UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONONDAGA NATION,

Plaintiff,

v. Civil Action No. 05-CV-314 (LEK/DRH)

THE STATE OF NEW YORK, *et al.*,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

The fundamental question posed by the motions of the State of New York and the other Defendants is whether the court system of the United States will at last permit the Onondaga Nation to present evidence that federal laws, treaties and the United States Constitution were violated when the State took the Nation's lands. The Nation is prepared to prove at an evidentiary hearing that it has never been guilty of laches. The historic question presented to this Court is whether the Onondaga Nation will be permitted access to a United States court and a fair opportunity to prove its claims in any court. To this day, the Nation has never been afforded that simple opportunity for justice that others in the United States take for granted.

The Nation opposes the motions to dismiss because this suit cannot be dismissed as a matter of law under Fed. R. Civ. P. Rule 12(b)(6). Second, the Nation argues that the Court should exclude the extraneous matters on which Defendants rely and deny the motions without converting them to motions for summary judgment. If, however, the motions are converted to motions for summary judgment, the Nation then shows that there are many genuine issues of material facts about the issues of laches, acquiescence, impossibility and disruptiveness. Finally, the Nation establishes that the State Defendant should not be excused from answering for its misconduct on the grounds of sovereign immunity, and that, even if the State is dismissed from the action, it is not an indispensable party and the action may proceed against the other Defendants.

I. DEFENDANTS' 12(b)(6) MOTIONS SHOULD BE DENIED BECAUSE THEY IMPROPERLY CHALLENGE FACTS THAT MUST BE TAKEN AS TRUE FOR PURPOSES OF THE MOTION

Both motions argue that this suit must be dismissed on the grounds of laches, acquiescence, and impossibility, and they apparently argue that *Cayuga* and *Sherrill* create a new

and special rule that "disruptive" and "possessory" claims must be dismissed as a matter of law. *Cayuga Indian Nation of New York* v. *Pataki,* 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 126 S.Ct. 2021,2022 (2006); *City of Sherrill* v. *Oneida Indian Nation,* 544 U.S. 197 (2005). On the contrary, as discussed below, laches, acquiescence and impossibility are affirmative defenses that cannot be raised on a 12(b)(6) motion, and C*ayuga* and *Sherrill* created no such rule requiring dismissal of this suit as a matter of law. Moreover, the allegations of the First Amended Complaint (hereafter "Complaint"), which must be accepted as true on a 12(b)(6) motion, plainly show that the Onondaga Nation did not unreasonably delay in filing this suit and that the Defendants are not prejudiced by its timing. This lawsuit is neither possessory nor disruptive.

"Given the Federal Rules' simplified standard for pleading, [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) (internal quotation omitted). This must be understood together with Rule 8(f)'s command that "[a]ll pleadings shall be so construed as to do substantial justice." In deciding a motion to dismiss under 12(b)(6), a court must accept all of the factual allegations of the complaint as true and in a light most favorable to the plaintiff. *Albright v. Oliver,* 510 U.S. 266, 267 (1994); *Twombly v. Bell Atlantic*, 425 F.3d 99, 106 (2d Cir. 2005).

Because the factual allegations of the complaint must be accepted as true on a motion under Rule 12(b)(6), an affirmative defense will rarely warrant dismissal. Only if the applicability of an affirmative defense is "clear on the face of the complaint" may a complaint be dismissed on that basis. *Carell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236, 263 (S.D. N.Y. 2000); *see also Flight Systems Inc. v. Electronic Data Systems,* 112 F. 3d 124, 127 (3d Cir. 1997).

Under these standards, it is virtually impossible to conclude that the applicability of laches, acquiescence, or impossibility is "clear on the face of the complaint." Indeed, the Complaint alleges in paragraphs 45-48 that the Onondaga Nation promptly protested New York's illegal takings of its homelands and that the lapse of time was not unreasonable. Accepting these allegations as true as the Court must, it is plain that laches and acquiescence cannot be said to be "clear on the face of the complaint."

The same is true for the defense of "impossibility." That is an extremely limited defense which, not surprisingly, is not specifically addressed by Defendants. There is no showing whatever that it applies and bars the claims at issue or that it is "clear on the face of the complaint". The State attempts a half-hearted argument by saying, "[T]he Onondaga do not allege that they have sought . . . to assert sovereignty over the subject lands." Memorandum of Law in Support of the State of New York Defendants' Motion to Dismiss at 22 (hereafter "State Memo"). But that avails the State nothing, because a plaintiff is not required in the complaint to anticipate or negative defenses. *Harris* v. *City of New York*, 186 F.3d 243, 251 (2d Cir. 1999).

Fed. R. Civ. P. Rule 8(c) requires that affirmative defenses, such as laches, "must be set forth affirmatively." Further, Rule 12 requires that such affirmative defenses be raised <u>in a pleading</u>, not in a Rule 12(b) motion. Thus, the equitable defenses of laches, acquiescence and impossibility are not appropriate subjects for a Rule 12(b)(6) motion to dismiss, because they are fact-based, affirmative defenses that raise matters outside the complaint. Laches is a factual question that requires the court to balance the equities by reference to the facts and circumstances peculiar to each case. *Tri-Star Pictures, Inc.* v. *Leisure Time Pictures Industries, Inc.,* 17 F. 3d 38, 44 (2d Cir. 1994). To prove the defense of laches, the Defendants must show that (1) Plaintiff inexcusably delayed in taking action; and (2) defendants would be prejudiced by the

delay. *Ikelionwu* v. *United States*, 150 F. 3d 233, 237 (2d Cir. 1998); *Ivani Contracting Corp* v. *City of New York,* 103 F.3d 257, 259 (2d Cir. 1997); *Galliher v. Cadwell*, 145 U.S. 368, 373 (1892). "[W]where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief." *Gardner v. Panama R.Co.*, 342 U.S. 29, 31 (1951).

Defendants' reliance on acquiescence as an affirmative defense suffers from the same infirmity. Acquiescence is defined as "tacit or passive acceptance, implied consent to an act" whereby "binding legal effect is given to silence and inaction." *Black's Law Dictionary* at 23 (7th ed. 1999). In the Second Circuit, acquiescence is an affirmative, equitable defense, almost exclusively raised in trademark cases, and the defendant bears the burden of showing all three of its elements:

> The defense requires proof of three elements: (1) [plaintiff's] active . . . representat[ion] that it would not assert a right or a claim; (2) the delay between the active representation and assertion of the right was not excusable; and (3) the delay caused the defendant undue prejudice.

Sunamerica Corp. v. Sun Life Assurance Co., 77 F.3d 1325, 1334 (2d Cir. 1998.); *Times Mirror v. Field & Stream*, 294 F.3d 383, 395 (2d Cir. 2002).

The Defendants have failed even to discuss any of these three elements of the affirmative defense of acquiescence. Much less have they met their factual burden. Defendants do not claim, nor could they, that the Onondaga Nation actively represented that it would not assert the rights raised in this action Any speculation to the contrary is simply unfounded.

In sum, the Defendants raise factual matters not contained in the Complaint and that are specifically contradicted by its allegations. Defendants improperly ask this Court to make assumptions or findings that are not supported by the record and that are entirely incorrect. We remind the Court that laches and acquiescence are, above all, equitable defenses, and equity

demands fairness. "[A] court of equity is a court of conscience; . . . . [It] acts in furtherance of justice, and in accordance with the principles of justice and fair dealing; . . . ." 30A *Corpus Juris Secundum*, Equity § 94 at 292. It cannot be fair to dismiss this suit on grounds of delay and acquiescence without ever giving the Nation a chance to prove these charges are false. The maxim "[e]quity will not suffer a wrong without a remedy," should be applied here. Henry L. McClintock, *Handbook of the Principles of Equity, 2d ed.* at 52. It would be fundamentally unfair to deny the Nation any justice, while permitting New York State and others to benefit from the State's violations of federal law and treaties. For these reasons, the motions to dismiss cannot be granted under Rule 12(b)(6) on the basis of laches, acquiescence or impossibility.

II. *CAYUGA* AND *SHERRILL* DO NOT REQUIRE THE DISMISSAL OF THIS SUIT AS A MATTER OF LAW

The Defendants appear to take the view that these decisions create a new and special rule requiring dismissal of this suit for a declaratory judgment as a matter of law on the face of the Complaint. The decisions in *Cayuga* and *Sherrill* lead to no such conclusion.

A. ***Cayuga*** **Did Not Rule That Laches Can Be Applied to Bar an Indian Land Claim Without an Evidentiary Hearing and Factual Findings**

In finding that the Cayugas' claim was barred by laches, Judge Cabranes relied quite pointedly on the factual findings of the District Court, noting that it had held evidentiary hearings on the question of laches and had made specific findings on the issue. The court's opinion points out that the District Court in fact concluded, after an extensive trial, that laches had in fact occurred and that the District Court applied that finding of laches in its decision on remedies. 413 F.3d at 268, 277, 279-280. These distinct points in the opinion show that the Court did not rule nor even imply that laches could be determined without an evidentiary hearing on the factual issues. It would have been novel and unprecedented for the Court to find that the

affirmative defense of laches could be determined without any evidentiary record as Defendants here propose. Defendants' arguments ignore the Circuit opinion's references to the hearings and findings on laches in the District Court. This reading of the Cayuga decision is in accord with the Supreme Court's statement in *Sherrill* that it leaves *Oneida II* undisturbed. 544 U.S. 197, 221(discussing *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985)).

B. *Cayuga* Applies Only to Possessory Actions

The decision in *Cayuga* states many times that the rule of that case applies to actions that are *possessory and disruptive*. 413 F.3d at 274-275, 277-278. Indeed, the opinion never once states that the decision in that case is to apply to any other kind of case, *only those cases that are possessory and disruptive*. This lawsuit, by contrast, is not a possessory action but a suit for a declaratory judgment only. This lawsuit is not disruptive, but is the very archetype of a nondisruptive action.

