief OIN here seeks must be evaluated in light of the long history of state sovereign control over the territory”).

Based on this history, the Court recognized that OIN’s attempt to reassert sovereignty would impose major disruptive impacts on state and local governance as well as the settled expectations of the current individual land-owners. Id. at 206 (declining “to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York’s counties and towns”); id. at 197 (noting the adverse affects on current landowners); id. at 219 (noting that “longstanding observances and settled expectations are prime considerations”). These disruptions, the Court explained, were the practical effect of the tribe’s reasserting sovereignty over lands within the bounds of its historic reservation: “The unilateral reestablishment of present and future Indian sovereign control . . . would have disruptive practical consequences . . . . [Indeed] a checkerboard of state and tribal jurisdiction -- created

unilaterally at OIN's behest -- would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches." Id. at 219-220 (quoting Hagen v. Utah, 510 U.S. 399, 421 (1994)). The Supreme Court specifically expressed concern about "... a new generation of litigation to free . . . parcels from local zoning and other regulatory controls that protect all landowners in the area." Id. at 220; *see also* n.13 referencing two regulatory control cases already proceeding in central New York, Cayuga Indian Nation v. Village of Union Springs, 390 F. Supp. 2d 203 (N.D.N.Y. 2005) ("Village of Union Springs"); Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius, 233 F.R.D. 278 (N.D.N.Y. 2006) ("Town of Aurelius"). Here, Plaintiff asserts that it has not "unilaterally" asserted jurisdiction, but seeks to establish it through a declaratory judgment action. However, the practical consequence of an order granting such a declaratory judgment, thereafter followed by unilateral open-market purchases by Plaintiff (or its members) within the historic reservation's boundaries, would create a "jurisdictional patchwork" indistinguishable from that which was condemned in Sherrill.

**2. Sherrill's application of laches was based upon the disruptive impact of the remedy sought by the tribal plaintiff, not the statutory basis of its claim of sovereignty.**

In the instant claim, the Tribe seeks to avoid the application of Sherrill and Cayuga by claiming that its so-called boundary claim is very limited in nature, seeking only a declaration of the 1796 Reservation boundaries as the foundation for its claim that 25 U.S.C. § 233 alone governs the State of New York's exercise of jurisdiction over the Hogansburg Triangle. *See* Complaint ¶¶ 1, 2; *see also* Opp MOL at 2, 3. However, the Tribe's reliance on 25 U.S.C. § 233 to avoid the results of Sherrill and Cayuga is of no avail. As the Cayuga Court aptly noted, what the Supreme Court was concerned with in Sherrill "was the disruptive nature of the claim itself,"

not the particular statutory basis of the disruptive claim or the particular form of relief requested. Cayuga, 413 F.3d at 274. In Sherrill, the Supreme Court did not explicitly cite 25 U.S.C. § 233, but analyzed the tribe's claim of sovereignty as an assertion that the subject lands had "Indian country" status. See 18 U.S.C. § 1151. However, the Court certainly was aware of 25 U.S.C. § 233 when it rendered the decision in Sherrill and made its findings regarding the disruptive impact of OIN's assertion of "Indian country" status respecting its property. Justice Stevens cited and quoted Section 233 in his dissenting opinion in Sherrill, 544 U.S. at 225 & n.4. Moreover, Section 233 had been expressly cited and discussed in the Second Circuit decision below. See Oneida Indian Nation of New York v. City of Sherrill, New York, 337 F.3d 139, 162 n.19 (2d Cir. 2003) ("City of Sherrill"). It must be presumed that the Court in Sherrill took this law into account in the course of analyzing the disruptive impact of a declaratory judgment conferring "Indian country" status on the parcels on which the OIN sought to avoid paying taxes. Cf. Buckhannon Bd. and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 615, (2001) ("Words that have acquired a specialized meaning in the legal context must be accorded their legal meaning").

25 U.S.C. § 233<sup>1</sup> does not purport to fix boundaries or to delineate the parameters of "Indian country" as that term is defined in 18 U.S.C. § 1151 and in cases that have construed it. Section 233 merely confers state court jurisdiction over certain types of civil cases that might arise within the bounds of Indian "reservations" in New York. It sets forth generally the scope of state court jurisdiction to address disputes among Indians, and between Indians and non-Indians, arising on "reservations"; it provides a mechanism under which certain intra-tribal matters could remain within the exclusive civil jurisdiction of the tribe; and it makes clear that Congress did

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<sup>1</sup> The full text of Section 233 is set forth at pages 25-26 of Defendants' MOL in Support of this Motion.

not intend that this statute would affect treaty-protected hunting and fishing rights, alter the tax-exempt status of tribally-owned lands, extinguish potential claims arising under the Nonintercourse Act (“NIA”) (25 U.S.C. § 177) or apply to civil matters that arose before the effective date of its passage.

Thus, Section 233 addresses only the narrow issue of state court jurisdiction over certain civil cases on “reservations” in New York, and does not purport to address or affect other sovereignty issues that are implicated by an area’s “Indian country” status, such as zoning, environmental protection, land use regulation, health and safety regulations, and criminal jurisdiction. This statute is not a magic “prism,” as is urged by Plaintiff (Opp MOL at 31-32) that was somehow overlooked by the Supreme Court in Sherrill (*id.* at 25) or by the Courts that subsequently applied Sherrill to dismiss tribal jurisdictional claims that also are indistinguishable from the case at bar, in Village of Union Springs, *supra*; Town of Aurelius, *supra*; and New York v. Shinnecock Indian Nation, 523 F. Supp. 2d 185, 279-291 (E.D.N.Y. 2007).<sup>2</sup>

Plaintiff’s effort to distinguish Village of Union Springs and Town of Aurelius is unpersuasive. Plaintiff concedes that these cases are jurisdictional claims, but attempts to confound them by asserting that “[i]n both cases the tribe asserted immunity based on title and land ownership.” Opp MOL at 32. This is plainly wrong. The tribal plaintiffs, to be sure, had purchased fee title to the lands that were at issue in those cases, but their claim of tribal jurisdiction over such lands was based on their assertion that the acquired parcels lay within “Indian country.” It was not disputed in those cases that such lands lay within the outer boundaries of the historic 64,000 acre Cayuga reservation, and, accordingly, there was no request

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<sup>2</sup> Plaintiff also asserts (Opp MOL at n.10) that Section 233 was not a ground for relief asserted by the plaintiff in the Thompson v. County of Franklin litigation. In Thompson v. County of Franklin, 15 F.3d 245, 246 & n.1 (2d Cir. 1994), the Court took note that this statute was in fact the basis of the tribal member’s claim (ultimately rejected) that land she owned in fee in the Hogsburg Triangle was entitled to tax-exempt status.

for the Court to identify the outer boundaries of the historic reservation. Similarly, here, Plaintiff does not seek to fix the outer boundaries of the 1796 Reservation, but only to establish that the Hogansburg Triangle lies within them. The Cayuga Nation's and Seneca-Cayuga Tribe's claimed immunity from state and local land-use laws was not grounded on the bare fact that they held fee title to the lands, but on the premise that such lands were "Indian country" because they lay within the historic boundaries of the Cayuga Indian Reservation.

The declaratory relief requested by Plaintiff would effectively confer "Indian country" status on all lands that lay within the boundaries of the 1796 Reservation, a legal status that would have significant consequences with respect to the jurisdictional status of all lands subject to the declaration. "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the states." Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 n.1 (1998) (citing South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998)); City of Sherrill, 337 F.3d at 153 ("In general, 'Indian Country' refers to the geographic area in which tribal and federal laws normally apply and state laws do not."). Indian Country is defined by statute as follows:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. "Although § 1151 is a criminal statute, it generally applies as well to questions of civil jurisdiction." City of Sherrill, 337 F.3d at 153 n.11 (citing DeCoteau v. District County Court, 420 U.S. 425, 428 n.2 (1975) (internal quotations omitted; emphasis added)).

Clearly, if the declaratory relief requested in this action were granted, in its contemplated “case-by-case” actions, Plaintiff will contend that any land in the Hogansburg Triangle currently owned in fee (or purchased in the future) by the Tribe or by its members is entirely outside the civil jurisdiction and taxing authority of the state and local governments. As to non-members who own land in the claim area, as a “general proposition . . . the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” Montana v. U. S., 450 U.S. 544, 565 (1981) (“Montana”). Nonetheless, Montana recognized two possible bases for tribal jurisdiction over non-Indian fee land. First, “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.” Id. Second, “[a] tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” Id. at 566.