The Nation has not sought possession, ejectment or damages for loss of possession. The law recognizes a distinction between a claim to establish title and a claim to recover possession, and the elements of proof for each are distinct one from the other. Justice O'Connor recognized this distinction in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 291 (1997). Justice O'Connor gave two examples in which the Supreme Court had distinguished between possession of property and title to property, *United States v. Lee*, 106 U.S. 196 (1882) and *Tindal v. Wesley*, 167 U.S. 204 (1897). She summarized the holdings of those cases as recognizing that a "court could find that the 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 its title." *Coeur d'Alene, supra* at 290. There is no jurisprudential reason why the converse is not also true; the State could be divested of its title but allowed to remain in possession, as the Onondaga Nation has requested

here. As a result, a declaratory judgment recognizing the Nation's title does not necessarily include a right to possession. It is thus not necessary for the court to determine whether the Nation has a possessory right in order to adjudicate its claim that the State's acquisition of Nation land violated the Trade and Intercourse Act.

In the Declaratory Judgement Act, Congress created a remedy that is above all non-coercive and not disruptive. Declaratory judgments by nature are not coercive. A declaratory judgment is "merely a declaration of legal status and rights; it neither mandates nor prohibits state action." *Perez v. Ledesma*, 401 U.S. 82, 124 (1971). A declaratory judgment is appropriate when it will serve a useful purpose in clarifying and settling legal relations. *Concise Oil & Gas Partnership v. Louisiana Intrastate Gas Corp.,* 986 F.2d 1463, 1471 (5th Cir. 1993). Though a declaratory judgment "may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but it is not contempt." *Id*. at 125-126. The purpose of the Declaratory Judgment Act is to provide a means for recognizing the plaintiff's right even though no immediate enforcement is sought. *Textron Lycoming Reciprocating Engine Division v. United Automobile, Aerospace, Agricultural Implement Workers of America Int'l Union*, 523 U.S. 653, 660 (1998).

Declaratory judgments have a special efficacy in settling rights to land "without stirring up legal hostilities. . . ." Brief of Professor Edwin M. Borchard on Declaratory Judgments, Senate Committee on the Judiciary," 65th Cong., 3d Sess. at 52 (1919). As such, a declaratory judgment action is ideally suited for establishing the proposition that the State of New York violated the Trade and Intercourse Act in acquiring Onondaga land between 1788 and 1822, and that those land transactions are void. A declaratory judgment, if granted, will be useful in clarifying and settling the Nation's relationship with the State of New York with regard to the

land at issue. The Nation has long insisted that these land rights issues should be resolved through government-to-government negotiations and through action by the political branches of the federal and state governments, in cooperation with the Nation. A declaratory judgment would advance and aid such processes tremendously.

Cayuga is relevant only to actions that are possessory and disruptive. It does not apply to actions that seek only non-possessory declaratory relief. The Defendants thus mis-read *Cayuga*. In *Cayuga*, the Second Circuit's divided ruling was limited to: "hold[ing] that the doctrine of laches bars the *possessory* land claim presented by the Cayugas here." 413 F.3d 266, 277 (emphasis added).

Likewise, the Non-State Defendants incorrectly say that "the Second Circuit concluded that land claims seeking a declaration of title must be dismissed as inequitable in light of the profoundly disruptive consequence of such a declaration 200 years after dispossession." Memorandum of Law in Support of Non-State Defendants' Motion to Dismiss (hereafter "Non-State Memorandum) at 5. The Non-State Defendants reference 413 F.3d at 274. However, all of the discussion on page 274 is about the *possessory* remedies which were sought by the Cayugas; those remedies are not sought by the Onondagas here. There is no discussion of title.

III. *CAYUGA* IS INAPPLICABLE BECAUSE THIS IS NOT A DISRUPTIVE LAWSUIT

The opinion in *Cayuga* was particularly concerned about the disruptiveness of the claims for ejectment against an entire defendant class, claims that were maintained, the opinion points out repeatedly, for some 19 years in the district court and on appeal. 413 F.3d at 271, 274, 277-278. The perceived impact of that broad possessory claim for ejectment was central to the Court's reasoning and its holding. *Id.* at 274-275

This suit is not similarly disruptive. The past 25 years have shown that the filing and prosecution of the claims have not had a demonstrable effect on the marketability of land titles in the claim areas. On the contrary, real estate markets appear to have been largely unaffected, with title insurance companies continuing to write policies, with an Indian claim exception. Real estate sale prices have not been affected by the Indian claims to any noticeable or measurable degree. Declaration of Joseph J. Heath ¶¶ 27-29 (Heath Declaration).

Another example of the absence of disruption is the case of the Seneca Nation of New York's ownership of the lands that comprise the City of Salamanca, New York. When the courts ruled the leases invalid for failure to obtain federal approvals, Congress authorized further leasing of the Nation's land. The Nation then leased its land to hundreds of non-Indian residents for 99 years, and in 1991, when the leases were about to expire, the parties entered into an agreement to facilitate the negotiation of new leases. Congress implemented the agreement. 25 U.S.C. §1774 *et seq*. This result was accomplished with minimal disruption of the local real estate market and economy. Heath Declaration ¶¶ 47-50.

The State says regarding laches that *Sherrill* ruled that: "[All a]boriginal land claims that have a disruptive effect . . . are subject to dismissal, on a motion to dismiss, based upon well-recognized equitable principles." State Memorandum at 17. The State cites to page 214 of the decision. The State mis-states the *Sherrill* decision in general and that page reference in particular. Further, the assertion that the Onondagas' suit is disruptive is not supported by the record. The question of disruptiveness is a factual issue and one for which Defendants have the burden of proof. As shown below, there is no factual record established by Defendants, and Plaintiff has submitted evidence that shows there are many material issues of fact concerning the allegation of disruptiveness.

IV. THE APPLICATION OF LACHES TO THE CLAIMS OF THE ONONDAGA NATION CONFLICTS WITH CONGRESS' JUDGMENT THAT SUCH CLAIMS SHOULD BE PERMITTED TO GO FORWARD

The application of laches to bar the Onondagas' case would be particularly inappropriate because Congress has precisely defined the circumstances under which Indian land cases should be treated as time-barred. In 1982, Congress adopted the Indian Claims Limitation Act, which "established a system for the final resolution of pre-1966" Indian land claims. *County of Oneida v. Oneida Indian Nation*, 470 U.S. at 242. The Act established a relatively short limitations period within which the United States and Indian tribes could bring damages claims based on contract and tort. 28 U.S.C. § 2415(a) and (b). Pertinent here, the Act also declared that "[n]othing herein shall be deemed to limit the time for bringing an action to establish the title to, or the right of possession of, real or personal property." 28 U.S.C. § 2415(c). The claim of the Onondaga Nation falls precisely within the express terms of this provision, as a claim to "establish title" to real property.

The legislative history of 28 U.S.C. § 2415 confirms the conclusion that Congress intended to permit Indian land claims to establish title to be prosecuted without regard for any limitations period, including laches. Two features of that history are pertinent here. First, Congress was aware of the existence of so-called ancient Indian land claims in New York State. Second, there is abundant evidence that Congress intended to preserve such claims. *See, e.g.,* S. Rep. No. 1328, 89th Cong., 2d Sess., 3 (1966); S. Rep. No. 1253, 92d Cong., 2d Sess. 2, 4-5 (1972); H.R. Rep. No. 375, 95th Cong., 1st Sess., 2-4,6-7 (1977); H.R. Rep. No. 807, 96th Cong., 2d Sess., 9 (1980); S. Rep. No. 569, 96th Cong., 2d Sess., 3 (1980). Of particular significance is the fact that Congress adopted the 1982 Limitations Act eight years after the U.S. Supreme Court held in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) that suits like the

Onondagas' state claims arising under federal law. Had Congress intended that such claims be barred, it would not have subsequently enacted the 1982 Act expressly permitting them to be brought.

"Laches within the term of the statute of limitations is no defense at law." *United States v. Mack*, 295 U.S. 480, 489 (1935); *see also Cross v. Allen*, 141 U.S. 528 (1891) (laches will not bar a suit in equity to foreclose a mortgage so long as the statute of limitations has not run on the underlying debt). The Second Circuit follows this rule. *United States v. RePass*, 688 F.2d 154, 158 (2d Cir. 1982) ("[l]aches is not a defense to an action filed within the applicable statute of limitations"). Here, Congress' determination that no limitations period applies to Indian land claims to establish title reflects a "legislative value judgment" which strikes the appropriate balance between the interests promoted by the statute and the countervailing interests of repose. *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 463-464 (1975). This Court's application of laches to the claims of the Onondaga Nation would, therefore, be a "violation of Congress' will" as expressed in the statute. *County of Oneida*, 470 U.S. at 244; *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) ("Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute.")

The Onondaga Nation was justified in relying on Congress' determination that no limitations statute or common law doctrine barred its claims. Laches requires more than the mere passage of time; only unreasonable delays may be considered in determining whether it is fair to bar the claim. The existence of a congressional determination that these kinds of claims should be allowed to proceed is a special circumstance that weighs in favor of a conclusion that the Onondaga Nation acted reasonably in the timing of this suit. *Tri-Star Pictures, Inc. v.*

Leisure Time Pictures Industries, Inc., 17 F.3d at 44 (laches is a factual question that requires consideration of all circumstances peculiar to each case).

V. DEFENDANTS' FACTUAL ALLEGATIONS SHOULD BE EXCLUDED FOR PURPOSES OF THESE MOTIONS, AND THESE MOTIONS SHOULD NOT BE CONVERTED TO MOTIONS FOR SUMMARY JUDGMENT

Where Defendants assert a defense under Rule 12(b)(6), as here, and matters outside the pleadings are presented and not excluded by the Court, the "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Fed. R. Civ. P. Rule 12(b). The Defendants, by raising the defenses of laches, acquiescence and impossibility, and the element of disruptiveness have alleged many facts which are not in the Complaint and which are not true. The facts the Court is asked to assume or judicially notice are the supposed lack of action by the Nation, alleged delay by the Nation, the supposed availability in the past of a remedy for the Nation, the unreasonableness of the Nation's actions, alleged prejudice to all the Defendants, and "clean hands" on the part of all Defendants, among other issues. These allegations of fact are set out in detail in the Plaintiff's Response to the Defendants' Statement of Material Facts, which accompanies this filing. Defendants have asserted these facts without any supporting affidavits or documentary evidence.

This Court should exclude the Defendants' factual allegations outside the Complaint for two reasons: (1) Defendants have not characterized their motions as motions for summary judgment, and (2) the motions do not meet the threshold requirements for a motion for summary judgement: a showing of uncontested facts that Plaintiff is guilty of unreasonable delay resulting in prejudice to Defendants, that Plaintiff acquiesced in the taking of its lands, and that this lawsuit is disruptive, among other allegations. Defendants have not even attempted to support their factual allegations with any kind of evidentiary showing in an affidavit. The declarations

and documentary evidence submitted by Plaintiff show overwhelmingly the existence of genuine issues of material fact, as fully discussed below. As a result, summary judgment must in any event be denied.

VI. IF THE MOTIONS ARE TREATED AS SUMMARY JUDGMENT MOTIONS, THEY SHOULD BE DENIED BECAUSE DEFENDANTS HAVE NOT MET THEIR BURDEN OF PRODUCTION

If the Court decides to convert the motions into motions for summary judgment, then summary judgment must be denied on the ground that movants have not met their burden of production and on the ground that there are many genuine issues of fact concerning laches, acquiescence, impossibility, and disruptiveness that can only be resolved after discovery and an evidentiary hearing.

Rule 56(c), Fed. R. Civ. P., provides in pertinent part:

> [Summary] judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The moving party must make a prima facie showing that the standard for summary judgment has been met. *Rodriguez* v. *City of New York,* 72 F.3d 1051 (2d Cir. 1995); *FDIC* v. *Giammettei,* 34 F.3d 51, 54 (2d Cir. 1994); *Mt. Hawley Ins. Co.* v. *Fred A. Nudd Corp*., 382 F.Supp. 2d 404, 409 (W.D. N.Y. 2005); *Faggiano* v. *Eastman Kodak Co.*, 378 F. Supp.2d 292, 298 (W.D. N.Y. 2005). Movants must *demonstrate in some detail* that there is no genuine issue of material fact and that the movants are entitled to a judgment as a matter of law. *See Moore's Federal Practice* 3d at 56–136 (emphasis added); *Celotex Corp*. v. *Catrett,* 477 U.S. 317, 322 (1986); *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 250 (1986).

Where, as here, the movant bears the burden of proving laches, acquiescence and other affirmative defenses, the required prima facie showing is relatively higher. Professor Moore states:

> [I]f the movant has the burden of persuasion on an issue, the movant must make a stronger claim to summary judgment by introducing supporting evidence that would conclusively establish movant's right to a judgment after trial should nonmovant fail to rebut the evidence.

Moore's Federal Practice 3d, 56 –135; *see, Edison* v. *Reliable Life Ins. Co.*, 664 F.2d 1130, 1131 (9th Cir. 1981); *Jackobson Shipyard, Inc*. v. *Aetna Cas. & Sur. Co.*, 775 F.Supp. 606, 609-615 (S.D. N.Y. 1991), *aff'd,* 961 F.2d 387 (2d Cir. 1992). Defendants have the burden of proof to establish the defense of laches. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002)*; Ikelionwu v. United States*, 150 F.3d 233, 237 (2d Cir. 1998); *Times Mirror Magazines, Inc*. v. *Field & Stream Licenses Co.*, 294 F.3d 383, 395 (2d Cir. 2002) (acquiescence).

Further, the standard for satisfying the initial burden of production is to be interpreted in light of the requirement that the court must view all reasonable inferences drawn from the facts in the light most favorable to the nonmoving party (the Plaintiff here). *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986); *Sologub* v. *City of New York,* 202 F.3d 175 (2d Cir. 2000).

The Defendants have not made the prima facie showing that is required, especially taking into account the Defendants' ultimate burden of persuasion on the issues of laches, acquiescence and other affirmative defenses. Movants have made virtually no attempt to demonstrate the lack of factual issues about the existence of any actual delay, about the availability or non-availability of any remedy in the past, about the reasonableness of the Nation's conduct, nor about the question of actual prejudice to any of the Defendants. Defendants rely on only one fact that is

not in dispute, a fact that may be judicially noticed: the passage of some 200 years. But this is not legally sufficient to establish the defense of laches or any other defense. For this reason alone summary judgment must be denied.

VII. SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THERE ARE SUBSTANTIAL AND GENUINE ISSUES OF MATERIAL FACT

Plaintiff has submitted detailed Declarations by four eminently qualified historians, Anthony F.C. Wallace, Lindsay G. Robertson, Robert E. Bieder, and J. David Lehman, as well as Declarations by Tadadaho Sid Hill of the Onondaga Nation and by Joseph J. Heath and Robert T. Coulter. Each of these Declarations states specific facts demonstrating that there are many genuine issues of material fact and demonstrating that there is substantial evidence on which this Court could base a judgment in favor of Plaintiff on the issues of laches, acquiescence, impossibility and disruptiveness.

The Supreme Court has established the opposing party's burden: the nonmovant must respond with "substantial evidence" sufficient to support a reasonable jury's verdict.

> [The] inquiry performed is the threshold inquiry of determining whether there is the need for a trial - whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson v. Liberty Lobby, 477 U.S. at 250, 252-253.

This test has been applied in this Circuit. *Lang v. Ret. Living Publ'g Co., Inc.,* 949 F.2d 576 (2d Cir.1991); *Knight* v. *U.S. Fire Ins. Co.,* 804 F.2d 9, 11-12 (2d Cir., 1986), *cert. denied,* 480 U.S. 932 (1987). The opposing party must provide evidence of "specific facts" which articulate and illustrate the existence of a genuine issue requiring trial. *Trebor Sportswear Co. v. The Limited Stores, Inc.,* 865 F.2d 506, 511 (2d Cir. 1989).

The Onondaga Nation has submitted seven Declarations containing extensive evidence of many specific, material facts, more than sufficient to sustain the trier of fact in finding for the Nation on the issues of laches, acquiescence, impossibility, and disruptiveness. The evidence submitted by the Nation shows that the Nation has at all times acted with extraordinary promptness and persistence in raising its claims that its lands were taken illegally, but despite its efforts the Nation has never been afforded the opportunity to present this evidence in court. The need for a trial of all the issues relating to laches, acquiescence, impossibility and disruptiveness could not be clearer. The specific facts established by the Nation in the Declarations are also set forth in detail in Plaintiff's Response to Defendants' Statement of Material Facts, submitted pursuant to Local Rule 7.1(a)3.

The Onondaga Nation has never delayed in filing this suit, because from 1788 until 1974 the Nation had no opportunity to prosecute such a suit. The federal courts had no jurisdiction to entertain such suits until 1974. Declaration of Professor Lindsay Robertson, ¶¶ 44-49 (Robertson Declaration). Even so, the Onondaga Nation joined with the other Nations of the Haudenosaunee to press a federal lawsuit in 1924 as a test case to determine whether the claims could be prosecuted in the federal courts. Declaration of Robert E. Bieder (Bieder Declaration) ¶¶ 41- 55. New York State argued that an Indian nation or tribe does not have capacity to bring such a suit, and the Court of Appeals held that the federal courts lack jurisdiction over such suits. Robertson Declaration ¶ 48. *Deere v. State of New York,* 22 F.2d 851 (N.D. N.Y. 1927), *aff'd,* 32 F.2d 550 (2d Cir. 1929).

New York law provided that Indian nations lacked capacity to sue generally in state courts in the absence of authorizing legislation, and no such legislation was enacted. Roberston

Declaration ¶¶ 37-39. Thus, there has never been any possibility of bringing an action in state court. Roberston Declaration ¶¶ 41-43.

The Onondaga Nation and the Haudenosaunee as a whole were dislocated and temporarily dispersed after the Revolutionary War, and New York State, between 1790 and 1822, took advantage of this geographical separation to make fraudulent deals with certain Onondaga individuals who were in no way authorized to represent the Nation. The Onondaga Chiefs, then at Buffalo Creek, protested to New York, but the State continued its purported purchases of Onondaga Nation land, all in violation of the Trade and Intercourse Acts. Declaration of Anthony F. C. Wallace (Wallace Declaration) ¶¶ 24-27, 29, 31-44; Declaration of Professor J. David Lehman (Lehman Declaration) ¶¶ 7,10,12 (treaty of 1788); ¶¶ 15,19, 21, 28, 52 (Treaty of 1793); ¶¶ 58, 59 (Treaty of 1795); Wallace Declaration ¶¶ 31, 34 (Treaty of 1788); ¶¶ 41, 42 (Treaty of 1793); and ¶¶ 43, 46, 54. New York State also knew that its purported purchases of Onondaga Nation land were made contrary to the long-established practices and laws of the Onondaga Nation and the Haudenosaunee. Wallace Declaration ¶¶ 5, 19, 45.

The United States officially informed the State of New York that congressional approval was required under the Trade and Intercourse Act for the acquisition of Indian land and that transactions lacking such approval were void, but the State nonetheless obtained Onondaga land in knowing violation of that requirement. Lehman Declaration ¶¶ 22, 39, 40; Wallace Declaration ¶ 54. It is clear from this record that the State has acted wrongfully and does not have "clean hands" to invoke equitable defenses.