The Supreme Court recognized in Sherrill that *potential* disruption to state and local governance barred the Oneidas’ claims. Sherrill, 544 U.S. at 220. As in Sherrill, “little would prevent” the Plaintiff in this case “from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area.” Id., and n.13. This is what Plaintiff apparently contemplates when it alludes to a “case-by-case” clarification of the consequences of an order granting the broad declaratory relief that is requested in this action. The potential for such a “piecemeal shift in governance” (Sherrill, 544 U.S. at 521), subject only to the unilateral purchasing decisions of the Tribe and/or its members, bars relief here, as it did in Sherrill.

Plaintiff fails to address, and presumably does not dispute, Defendants' contention that the requested declaratory relief would adversely affect Defendants' centuries-old exercise of government jurisdiction over the additional 10,000 acres of fee lands that lay within the original 1796 Reservation boundaries but which are not part of the Hogansburg Triangle. Plaintiff's professed desire to "limit" the requested declaratory relief to the Hogansburg Triangle is akin to the "assurances" that were made by the Oneida Indian Nation in its land claim litigation, when it represented that it would not seek to eject any current landowners in the event that the Court granted it declaratory relief that the Oneidas "are the owners of and have the legal and equitable title as well as the right to possession of the subject lands claimed or held by any defendant or member of the defendant class[.]" Oneida Indian Nation of New York State v. County of Oneida, 199 F.R.D. 61, 82 (N.D.N.Y. 2000) ("Oneida"). The requested relief, in other words, amounted to "a judicial declaration that the challenged treaties [transferring lands within the historic Oneida reservation to the State] were null from the beginning." Id. Similarly, in this case, Plaintiff seeks a judicial declaration that the 1796 Reservation boundaries "have never been diminished by Congress and, therefore, remain today as they were upon the signing of the Treaty," which, if granted, would amount to a declaration that New York's treaties of June 12, 1824, December 14, 1824 and September 23, 1825 "were null from the beginning."<sup>3</sup> Indeed, as was pointed out in Defendants' initial brief (but ignored in Plaintiff's Opposition), this very declaratory relief is among the remedies already demanded by Plaintiff in the pending St. Regis Mohawk Land Claim.

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<sup>3</sup> This Court has previously held in the context of Plaintiff's pending land claim that its claim to one hundred forty-four acres located in the Hogansburg Triangle (aka Bombay Triangle) is barred by the doctrine of *res judicata*. See Canadian St. Regis Band of Mohawk Indians v. New York, 146 F. Supp. 2d 170, 192 (N.D.N.Y. 2001). Plaintiff cannot by this new claim avoid the effect of this Court's previous ruling as to those parcels within the Hogansburg Triangle.

Presaging the Sherrill decision, this Court in Oneida refused to permit amendment of the complaints in that land claim action, to allow such declaratory relief:

[P]ractically speaking, the effect of a declaration that the Oneidas have the right to possess the subject land, is that they would have the concomitant right to, or at a minimum, the prerogative to, evict current landowners. Thus, if the court allows the Oneidas to amend their complaint to assert such possessory claims, whether they would actually choose to exercise the option to evict, the fact remains that eviction would be an option available to the Oneidas. Consequently, despite the Oneidas' repeated public assurances that they will not evict any current landowner, in considering these motions to amend the court cannot ignore the harsh reality of the possessory nature of the claims which they are seeking to add to their complaint, especially as manifested in their requests for declaratory relief.

Oneida, 199 F.R.D. at 82. So too here, the Court cannot ignore the "harsh reality" that would flow from a declaration that the 1796 Reservation boundaries "have never been diminished by Congress and, therefore, remain today as they were upon the signing of the Treaty." Complaint, Prayer for Relief ¶ (a).

Even though the Prayer for Relief purports to limit the impact of such a judicial declaration to lands within the Hogansburg Triangle (id., ¶¶ (b) and (c)), the grant of such relief would also grant the Plaintiff a "concomitant right to, or at a minimum, the prerogative to" exercise jurisdiction over the additional 10,000 acres in the land claim area that lay outside the Hogansburg Triangle. In the same vein, there is no repose to be found in Plaintiff's repeated representation (see Opp MOL at 23, 28, 29, 31-32) that its chosen remedy in this action is "only" declaratory, not injunctive, relief -- particularly when Plaintiff is a participant in the parallel land claim litigation in which it seeks to evict all non-Indian property owners from the land claim area, and when it foresees subsequent "case-by-case" clarification of the jurisdictional consequences of an order granting the requested declaratory relief.