Although no judicial relief was possible, the Onondaga Nation Chiefs immediately protested, repeatedly and strongly, against New York's illegal and deceitful acquisitions of Onondaga Nation land. Lehman Declaration ¶¶ 5, 7, 10, 14, 30, 60; Wallace Declaration ¶¶ 31,

42. The Onondaga Nation and the Haudenosaunee also appealed promptly to the United States for help in dealing with New York's illegal transactions. Lehman Declaration ¶¶ 24, 27, 28, 32; Wallace Declaration ¶ 55. The protests and appeals of the Onondaga Nation and the Haudenosaunee resulted in repeated assurances that New York's transactions in violation of the Trade and Intercourse Acts were void and that the United States confirmed the Nation's land rights. Lehman Declaration ¶¶ 35, 37, 41; Wallace Declaration ¶¶ 4, 57, 58, 63. These facts are set out in detail in Plaintiff's Response to Defendants' Statement of Material Facts ¶¶ 34-36.

New York State deliberately deceived the Onondagas with whom it dealt about the transactions of 1788, 1793, and 1795, telling them that the lands were merely leased and not sold. Lehman Declaration ¶¶ 45-58; Wallace Declaration ¶ 33. As a result, Onondaga leaders and citizens of the Nation have continuously believed and understood that most of the Nation's lands were leased and still owned by the Nation. Declaration of Tadadaho Sidney Hill ¶ 37 (Hill Declaration); Wallace Declaration ¶ 37.

Though resort to the courts was not possible in any event, the Haudenosaunee, including the Onondaga Nation, had a centuries-old practice of dealing with disputes diplomatically through government-to-government negotiations. Wallace Declaration ¶ 9; Hill Declaration ¶ 27, 29. The land issues of the Haudenosaunee during this period were issues of major political importance to be settled by negotiation between the legitimate representatives of sovereign governments. Wallace Declaration ¶ 47. Article VII of the Treaty of Canandaigua of 1794 (7 Stat.44), a treaty still in force today, reflects this method of resolving disputes. Hill Declaration ¶¶ 29, 30, 31. New York State encouraged the Onondaga Nation, to negotiate its differences with the State about land rather than to take other measures. Wallace Declaration ¶ 4, 10.

Thus, during this period of 1790 to 1830, the Onondaga Nation and the Haudenosaunee acted vigilantly and strongly to protest and seek redress for the taking of the Nation's lands. They were persistent in their efforts despite the fact that judicial remedies were not available and both the Federal and State governments were unresponsive to their protests and appeals. They did everything that could be done. But they were soon to enter an even darker period.

Efforts to remove the Onondagas and other Nations of the Haudenosaunee and settle them west of the Mississippi River began early in the century and continued strongly until about 1845. These efforts were almost entirely unsuccessful, and the Onondaga Nation remained on its traditional lands. Wallace Declaration ¶¶ 64-70. The State policy and, later, federal policy turned to allotment, the practice of taking the land of Indian nations and distributing it among the members or families of the Indian nation. New York State adopted allotment legislation in 1849. Congress passed the Dawes Act in 1887. The Onondagas rejected allotment, because it threatened the Nation's land base and because, without land, the Nation's sovereignty was at risk. Bieder Declaration ¶¶ 5-19. From 1849 to 1914, the Nation was compelled to resist and oppose bill after bill seeking the allotment of the Nation's lands, and overwhelming political sentiment favored allotment of the remaining Onondaga land. *Id.*

The *Boylan* case, decided by the federal District Court in 1919, ruled that transfers of Indian land in New York without compliance with the Trade and Intercourse Act were void. *United States v. Boylan,* 265 F.2d 165 (2d Cir. 1920). In response, the New York legislature created the New York State Indian Commission to examine this question, and this Commission gave the Onondaga Nation a fresh opportunity to express its claims to its lands. Bieder Declaration ¶¶ 20, 40. The Onondaga leaders clearly stated their land claims and also demonstrated that they had not acquiesced in New York's taking of the Nation's lands. Bieder

Declaration ¶ 39. New York State and the public were yet again put on notice of these land claims. Bieder Declaration ¶¶ 36-38. The Commission's report concluded that the Six Nations held title to about half of New York State. Bieder Declaration ¶¶ 37-38.

The Commission helped to motivate a fresh effort to take legal action on the Nation's land claims and the claims of the Haudenosaunee. This effort led to the *Deere* case described above. Though the *Deere* case ended the possibility of court action on the Nation's claims, the Onondaga Nation and the Haudenosaunee persisted in their efforts, making repeated appeals in congressional hearings for United States support. Bieder Declaration ¶¶ 51-63. A powerful and detailed written Petition by the Haudenosaunee, stating the land claims of the Onondaga Nation and other Iroquois Nations, was submitted to Congress and printed in the hearing record in 1929 and again in 1930. Bieder Declaration ¶¶ 56-58, 63. Again in 1948, Onondaga Nation Chiefs stated their land claims against New York in U.S. Senate Hearings. Bieder Declaration ¶¶ 64-70.

After the *Oneida* decision in 1974, the Onondaga Nation as part of the Haudenosaunee began efforts to assert its claims to its illegally taken lands and to seek a negotiated resolution. *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974); Declaration of Robert T. Coulter (Coulter Declaration) ¶¶ 6-10. It was not until 1985, that the courts resolved some of the remaining substantial issues and established that Indians had a cause of action arising from a violation of the Act, and that there was no statute of limitations on such claims. *County of Oneida v. Oneida Indian Nation,* 470 U. S. 226 (1985). Additional questions remained, such as appropriate remedies, state immunity, and liability for land takings prior to the Trade and Intercourse Act. The Nation monitored these developments, waiting to see whether a federal law suit could succeed. Coulter Declaration ¶¶ 6-11.

The Onondaga Nation and the Haudenosaunee Lands Committee sought negotiations and at the same time worked to stave off a number of grave threats to the Nation's land rights. They fought to overcome or limit the federal power to "extinguish" Indian land title without compensation and the "plenary power" of Congress over Indian lands. Coulter Declaration ¶¶ 18-29.

The Onondaga Nation, between 1976 and 2005, was compelled to litigate in case after case to protect its land rights from extinguishment or adverse decisions. As a part of the Haudenosaunee, the Nation defended its land interests in five major federal cases, exhausting its financial and legal resources. Coulter Declaration ¶¶ 30-55. Nevertheless it sought to take action on the Nation's particular land rights and sought federal help in order get legal assistance and other needed assistance. Efforts to get financial assistance and efforts to find other legal resources failed. Coulter Declaration ¶¶ 58-62.

Beginning in 1989 and continuing to the present time the Nation asked repeatedly, in writing and in many meetings, for the United States to provide litigation support for the Nation, that is, to file suit against the State of New York in support of the Nation's land rights. The United States has never made a decision on that request. The Nation waited for this crucial assistance for years, believing that the United States would file suit on behalf of the Nation as it had done in nearly every one of the previous Trade and Intercourse Act suits in New York. Coulter Declaration ¶¶ 62-71.

Throughout this period the Nation was aware that there was no statute of limitations on Indian lawsuits for title to land, and, understandably relied on the assurances provided by the act of Congress, 28 U.S.C. §2415, and by the Supreme Court's decision in *Oneida II*. Coulter Declaration ¶¶ 81-83.

In 1988, the Nation renewed its efforts to negotiate a resolution with the State of New York. It was not until 1998 that a brief period of negotiations with the State was begun. Coulter Declaration ¶¶ 72-83. The Governor's office insisted that further negotiations could not be conducted until the Nation filed its suit in court. Coulter Declaration ¶ 83; Hill Declaration ¶ 33.

This lawsuit is not disruptive, and that is due in part to the communications campaign that the Nation began in 1995 to build public understanding about the Nation and its land rights. Coulter Declaration ¶¶ 87-90; Hill Declaration ¶¶ 22, 23, 40. Responses to the Nation's suit have been largely positive and supportive, particularly with regard to the Nation's goals of environmental clean-up and rehabilitation of the land and waters. There have been no substantial disruptions. Heath Declaration ¶¶ 8-34. Relations with the surrounding community are harmonious, and nothing suggests that this would be disrupted by a declaratory judgment in favor of the Nation. Heath Declaration ¶¶ 35-50.

The Nation seeks a just resolution that will be non-disruptive. Hill Declaration ¶¶ 19-22, 27. The Nation is primarily concerned with the damage to the lands caused by the corporate defendants through dumping of toxic wastes and mining. Heath Declaration ¶¶ 51-58.

The Onondaga Nation maintains a strong demographic, cultural, legal and political presence in the lands that were taken by the State of New York, and this goes far to show that the Nation has not acquiesced in the taking and that a declaratory judgment in the Nation's favor would cause little or no disruption. The majority of all Onondagas continue to live in the aboriginal territory of the Nation and continue to use and go upon these lands, including some of the lands taken by New York, for hunting, fishing, and medicinal and cultural plant gathering. Hill Declaration ¶¶ 4, 11-14. Onondaga Lake is particularly important to the Nation as the place where the Haudenosaunee was formed. Hill Declaration ¶13. The federal, state and local

governments have acknowledged the continuing ties of the Onondaga Nation to many areas within the land that is the subject of this action by consulting with the Nation with regard to the impacts caused by development projects on cultural resources significance to the Nation. Heath Declaration ¶¶ 37-39.

The historical and factual evidence set forth in specific detail and supported by historical documentation in the seven Declarations shows that practically all of the allegations and assumptions that Defendants rely upon are incorrect and are controverted by substantial evidence. In making the determination whether a trial or evidentiary hearing is warranted, the Court must view the pleadings and submissions, particularly the declarations, in the light most favorable to the party opposing summary judgment. *Anderson* v. *Liberty Lobby*, 477 U.S. at 255 ("evidence of nonmovant is to be believed and all reasonable inferences are to be drawn in his favor"); *United States* v. *Diebold, Inc*., 369 U.S. 654, 655 (1962); *Miner* v. *City of Glens Falls,* 999 F.2d 655 (2d Cir. 1993). In assessing the summary judgment record, a court is required to resolve all ambiguities and draw all factual inferences in favor of the party opposing summary judgment. *Chambers* v. *TRM Copy Ctrs Corp.,* 43 F.3d 29(2d Cir. 1994).

The determination of historical facts, especially, is the proper function of the trier of fact, not a question to be decided on a motion for summary judgment. *See* William W. Schwarzer, Alan Hirsch & David J. Barrans, *The Analysis and Decision of Summary Judgment Motions,* 139 F.R.D. 441, 455 (1992). The disputed issues of fact are principally issues of historical fact, including whether the Nation acted reasonably in protesting repeatedly to New York State and to the United States, whether the Nation had an opportunity to bring a lawsuit at an earlier time, whether the Nation was justified in its understanding that the Syracuse area had been leased rather than sold, whether the Nation ever acquiesced in New York State's takings of its lands,

and whether New York State was on notice that its conduct was in violation of federal law and was dishonest and fraudulent toward the Onondaga Nation, among other factual issues. The determination of such historical facts and making the necessary inferences from the evidence presented are not matters to be decided by summary judgment. *Anderson* v. *Liberty Lobby*, 477 U.S. at 255.

The determination of the many issues relevant to the defenses of laches, acquiescence and impossibility demands a full evidentiary hearing to present the full body of historical evidence and the testimony of expert witnesses. The Nation cannot fully and fairly present its case against laches, acquiescence, and impossibility without the testimony of expert witnesses, without discovery to obtain other crucial information and documents, and without some additional time to complete research in the National Archives and other repositories. The Nation is entitled to an opportunity to present all its evidence and to have a full evidentiary hearing at which all the evidence on these factual issues can be weighed and evaluated by the Court.

If the Court finds that the evidence presented in opposition to summary judgment leaves any doubt about the existence of genuine issues of material facts, then the Nation requests, at is has done in separate motion papers, a continuance pursuant to Rule 56(f), Fed. R. Civ. P., to permit discovery and to permit further research on the historical issues relating to laches, acquiescence, impossibility and disruptiveness. The evidence presented at this time is only a portion of what could be adduced if Plaintiff had an opportunity for discovery and further research.

VIII. THE ONONDAGA NATION'S SUIT IS NOT BARRED BY THE SOVEREIGN IMMUNITY OF NEW YORK STATE

The State argues that its sovereign immunity from suit, as confirmed by the 11th Amendment to the Constitution, precludes this Court from exercising jurisdiction over the Onondaga Nation's claims. In asserting that its Eleventh Amendment immunity requires dismissal of the Nation's suit, the State unashamedly attempts to evade all responsibility for its unlawful actions in obtaining the Nation's land and shift that responsibility entirely to the non-state defendants.[1] The Nation's Complaint states facts that show a decades-long pattern of bad faith by the State in acquiring Indian land in violation of federal law and through deceitful means. Complaint ¶¶ 34, 39, 43, 53. These material facts are deemed true for purposes of this motion. *Atlantic Mut. Ins. Co. v. Balfour Maclaine*, 968 F.2d 196, 198 (2d Cir. 1992).

Though the State has profited enormously from its duplicitous conduct, it now seeks to avoid a judicial determination of the legality of its actions. Rather, than confront and resolve this dispute on its merits, the State retreats behind the veil of alleged 11th Amendment immunity. Manifestly, this not a case where the "King Can Do No Wrong," as the fictional rationale for the sovereign immunity doctrine originally had it. *Comm'rs State Ins. Fund v. United States*, 72 F. Supp. 549, 552 (N.D. N.Y. 1947). Nothing in the Supreme Court's 11th Amendment immunity jurisprudence requires this Court to deny the Onondaga Nation its day in court. On the contrary, well-established principles of the sovereign immunity doctrine provide ample basis for the exercise of this Court's jurisdiction. The State's motion should be denied.

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[1] The Onondaga Nation formally requested that the State waive its immunity so that the Nation's claims could be determined "in the interest of fairness toward the other defendants and in the interest of justice." Complaint at ¶ 8. The State's only response is this motion.

Three reasons are sufficient to deny the State's motion: 1) because it seeks only a declaratory judgment, by definition a non-coercive remedy, the Onondaga Nation's suit does not directly implicate the state dignity concerns protected by the Eleventh Amendment; 2) Congress, pursuant to its War Powers authority under Article I of the Constitution, has abrogated the State's immunity in the Trade and Intercourse Act; and 3) the Nation's claims against Governor George Pataki may proceed under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908) and its progeny.

A. The Relief Sought by the Onondaga Nation Does Not Impermissibly Intrude on the Dignity of New York State and Is Not, Therefore, Barred by the Eleventh Amendment

The twin purposes of the Eleventh Amendment are to protect the treasuries of the states from unconsented judgments and to protect the dignity of the states in the federal system. *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002). The Supreme Court has established that these purposes are the "prime guide" for determining the reach of the Eleventh Amendment. *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994). Here, the first purpose is not implicated, because the Onondaga Nation does not seek money damages. The second purpose is not implicated because a non-coercive declaration of title is not the kind of affront to the dignity of the state that would call for a strict application of the Eleventh Amendment. For these reasons, the narrow scope of the relief the Onondaga Nation seeks should inform this Court's determination of the questions discussed *infra,* whether Congress has abrogated New York State's immunity in the Trade and Intercourse Act, and, alternatively, whether the suit may proceed on the basis of *Ex parte Young*.

Suits requesting specific relief such as the recovery of property or monies, ejectment from land, or an injunction directing or restraining the State's actions plainly implicate immunity principles because of the coercive nature of that relief. *Larson v. Domestic & Foreign*

Commerce Corp., 337 U.S. 682, 688 (1949). The Onondaga Nation's declaratory judgment action, by contrast, seeks neither damages nor injunctive relief. In fact, it asks for no coercive relief at all. The suit does not seek ejectment, and thus the State would not be dispossessed. Rather, the Nation's suit requests only a declaratory judgment that the transactions by which the State acquired the Nation's land are unlawful and that the title of the Onondaga Nation is confirmed. Complaint, Prayer for Relief ¶¶ A, B.

A judgment in favor of the Onondaga Nation would do no more than declare the rights of the parties to the subject land. There is less need for 11th Amendment protection when the suit does not seek to subject the state to "the coercive process of judicial tribunals." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

The entry of judgment would in legal effect confirm Onondaga title to certain lands to which the State has record title. Confirmation of bare fee title, however, would not disturb the State's possession nor require the State to take affirmative steps divesting itself of any state interest.[2] The Onondagas do not ask this Court to cancel the State's deeds to the subject land, or to reformulate the State's record title, or to execute any documents transferring the land to the Nation, to nullify any State jurisdiction, or invalidate any state regulatory statutes.[3]

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[2] The United States claims to hold underlying fee title to virtually all Indian land in the country, with the Indian nations holding "a right of occupancy." *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 234 (1985). Except where the United States seeks to extinguish the Indian right of occupancy, these distinct classifications of legal interests in land harmoniously co-exist. Just as the United States may assert title to lands possessed by Indian tribes, so here the Onondaga Nation may assert title to lands possessed by the State of New York. The Onondaga Nation has renounced any intention to seek to dispossess the State of New York, and there is considerable legal doubt about whether an Indian nation holding naked fee title would have that authority in any event.

[3] In the nature and scope of relief sought, this case closely resembles the kind of *in rem* actions that traditionally are not barred by sovereign immunity principles. *See, e.g., California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506 (1998) (sovereign immunity bars *in rem* actions only when it is necessary to invade the possession of the sovereign "under process of the court."); *Hood v. Tennessee Student Assistance Corp.*, 541 U.S. 440, 45-451 (2004) (*in rem* actions do not implicate state sovereignty

A declaratory judgment is ideally suited to address the historic wrong alleged in this action. As "merely a declaration of legal status and rights," a declaratory judgment neither mandates nor prohibits state action." *Perez v. Ledsma*, 401 U.S. 82, 1214 (1971). The purpose of the Declaratory Judgment Act was to provide the means for clarifying legal relations and recognizing the plaintiff's rights "even though no immediate enforcement was asked." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-672 (1950). A lawsuit seeking declaratory relief only is a "cooperative proceeding, in which the court merely assists the parties to settle their own differences by stating to them the rules of law which govern them." Edson R. Sunderland, "A Modern Evolution in Remedial Rights – The Declaratory Judgment, 16 *Mich. L. Rev.* 69, 76 (1917). A declaratory judgment action serves a "peacekeeping function" and asks the court to resolve a legal and/or factual question while leaving the parties to abide by it without the court "having either to determine how much one party owes another or to oversee one party under an injunction." Elizabeth L. Hisserich, "The Collision of Declaratory Judgments and Res Judicata," 48 *U.C.L.A. L. Rev.* 159, 162 (2000).

From the perspective of the Onondaga Nation, the issuance of a declaratory judgment here represents the first step toward an amicable resolution of the Nation's land rights disputes with the State of New York. This suit is the beginning of a process to achieve a just resolution of its claims. This action does not offend the dignity of the sovereignty of the State of New York to the degree required for a strict application of the Eleventh Amendment. This fact should inform the analysis of the two questions that follow.

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to the same degree as other kinds of jurisdiction).

B. Pursuant to its Constitutional War Powers Authority, Congress Has Abrogated New York State's Immunity in the Trade and Intercourse Act

Congress has abrogated New York's immunity in the Trade and Intercourse Act pursuant to its constitutional war powers authority. The first step in the analysis is whether Congress "has unequivocally expressed its intent to abrogate immunity," and the second step is whether Congress has acted "pursuant to a valid exercise of power." *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996) (internal quotations omitted). Both parts of the analysis are satisfied here.

1. Congress Has Unequivocally Abrogated New York State's Immunity In the Trade and Intercourse Act

The Trade and Intercourse Act provides that no acquisition of Indian land from any Indian nation "shall be of any validity in law or equity" unless the transaction is made "by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. The analysis of congressional intent in the Act "must take into account its contemporary legal context," and it should be assumed that Congress was familiar with that context when it enacted the statute. *Cannon v. University of Chicago*, 441 U.S. 667, 698-699 (1979); *Central Virginia Community College v. Katz*, 126 S.Ct. 990, 996, n.3 (2006). Here, the terms of the Act and its contemporary legal context show unequivocally that Congress intended that Indian nations be able to enforce the Act against the States if federal court jurisdiction was otherwise available.