Plaintiff places great reliance on Saginaw Chippewa Indian Tribe of Michigan v. Granholm, 2008 WL 4808823 (E.D. Mich. 2008) (“Saginaw Chippewa”). Opp MOL at 26-30. Not only is this case not binding on this Court, the Michigan District Court expressly declined to follow the controlling law in this Circuit, Cayuga. Saginaw Chippewa, at \*22-24. In addition, Saginaw Chippewa is factually and legally distinguishable from this case.<sup>4</sup>

Plaintiff has submitted for the Court’s consideration an *amicus* brief that was recently filed by the United States before the New York Court of Appeals, which is considering an appeal from the Fourth Department in Cayuga Indian Nation v. Gould, 66 A.D.3d 100, 884 N.Y.S.2d 510 (4<sup>th</sup> Dep’t 2009) (“Gould”). [Docket No. 21-1]. The government’s *amicus* brief is remarkable for the following passage which, in the course of downplaying the disruptiveness of the Cayuga Nation’s tax immunity claim, underscores the disruptive nature of the stakes in this litigation:

Furthermore, the Cayuga did not initiate this action in order to reassert their sovereign, governmental, or regulatory control over their land and do not seek the sort of “disruptive” relief that concerned the Courts in City of Sherrill and Cayuga. Rather, the Tribe brought this action in response to Cayuga and Seneca Counties’ initiation of criminal proceedings; the Counties are the parties seeking to disturb the *status quo*.

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<sup>4</sup> Saginaw Chippewa apparently arose from a series of transactions in the relatively recent past that gradually eroded the boundaries of certain lands set aside for the Tribe by the United States in 1855 and 1864. The Court distinguished Sherrill and Cayuga on the ground that the subject lands in those cases (like this one) were within the historic bounds of reservations that had been the subject of discrete treaties of purchase with the State that dated back to the earliest days of the Republic, which allegedly were void under the NIA and constituted “a distinct ancient wrong.” Saginaw Chippewa, at \*22. In this case, the lands within the Hogsburg Triangle were transferred to the State in three discrete treaties that were executed in 1824 and 1825, which (in the pending Land Claim) the Plaintiff asserts were void *ab initio* under the NIA. The plaintiffs in Saginaw Chippewa sought to ameliorate the disruptive consequences of the declaratory relief that they sought in that case, by expressly stipulating that, in the event such relief were granted, they would make no claim that the subject lands would be exempt from taxation by the State and municipalities; nor would the Tribe seek to exercise jurisdiction over non-Indians within the boundary it sought to establish. Id. at \*22. No such assurances are present here; indeed, one of Plaintiff’s express grievances is that “Franklin County has long claimed the authority to impose real property taxes on all land owned by the Tribe or tribal members within the Triangle.” Complaint, ¶ 13(c). Finally, the United States intervened as a co-plaintiff in Saginaw Chippewa, which the government obviously has not elected to do in this case. The Court attached significance to the fact that the United States had not intervened in the Sherrill litigation (id. at \*18), and it simply rejected the application of laches or other equitable defenses against the United States, flatly rejecting the Second Circuit’s contrary holding in Cayuga. Id. at \*23.

U.S. Amicus MOL at 11 (emphasis added). The State of New York filed an *amicus* brief before the Court of Appeals in the Gould appeal, which makes substantially the same points that are set forth herein. For the Court's information, a copy is submitted herewith and marked as Attachment A.

**3. Laches is properly applied in this case at the pleadings stage.**

Plaintiff argues that laches is generally a fact-based defense that should not be determined on a motion to dismiss. Opp MOL at 34-36. In doing so, it misapplies the holdings of Sherrill, Cayuga, and Judge Kahn's 2007 decision in the Oneida land claim, Oneida Indian Nation of New York v. New York, 500 F. Supp. 2d 128 (N.D.N.Y. 2007) ("Oneida").

When the Second Circuit applied laches in Cayuga, it found "no need to remand [for a fact-finding hearing]. . . for a determination of the laches question" and simply entered judgment for defendants. Cayuga, 413 F.3d at 280. Underscoring the point, the Court stated that the claim could properly have been dismissed at the pleading stage under the rule it adopted: "**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.**" Id. at 278 (emphasis added). The highlighted language makes clear that the Court went beyond a simple statement that disruptive Indian land claims "are 'subject to' the defense" of laches (Opp MOL at 34), "mean[ing] that the defense is available" in such cases (id. at 35). Rather, the Court clearly endorsed the application of laches in the specific context of disruptive Indian land claims, based upon a motion raised at the pleadings stage.