For 11th Amendment purposes, it was not necessary for Congress to provide for federal court jurisdiction in the language of the Act itself. The Second Circuit has held that immunity abrogation rules adopted after the 11th Amendment was enacted should not be applied to statutes enacted before the Amendment. *County of Monroe v. Florida*, 678 F.2d 1124, 1133 (2d Cir. 1982) (It was not necessary for the Federal Extradition Act to expressly abrogate 11th Amendment immunity because it was enacted in 1793, before the adoption of the Amendment).

The Act's focus on state liability for violations was sufficient for the court to conclude that Congress intended to abrogate state immunity.

The same principle applies here. By its express terms the Trade and Intercourse Act applies to "any state, whether having the right of preemption to such lands or not." 1 Stat. 137 (1790). By declaring certain Indian land transactions void, Congress necessarily contemplated that the issue of voidness as against the states under the criteria of the Act would at some point be litigated. *See, e.g., Oneida Indian Nation of New York v. County of Oneida*, 719 F.2d 525, 535 (2d Cir. 1983), *aff'd on other grounds*, 470 U.S. 226 (1985) (relying on congressional intent to find implied private right of action under the Trade and Intercourse Act); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18-19 (1979). As the Supreme Court has observed, "[a] person with the power to avoid a contract ordinarily may resort to a court to have the contract rescinded. . . ." *Id*., 444 U.S. at 18. Thus, it is doubtful that Congress in 1790 believed that the states' immunity could defeat this customary legal incident of voidness.[4] Without the ability to overcome the states' immunity, Indian nations, as the principal beneficiaries of the Act, would have been unable to enforce its terms against one of the gravest threats to the security of their lands. *Mohegan Tribe v. Connecticut*, 638 F.2d 612 (2d Cir. 1981), *cert. denied*, (Act applies to states, not just to land within "Indian country"). In other words, absolute state immunity would have made the Act largely meaningless, a result that Congress did not intend. *See, e.g., County of Monroe v. Florida*, 678 F.2d at 1134 (2d Cir. 1982). State

[4] The fact that the federal courts were not open to Indian nations at that time is not relevant to this analysis, because it is Congress' perception of the legal context that is determinative, not whether its perception was correct. *See Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378, n.61 (1982).

immunity would frustrate the principal purpose of the Act, "to protect the rights of Indians to their property." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664 (1979).

The Trade and Intercourse Acts were enacted in a legal climate in which unfair and fraudulent state treaties to obtain Indian lands in defiance of the national government's authority threatened the peace of the United States. The Constitution nationalized congressional authority over Indian affairs in the Constitution in part as a response to uncontrolled state land transactions with Indian nations during the Articles of Confederation period. James Madison included among the vices of the Articles of Confederation government the inability of the confederal authorities to restrain Georgia's treaties with Indian nations, which risked a general Indian war in the South. "The Vices of the American Political System," Rutland, et al, eds., 9 *Papers of James Madison* 348 (1986). Secretary of War Henry Knox, who first proposed to President Washington a national law to regulate Indian land transactions, based the rationale for such a statute on the pressing need to control land deals as a means to secure the peace:

> It would reflect honor on the new Government, and be attended with happy effects, were a declarative law to be passed, that the Indian tribes possess the right of the soil of all lands within their limits, respectively, and that they are not to be divested thereof, but in consequence of fair and bona fide purchases, made under the authority, or with the express approbation, of the United States.
>
> As the great source of all Indian wars are disputes about their boundaries, and as the United States are, from the nature of the government, liable to be involved in every war that shall happen on this or any other account, it is highly proper that their authority and consent should be considered as essentially necessary to all measures for the consequences for which they are responsible.
>
> No individual state could, with proprietary, complain of invasion of its territorial rights. . . . Each individual state, indeed, will retain the right of pre-emption of all lands within its limits, which will not be abridged; but the general sovereignty must possess the right of making all treaties, on the execution or violation of which depend peace or war.

Secretary of War Henry Knox to President George Washington, July 7, 1789, *American State Papers,* I *Indian Affairs*, 52-53 (1832). Madison's and Knox's views about the rationale for the first Trade and Intercourse Act are perhaps the best evidence of congressional intent, because there is almost no legislative history, and certainly none to contradict their views, to guide this determination. Moreover, the absence of legislative history makes it particularly appropriate to assume that Congress was aware of this rationale, and acted on that premise.

Congress' failure to explicitly consider state immunity is not inconsistent with an intent to require that the Act be enforced notwithstanding such immunity. *See Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. at 18 (Congress failure to expressly provide a right of action is not necessarily inconsistent with an intent to make such a remedy available). Here, the absence of any discussion of state immunity in the legislative history is explained by the fact that in all likelihood Congress assumed such immunity would not be an obstacle to the Act's enforcement, in light of the paramount national goal of maintaining peace with the Indian nations.

The Indian nations' understanding of the purpose of the Trade and Intercourse Act is consistent with the Government's. After President Washington explained the new law to the chiefs of the Seneca Nation, Chief Cornplanter responded that the Indians were nonetheless distrustful of any emissary sent to address land issues, because "the agents that have come amongst us, and pretended to take care of us, have always deceived us whenever we sold lands; both when the King of England and when the States have bargained with us. They have by this means occasioned many wars, and we are therefore unwilling to trust them again." The Speech of Cornplanter, Half-Town, and the Great Tree, Chiefs of the Seneca Nation, to the President of the United States, January 10, 1791, *American State Papers,* I *Indian Affairs* 143.

In light of this legal context, it is inconceivable that Congress would have believed, in the face of grave risks of an Indian war, that the Trade and Intercourse Act would not be enforceable against the states, by whatever means available. The stakes were simply too high to justify a regulatory scheme that left the application and enforceability of the Act to the whims of the individual states whose conduct occasioned the need for the Act in the first place. Under these circumstances, Congress did not intend the states' immunity to bar enforcement of the Act.

2. The Trade and Intercourse Act is a Valid Exercise of Congress' Authority Under the War Powers Clause of the Constitution

The second part of the *Seminole Tribe* test is satisfied as well. Congress' authority to enact the Trade and Intercourse Act may be sustained under the War Powers Clause of Article I of the Constitution. Although it is generally assumed Congress acted pursuant to the Indian Commerce Clause when adopting the Act, the legislative history is silent as to Congress' understanding regarding the source of its power. In any event, "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd Miller Co.*, 333 U.S. 138, 144 (1948). Congressional power may rest on more than one constitutional foundation, and for this reason, the Supreme Court does not require Congress to articulate its reasons for enacting a statute. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *Fullilove v. Klutznick*, 48 U.S. 448, 476 (1980).

Congress has authority under its War Powers to abrogate New York State's immunity to suits to enforce the Trade and Intercourse Act. Although the issue has not been addressed in this Circuit, the First and Fifth Circuits have ruled that Congress has War Powers authority to abrogate state immunity. *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609 (1st Cir. 1996) (Veterans Reemployment Rights Act, which authorized suit against a state, is a legitimate

exercise of Congress' war powers); *Peel v. Florida Dept. of Trans.*, 600 F.2d 1070 (5th Cir. 1979) (same).

Seminole Tribe is not to the contrary. Although that case suggests in *dicta* that Congress may not abrogate state immunity through the exercise of any of its Article I powers, 517 U.S. at 73, subsequent Supreme Court opinions have clarified that other provisions of Article I may be sufficient to support congressional abrogation. *See, e.g., Central Virginia Community College v. Katz*, 126 S.Ct. 990 (2006). In that case, the Court ruled that the Bankruptcy Clause power under Article I was sufficient to support Congress' authorization of suits against states to avoid alleged preferential transfers in bankruptcy proceedings. The Court refused to follow the Article I dicta in *Seminole Tribe* because the "the point now at issue was not fully debated." *Id*. at 995. Similarly, the First Circuit refused to apply *Seminole Tribe* because its holding that Congress lacks power under the Commerce Clause to abrogate state immunity "does not control the War Powers analysis." *Diaz-Gandia*, 90 F.3d at 616, n.9.

Central Virginia Community College provides the analytical framework for the War Powers determination in the Trade and Intercourse Act context.[5] Relying on the history of the Bankruptcy Clause and legislation enacted immediately after the Constitution was adopted, the Court concluded that the States acquiesced in a regulatory scheme that subordinated state sovereign immunity to the paramount goal of a national, uniform bankruptcy system.

The history and implementation of the War Powers Clause mirrors that of the Bankruptcy Clause in the goal of lodging an unfettered federal power in Congress to the complete exclusion

[5] *Alden v. Maine*, 527 U.S. 706, 731 (1999) likewise confirms that Congress may abrogate state immunity where there is "compelling evidence that the states were required to surrender [their immunity] to Congress pursuant to the constitutional design."

of the States. Although the Articles of Confederation in Article 9 granted the Continental Congress the "sole and exclusive right and power of determining on peace and war," Congress' ability to maintain peace with Indian nations was continually threatened by State encroachments on that authority. *See, e.g., Oneida Indian Nation v. State of New York*, 649 F. Supp. 420, 441 (N.D. N.Y. 1986), *aff'd,* 860 F.2d 1145 (2d Cir. 1988) (the Southern states were violating Indian peace treaties and the Articles of Confederation by engaging in war with the Indians). To remedy these problems in the new government, the Constitution explicitly granted expansive war powers to the federal government and prohibited state power in the same area. Article I, § 8, cl. 11; Article I, § 10, cl. 3. In the plan of the convention, authority over matters of war and peace was made a paramount national concern under Congress' exclusive Article I powers.[6] It is reasonable to conclude that state immunity was subordinated to that goal, and that the states, by ratifying the Constitution, implicitly agreed to that result.

Congress was exercising its war powers in enacting the Trade and Intercourse Act. Chief Justice John Marshall explicitly tied the Act to the constitutional war and peace power:

> [The Constitution] confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.