The Oneida land claim decision is instructive in the case at bar, for the manner in which Judge Kahn addressed fact-based contentions arising in the context of the laches defense. The Court held that Cayuga and Sherrill had developed "a specific set of criteria . . . to determine

when laches should bar possessory Indian land claims, such as those before the Court.” Oneida, *supra*, 500 F. Supp. 2d at 134 (citing Cayuga, *supra*, 413 F. 3d at 277). After quoting the laches “considerations” that had been applied by the Second Circuit in Cayuga -- and notwithstanding the voluminous factual record advanced by plaintiffs, and their asserted need to pursue further discovery relating to the issue of laches -- Judge Kahn “conclude[d] that the factual record developed in this case and the Supreme Court’s findings in Sherrill warrant dismissal of Plaintiffs’ possessory claims to the land held by Defendants” based upon “generally self-evident findings.” Oneida, *supra*, 500 F. Supp. 2d at 134.

Plaintiffs argue that a laches inquiry is fact-intensive and that the Court cannot determine whether laches bars Plaintiffs’ claims without permitting additional discovery and holding an additional evidentiary hearing. Some could read the Cayuga decision to require an evidentiary hearing regarding a laches defense because it states that it is “affirm[ing] the District Court’s finding that the possessory land claim is barred by laches.” Cayuga, 413 F.3d at 277. However, the Second Circuit prefaced its “affirmance” by noting that “the considerations identified by the Supreme Court in Sherrill mandate[d]” such an action. *Id.* This Court understands this language to mean that even in the absence of a finding by the district court that laches barred the claims, the Second Circuit would have held that the Sherrill factors controlled and that the Cayugas’ claims were barred by laches. Therefore, as discussed above, the Court finds additional discovery unnecessary, and that the undisputed facts as developed by the parties and in Second Circuit and Supreme Court precedent require the Court to grant Defendants’ Motion for summary judgment and dismiss Plaintiffs’ possessory land claims.

*Id.* at 136-37 (citation to record omitted). Judge Kahn specifically noted that there was no need for factual development, particularly with respect to the issue of prejudice to the defendants, and that discovery on laches would be “counterproductive” (*id.* at 137 n.2) because “the facts that would be considered as part of a laches inquiry . . . are generally self-evident . . . .” *Id.* In so holding, the Court “[took] special notice of Judge McCurn’s wise reasoning, born of long

experience with various Indian land litigations [regarding] the efficacy of ordering such an evidentiary hearing” wherein Judge McCurn had found such a hearing would constitute “an academic exercise” that adduced “commonsense observations” concerning factual questions that “were self-evident.” *Id.* (quoting Oneida, 199 F.R.D. at 92); *see also* Canadian St. Regis Band of Mohawk Indians v. State of New York, 278 F. Supp. 2d 313, 332 (N.D.N.Y. 2003) (“laches may be raised by a motion limited to a review of the pleadings when it is clear on the face and no set of facts can be proven to avoid that insuperable bar”) (citations and internal quotes omitted).

For all of the foregoing reasons, the relief requested in this action -- the reestablishment of Indian sovereignty over a tract of land that has been freely alienable and subject to unquestioned governance and taxation by the state and local governments since 1825 -- is a disruptive claim of sovereignty indistinguishable from the jurisdictional claim asserted in Sherrill. The claim is barred by the equitable principles, including laches, enunciated in Sherrill, Cayuga, and Oneida; and the laches bar is properly applied at the pleadings stage of this litigation. Plaintiff’s complaint should be dismissed.

## POINT II

### **THIS ACTION SHOULD BE DISMISSED, NOT CONSOLIDATED, WITH THE ALREADY-PENDING LAND CLAIM.**

The Tribe does not dispute the settled law that permits this Court to act against claims which are subsumed within an already-pending action or which seek to litigate issues on a piecemeal basis. Indeed, whether viewed as a doctrine, a rule or a principle of law, there can be no dispute that a party will not be permitted to split its claims and litigate across multiple actions or to file duplicative actions seeking the same relief. *See* Lopez v. Commissioner, No 08-3833-pr, 2010 U.S. App. LEXIS 988, at \*3 (2d Cir. Jan. 19, 2010) (upholding dismissal of

duplicative claims) (citing Curtis v. Citibank, N.A., 226 F.3d 133, 138 (2d Cir. 2000); Howard v. Klynveld Peat Marwick Goerdeler, No. 98-9326, 1999 U.S. App. LEXIS 8402, at \*3 (2d Cir. Apr. 16, 1999) (upholding dismissal of duplicative complaint requesting essentially the same relief as in pending suit).

Addressing such conduct through dismissal of the new action is squarely within the authority of the Court and is consistent with the Court's effective administration of justice, its own docket and party expectations. See Bernheim v. Elia, No. 06-0885-cv, 2007 U.S. App. LEXIS 15529, at \*3 (2d Cir. June 28, 2007) (upholding dismissal of claims "in light of the necessity of avoiding duplicative litigations, thereby conserving judicial resources" (citations omitted)); Mackey v. Bd. of Educ., 112 Fed. Appx. 89, 91 (2d Cir. 2004) (finding that district court properly dismissed second-filed action based on the "rule against duplicative litigation").

Here, the Tribe seeks to downplay and in many respects avoid altogether the relief sought in the land claim litigation and its own prior admissions as to the nature and scope of that already-pending action. In the land claim, the Tribe plainly and expressly seeks, *inter alia*, a declaration that "the subject land [including all land within the original bounds of the 1796 Treaty] remains treaty-guaranteed Indian land." In the new, so-called boundary claim, the Tribe plainly and expressly seeks a declaration to establish its governmental control over the land in the Hogansburg Triangle. No amount of wordsmithing or analytical misdirection changes the basic fact that the relief sought in the new action is part of the very relief sought in the land claim and that the separate actions will therefore inherently involve intertwined, operative facts in support of claims that are directed, at least in part, to common relief.

The Court need look no further than the Tribe's own prior statements concerning the land claim. Roberts Affirmation, Exhibit P, ¶¶ 1, 7, 13. While the Tribe's response to the instant

motion downplays the import of its own words in its Notice of Appearance and Answer to Tax Enforcement Notification dated November 18, 2004 (Roberts Affirmation, Exhibit P), there can be little debate that the Tribe has previously acknowledged that the land claim challenges municipal authority to exercise jurisdiction over native-owned property and that the lands at issue are “Indian lands” never removed from the reservation. The Tribe seeks to withstand dismissal of the new action by contradicting its own prior position concerning the nature and scope of the land claim. That effort should be rejected as the Tribe may not properly create a “new” action by refuting its own prior position. *Cf. Bridgeway Corp. v. Citibank*, 201 F.3d 134, 141 (2d Cir. 2000); *Oneida Indian Nation v. New York*, 194 F. Supp. 2d 104, 126 (N.D.N.Y. 2002).

The Tribe’s opposition to the instant motion exposes the true motivation behind the new lawsuit. It is apparent that the Tribe is dissatisfied with the progress of the land claim case and filed the new lawsuit as a self-help remedy to unilaterally bring about an end to the existing Stay. Beyond the commonality to the already-pending action, the Tribe properly recognizes that equity is a factor to be considered in this assessment. Contrary to the Tribe’s position, however, the true “inequity” in this matter would be allowing a party to willfully circumvent the Court’s judicial management of a pending action simply because that party dislikes the manner in which it has been managed by the Court. Likewise, it is manifestly inequitable for the Defendants to have to address, in piecemeal fashion, a “new” claim for relief that is effectively a severed component of the already-pending and presently stayed land claim. Under any assessment, this case seeks an outcome that is partly subsumed within the land claim and is yet another in a series of actions where relief has been sought by the Tribe concerning the Hogansburg Triangle area.

The commonality of the jurisdictional claim and relief in the instant action to that sought in the land claim warrants dismissal of the action rather than consolidation.

If the Court does not dismiss the present action, it should be consolidated and stayed with the land claim. Consolidation is the appropriate approach under Federal Rule of Civil Procedure 42 in the interests of judicial economy and consistency for actions involving common questions of law and fact. Moreover, “[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. Landis v. N. Am. Co., 299 U.S. 248, 254 (1936); Fed. R. Civ. P. 42. The discretion held by the Court is broad as, indeed, a “stay may . . . be appropriate [while] awaiting ‘the outcome of proceedings which bear upon the case, even if such proceedings are not necessarily controlling of the action that is to be stayed.’” LaSala v. Needham & Co., Inc., 399 F. Supp. 2d 421, 427 (S.D.N.Y. 2005). The determination reflects a balancing of judicial economy along with the interests and burdens of the Court, the parties and the public. Catskill Mts. Chapter of Trout Unlimited, Inc. v. U.S. Env. Prot. Agency, 630 F. Supp. 2d 295, 304 (S.D.N.Y. 2009) (citations omitted).