(emphasis in original) *Worcester v. Georgia*, 31 U.S. 515, 562 (1832). There is ample contemporaneous evidence that the impetus for the Act was the need to prevent the outbreak of

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[6] *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), does not preclude a finding that in the War Powers Clause the states acquiesced in the subordination of state immunity to the overriding national goal of a uniform regulation of military affairs. The War Powers Clause was not considered by the Court in that case, which dealt more generally with the question of whether the status of Indian tribes in the Constitution deprived states of their immunity for tribal suits.

hostilities caused by states and private individuals obtaining Indian land by fraudulent means. Secretary of War Henry Knox urged that the law was needed in order to lay "the foundation for justice and peace." Knox to President Washington, July 7, 1789, *American State Papers*, I *Indian Affairs* at 53. Put simply, a major purpose of the Act was to avoid war with Indian nations, who "have constantly had their jealousies and hatreds excited by the attempts to obtain their land." *Oneida Indian Nation of New York v. County of Oneida*, 719 F.2d 525, 534, n.10 (2d Cir. 1983) (quoting Secretary of War Henry Knox to Governor Blount of North Carolina). Noted Indian law scholar Felix Cohen confirms this conclusion, writing that the war powers "underlay much of the federal power exercised over Indian land and Indians during the early history of the Republic." Felix Cohen, *Handbook of Federal Indian Law* at 93 (1942).

One court outside this Circuit has held that Congress did not have authority under the War Powers Clause to abrogate state immunity in the Trade and Intercourse Act. *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281 (5th Cir. 2000). That case should not be followed here, however. Unlike the suit here, that case sought to dispossess the State and was, therefore, unequivocally a suit against the state within the 11th Amendment. In addition, that case was decided before *Central Virginia Community College v. Katz*, 126 S.Ct. 990 (2006), which clarified that Congress had authority under those Article I powers that could be read to subordinate state immunity to the need for federal uniformity in the area of regulation at issue. *Central Virginia Community College* calls into question the continuing validity of the *Ysleta Del Sur Pueblo* ruling. Moreover, the court in *Ysleta Del Sur Pueblo* did not consider the extensive evidence of the war powers rationale for the adoption of the Trade and Intercourse Act. For that reason too, that case is not persuasive authority here.

Congress' purpose in adopting the Trade and Intercourse Act would be nullified if the State of New York were allowed to retain land titles that are made void *ab initio* by the express terms of the Act. It would be anomalous indeed if the State's 11th Amendment immunity, which arose several years after the Act was adopted, were permitted to thwart Congress' intent to protect Indian lands. All of the available historical evidence points to the opposite conclusion: Congress intended to abrogate the State's immunity in the Act, and Congress was exercising its constitutional war powers authority in doing so.

C. Governor George Pataki Is Amenable to Suit Under the Doctrine of *Ex parte Young*

This Court has subject matter jurisdiction over the Onondaga Nation's claims against Governor George Pataki under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). The complaint named the Governor as a defendant in his individual capacity and in his official capacity as Governor. Complaint ¶ 10. The complaint alleges that he asserts title to certain state lands in violation of the Trade and Intercourse Act, and is, therefore, acting beyond the scope of this lawful authority. *Id.* The Onondagas' suit seeks a finding that the Governor's assertion of title is a continuing violation of federal law. The complaint requests a declaratory judgment, a form of prospective relief. Thus, a "straightforward inquiry" into whether the complaint alleges an ongoing violation of federal law and seeks prospective relief leads to the conclusion here that the suit against the Governor may proceed under *Ex parte Young*. *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 645 (2002) (internal citation omitted). *Frew v. Hawkins*, 540 U.S. 431, 437 (2004) ("To ensure the enforcement of federal law, however, the Eleventh Amendment permits suits for prospective injunctive relief against state

officials acting in violation of federal law."); *Alden v. Maine*, 527 U.S. 706, 747 (1999) (the *Ex parte Young* doctrine includes claims for prospective declaratory relief).

Although the Supreme Court has narrowed somewhat the scope of the doctrine, the Court has not questioned its "continuing validity." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997). For example, the Court has ruled that courts should "hesitate" to apply *Ex parte Young* where Congress has intended to limit the remedy through the prescription of "a detailed remedial scheme for the enforcement against the State of a statutorily-created right." *Seminole Tribe*, 517 U.S. at 74. The Trade and Intercourse Act contains no such "detailed remedial scheme." The Supreme Court has found that the Act "did not establish a comprehensive remedial plan for dealing with violations of Indian property rights." *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 237, n. 4 (1985). As a result, the Act falls far short of the *Seminole Tribe* standard for the inapplicability of *Ex parte Young*.

Defendant State of New York argues that *Coeur d'Alene Tribe* precludes the application of the *Ex parte Young* doctrine to the Onondagas' claims against the Governor because the suit implicates the State's "ownership and jurisdiction" over the subject lands. State Memorandum at 14. This argument should be rejected because it is based on an erroneous premise about the nature and scope of the Onondagas' suit, that it seeks to divest the State of possession and of its regulatory jurisdiction over the subject land. This case is distinguishable from *Coeur d'Alene* in two critical respects: first, the Onondaga Nation does not seek to "invalidate all statutes and ordinances purporting to regulate the lands" as the Coeur d'Alene Tribe did; and second, the Nation does not seek to "eliminate altogether the State's regulatory power" nor establish that the State has no right to possession, as the Coeur d'Alene Tribe did. 521 U.S. at 289 (O'Connor concurring). It was these critical features of the relief requested by the Coeur d'Alene Tribe that

made that suit the "functional equivalent of an action to quiet title." *Id.* The Onondaga Nation's suit, which seeks limited declaratory relief only, is far less invasive. No special sovereignty interests of the State of New York are implicated.

Coeur d'Alene Tribe is inapplicable for the additional reason that, unlike Idaho, the courts of the State of New York are not available to hear the Onondaga Nation's federal law claims.[7] Justice Kennedy's approach recognizes the "special obligation" of the federal courts to "ensure the supremacy of federal statutory and constitutional law" when a state forum is not available. 521 U.S. at 270. As a result, when there is no state forum, *Ex parte Young* has "special significance." *Id.* That is the case here. In 1952, Congress stripped New York State courts of any jurisdiction they may have had by adopting 25 U.S.C. § 233. That statute provides that the grant of civil jurisdiction to the State over Indian reservations "shall not be construed as conferring jurisdiction on the courts of the State of New York" in civil actions involving Indian land claims arising before September 13, 1952, the effective date of the statute. The Onondaga Nation claim plainly falls within the terms of that statute, and the State courts are not, therefore, available to hear it.

The State's reliance on *Western Mohegan Tribe and Nation v. Orange County*, 395 F.3d 18 (2d Cir. 2004) is equally misplaced. The Tribe in that case sought to have the subject land restored to it through an order of ejectment, a remedy that is identical to the relief the Coeur d'Alene Tribe sought. *Coeur d'Alene Tribe*, therefore "directly control[led]" the outcome. 395

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[7] The unavailability of a state forum is one factor in Justice Kennedy's case-by-case approach to applying the *Ex parte Young* doctrine. 521 U.S. at 269-280. It is not the controlling approach for the Court, however. 521 U.S. at 298 (dissenting opinion of Justice Souter acknowledging that Justice O'Connor's concurrence is the "controlling" view of the applicability of the doctrine to land rights suits against state officials). This factor is nonetheless analyzed here because it is another way in which the case is distinguishable from the Onondagas' suit.

F.3d at 23. As the Second Circuit noted, the Tribe in *Western Mohegan* was seeking a declaration that in legal effect required a finding "that the lands in question are not even within the regulatory jurisdiction of the State." 395 F.3d at 23. By contrast, the Onondaga Nation seeks no such relief. As explained above, *Coeur d'Alene Tribe* is inapplicable, and therefore *Western Mohegan* is as well.

Because the requirements for an *Ex parte Young* suit are satisfied, the Onondaga Nation's suit is "undoubtedly the most convenient, the most comprehensive and the most orderly way in which the rights of all the parties can be properly, fairly and adequately passed upon." *Ex parte Young*, 209 U.S. at 166.

IX. THE DISPUTE BETWEEN THE NATION AND THE COUNTY, CITY AND CORPORATIONS SHOULD BE DETERMINED AS A MATTER OF "EQUITY AND GOOD CONSCIENCE" IN THE ABSENCE OF A PREDECESSOR IN THE CHAIN OF TITLE TO THE LAND, THE STATE OF NEW YORK

The Onondaga Nation has endeavored for nearly two centuries to re-establish its rights to its aboriginal lands. Having finally been granted the ability to use the courts of the United States, and having observed that the law has developed so as to create this right of action, the Nation seeks now to determine that the Defendants' claims to title to the disputed lands fail because the Defendants' predecessor in the chain of title, New York State, acquired the title intentionally without compliance with federal and state law.

The land which is the subject of this suit is, and has at all times been the property of the Onondaga. Complaint at ¶ 12.[8] The purported conveyances of the Onondaga land to the State of New York, Defendants' predecessor in title, were achieved only by the State's misconduct in violation of state and federal law. *Id.* at ¶¶ 25-43. Defendants Onondaga County, City of

[8] As noted, the facts of its complaint are deemed to be true at this stage of these proceedings. *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996).

Syracuse, Honeywell International, Clark Concrete, Valley Realty Development, Hansen Aggregates, and Trigen Syracuse Energy Corporation, claim to hold title to the land by reason of transfers ultimately from the State; by their use and occupancy, they have polluted and degraded that land. *Id.* at ¶¶ 11-16. These Defendants now seek to prevent the Onondaga Nation from litigating in this court its title to the land occupied and degraded by them. They do so by asserting that a previous claimant to the title of the lands they now claim to own, the State of New York, cannot be joined in the case. If this previous alleged title-holder may not be joined, these remaining Defendants claim that their interests with respect to the interests of the Onondaga Nation, cannot be determined. The Defendants mischaracterize the very nature of this dispute.