If this case is not dismissed, the interests of judicial efficiency and economy would be served by consolidating and staying these actions and would minimize the possibility of conflict on Indian claim issues between different actions and courts. The land claim has been stayed pending the Second Circuit Decision in the Oneida land claim case. Consistent with the basis for the Stay in the land claim, that Decision may well extend to matters implicated by the Tribe’s new “jurisdictional” action. It is, therefore, most efficient and equitable for this Court to stay this claim upon consolidation with the land claim. Id. at 305. The Tribe’s argument against a Stay, citing reasons of “significant delay” and “cases [being] at different stages of preparedness,”

is a red-herring at best given the long delay in bringing the matter to Court. Opp MOL at 20. Joining this matter with the pending land claim and holding it in abeyance with that claim are hardly prejudicial given the procedural posture of the land claim and this matter, and the commonality between the actions. It will likewise lend consistency for the Public affected by the land claims and avoid cases seeking common relief proceeding on disjointed tracks with a potential for contradictory decisions.

### POINT III

#### **THIS ACTION IS BARRED BY THE ELEVENTH AMENDMENT.**

The only contested Eleventh Amendment issue is that which was addressed in Point III (B) of Defendants' main brief, which argued that this action could not be pursued against the Governor under the rationale of Ex parte Young, 209 U.S. 123, 155-56 (1908). Defendants urged that the Court analyze application of Eleventh Amendment immunity under the construct applied by the Supreme Court in Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) ("Coeur d'Alene"), which held that states have sovereign immunity from suits which are the functional equivalents of a quiet title action, including any claims for declaratory and injunctive relief. The primary argument advanced by Plaintiff is that the Court should decline to apply Coeur d'Alene, relying primarily on cases from the Tenth Circuit. Opp MOL at 36-39. Plaintiff urges that the Court instead adopt the Eleventh Amendment analysis set forth in Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 645 (2002) ("Verizon Maryland"), involving "a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."

In Western Mohegan Tribe and Nation v. Orange County, 395 F.3d 18 (2d Cir. 2004) ("Western Mohegan"), the Second Circuit considered Verizon Maryland, but nonetheless applied

the Eleventh Amendment analysis employed in Coeur d'Alene, because Western Mohegan presented a claim for prospective relief declaring that the Western Mohegan Tribe had unextinguished "Indian title" to certain New York lands. Recognizing that such relief would adversely impact the sovereignty of the State, both in terms of State "regulatory jurisdiction" over the tract and, to the extent that the State owned some lands in the claim area, the State's title to such lands, the Court concluded that the claim was the functional equivalent of a quiet title action against the State and, as such, barred by the Eleventh Amendment. Western Mohegan, 395 F.3d at 23.

Here, Plaintiff seeks prospectively to limit or even entirely displace the State's exercise of governmental authority in the Hogansburg Triangle -- particularly on individual parcels within the tract that are owned (or purchased in the future) by the Tribe and/or its members -- through a judicial declaration that all such lands have Indian country status because they lay within the boundaries of an established Indian reservation. Although the instant complaint does not expressly seek a declaration of title to such lands, this action has been brought in tandem with a separate land claim by the Plaintiff, seeking possession of all lands within the boundaries of the historic reservation and ejection of all non-Indians. Although the Plaintiff has sought to minimize the practical consequences of a declaratory judgment that all lands within the original boundaries of the 1796 Reservation have "Indian county" status, this Court "cannot ignore the harsh reality of the possessory nature of the claims." Oneida, 199 F.R.D. at 82. This action is the "functional equivalent" of a quiet title action, subject to dismissal under Coeur d'Alene and Western Mohegan. See generally Ward v. Thomas, 207 F.3d 114 (2d Cir. 2000) (declaratory judgment remedy is discretionary, governed by "equitable considerations," and "is not available when the result would be a partial 'end run' around" the Eleventh Amendment) (quoting Green v. Mansour, 474 U.S. 64, 73 (1985)).

**CONCLUSION**

Based on the reasons set forth in Defendants' initial moving papers and herein, Defendants' motion to dismiss Plaintiff's complaint should be granted in its entirety.

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