The crux of the dispute between the Nation and the Non-State Defendants is that each claims title to the same lands. Both "equity and good conscience" dictate that it would be improper to deny the Nation the opportunity to resolve that dispute simply because a predecessor in title is not a party. Fed. R. Civ. P. Rule 19(b). The Rule requires simply that persons "needed for a just adjudication" of the action be joined. *Id.; see also*, *Advisory Committee Notes* (1966 Amendment).[9] The determination of the identity of those persons is a "pragmatic" one. *Rule 19 Advisory Committee Notes ,*The Amended Rule. A simple, pragmatic analysis reveals that the State is not needed for a just adjudication of disputes over lands to which the non-State Defendants claim title.

[9] The Committee Notes state that the decision on "persons needed for a just adjudication" should be based on "pragmatic considerations which should be controlling", citing *Roos v. Texas Co*. 23 F.2d 171 (2d Cir. 1927). Advisory Committee Notes. The revised rule "uses the word 'indispensable' only in a conclusory sense," that is, whether after the pragmatic analysis required by the rule to identify an absent party "indispensable" to a "just adjudication," it is determined to be "preferable" that the case be dismissed. *Id.*

A. The State of New York Is Not "Needed for Just Adjudication" of Disputes Between the Onondaga Nation and Those Who Currently Claim Title to the Nation's Lands

An entity should be joined if (1) in its absence "complete relief cannot be accorded" among the remaining parties, or (2) the absent party "claims an interest relating to the subject of the action and is so situated that the disposition of the action" may either (i) "impair or impede [its] ability to protect that interest" or (ii) leave any of the remaining parties subject to a "substantial risk" of suffering "multiple or inconsistent obligations." Rule 19(a); *Johnson v. Smithsonian Institution*, 189 F.3d 180, 188 (2d Cir. 1999) (the fact that evidence may be required from an absent party, does not make it necessary to join them); *ConnTech Development Co. v. University of Connecticut Education Properties,* 102 F.3d 677, 682 (2d Cir. 1996) (not necessary to join an entity which is not party to the agreement in dispute when relief may be granted to parties who remain in the action).

The dispute between the Onondaga Nation, on the one hand, and (to use one Defendant as an example) Honeywell International on the other hand, has to do with whether Honeywell or the Onondaga Nation has title to certain land. The State of New York need not be a party to this litigation in order to achieve a "just adjudication" of that dispute; the State of New York is not a "party" to the deed which Honeywell relies upon for its claim of title. *ConnTech Development, supra; Sakaogon Chippewa Community v. Wisconsin*, 879 F.2d 300, 304 (7th Cir. 1989) (if Tribe has good claim to land, it should not be barred from proceeding by an inability to sue an entity remotely involved in dispute); *ABKCO Music, Inc., v. La Vere,* 217 F.3d 684, 687 (9th Cir. 2000)(persons who have relinquished their interests in property or whose interests are not actually affected by the suit are not "indispensable"); *R.C. Hedreen Co. v. Crow Tribal Housing Authority*, 521 F.Supp. 599, 609 (D. Mont. 1981)(entity who assigned all rights in contract, no

longer has any interest to protect). As Judge Posner of the Seventh Circuit stated in a dispute where a Tribe sought to reclaim land to which the United States had once claimed title:

> To exaggerate slightly (because the U.S. appears to be in occupation of some of the land . . .), it is as if every time someone claimed that someone else was encroaching on his property he would have to sue not only the alleged encroacher (here Exxon) but also the alleged encroacher's predecessors in title right back to King James or Lord Baltimore (here the U.S.). So far as can be determined from an utterly inadequate record, the relationship of the U.S. to the Indians' controversy with Exxon and the other occupiers of the land in derogation of the Indians' alleged occupancy rights is that of a predecessor in title (to Exxon), no more.

Sokaogon Chippewa v. Wisconsin, 879 F.2d at 304.

The Non-State Defendants assert that the State's interest in the treaties by which it unlawfully claimed Onondaga land, makes the State a necessary party. Non-State Defendants Memorandum at 12. The Defendants miss the point. A resolution of the dispute over title between a corporate defendant and the Nation will not bind New York State; the State may defend its treaties at some other time, if it so chooses, without being subject to this Court's ruling. *Provident Tradesmens Bank & Trust v. Patterson*, 390 U.S. 102 at 109-111 (a judgment is "not *res judicata* as to, or legally enforceable against a nonparty").[10]

In addition, the fact that evidence concerning the State of New York's fraudulent and conniving acts in securing those treaties will be introduced in this proceeding similarly does not mandate the State's presence as a party. *Johnson v. Smithsonian,* 189 F.3d at 188 (the question

[10] The cases cited by the Defendants all involve disputes between parties to the challenged transactions. *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341 (6th Cir. 1993)(Indian Tribe challenged claims of two absent Tribes to fishing rights in the same lake; absent tribes were indispensable); *Kickapoo Tribe v. Babbitt,* 43 F.3d 1491 (D.C.Cir. 1995)(the state, the absent party, was a party to the gaming compact at issue in the dispute); *Bay Mills Indian Comm. v. Western United Life Ins.,* 1998 US Dist. LEXIS 20782 (W.D. Mich 1998)(the absent Tribe was indispensable because it had an "equally strong claim" to title to the land in dispute); *Seneca Nation of Indians v. New York,* 383 F.3d 45 (2d Cir. 2003)(the Senecas challenged an easement held by New York; the State obviously, is an essential party to a dispute over the validity of its easement). The Defendants do not claim that New York holds title jointly with Honeywell, or the County of Onondaga, or any other Non-State defendant; the State is simply not a party to these disputes.

of whether an entity should be a party is "quite different" from the "problems associated with obtaining evidence from such an entity").

The State of New York "has not appeared and asserted that its interests cannot be protected without its presence as a party." *Johnson v. Smithsonian,* 189 F.3d at 189. In fact, the State has sought affirmatively to be dismissed from this case. *See also, United States v. San Juan Bay Marina*, 239 F.3d 400, 407 (1st Cir. 2001) (absent party's decision not to intervene indicates it does not deem its interests threatened). The State claims no title interest in lands of the county, city or corporations.[11] And there is no risk to Honeywell or any of the other title claimants that they may be subject to multiple or inconsistent claims.[12] Thus here, as in *Johnson*, it is clear that "just adjudication" of the disputes between Onondaga and the

[11] The Defendants claim that the State's "sovereign interests" are in jeopardy. They rely for this claim on a motion filed in a federal court in Pennsylvania, which the Defendants mischaracterize and refer to as a "holding" by a court. Non-State Defendants Memorandum at 14, citing "Motion to Dismiss Complaint" filed by landowners in a case entitled *Delaware Nation v. Pennsylvania*, not published in an official reporter, and found at 2004 WL 3660518. A motion filed by a party is not a "holding" by a court. The Onondaga Nation chooses to assume that the defendants' mischaracterization was negligent, and not intentional. The only other case cited by Defendants on this curious point has nothing to do with "sovereign interests." *Carlson v. Tulalip Tribes*, 510 F.2d 1337 (9th Cir. 1975) found that the United States was a necessary and indispensable party to a boundary dispute involving land held in trust by the United States. *Id*. at 1339. That was an actual "holding" and was hardly surprising, but is of no relevance here.

[12] Without citation to any authority, and based wholly on their own speculation, the Defendants state a fear that they will be subject to "inconsistent claims of sovereignty" if the court declares that the defendants' claims to title are void. Speculation about possible events which may or may not occur in the future is not a legal basis for dismissal of this litigation. *Francis Oil & Gas Inc. v. Exxon Corp*, 771 F.2d 873, 877 (10th Cir. 1981)(the "risk" of incurring inconsistent obligations must be substantial, a real likelihood rather than a theoretical possibility). The scope of "sovereignty" is a complex question, one well beyond the scope of this motion; it suffices to say that federal law does not recognize the right of any Indian nation to exercise the full authority of a sovereign over lands to which it holds bare fee title, i.e., lands which are not held in trust for the Nation or otherwise considered to be within "Indian Country." *See generally, Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998)(extended discussion of boundaries of Indian Country); *see also, Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)(no tribal criminal jurisdiction over non-members); *Nevada v. Hicks*, 533 U.S. 353 (2001)(limitations on tribal civil jurisdiction over nonmembers). The Onondaga Nation has not sought, as relief in this action to displace the State's "sovereignty."

Defendants other than the State, may be achieved without New York. *Johnson v. Smithsonian,* 189 F.3d at 188-189.

For these reasons, the Non-State Defendants' motion to dismiss for failure to join the State of New York should be denied. *Id.* at 188-189 (where party is found not to be "necessary," the inquiry ends and the motion to dismiss should be denied).

B. Even If it Is Found That New York Should Be Joined If Feasible, as a Matter of "Equity and Good Conscience" this Action Should Proceed in its Absence

If the Court concludes that somehow New York's presence as a party is required, there is a second inquiry: "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Rule 19(b).

This Court must analyze four factors and, in the end, determine whether in "equity and good conscience" the action should proceed in the absence of New York State. *Associated Dry Goods Corp. v. Towers Financial Corp*., 920 F.2d 1121, 1124 (2d Cir. 1990). The factors are: (1) the extent to which a judgment would prejudice either the State or the parties present before the court, (2) the extent to which any such prejudice may be reduced or avoided, (3) whether a judgment rendered in the absence of the State would be adequate for the remaining parties, and (4) whether if the action is dismissed, the Onondaga Nation would have an adequate remedy elsewhere. *Id*.

A pragmatic examination of the four "overlapping" factors reveals that this action should proceed even without the State. Rule 19, *Advisory Committee Notes*, "Amended Rule" ("The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations.")

1. A Judgment Declaring the Respective Rights of the Onondaga Nation and the County, the City, or a Corporation, Would Have No Effect on Lands to Which New York Claims Title, and Would Certainly Not "Prejudice" the State or the Remaining Defendants

If the State of New York is absent from the lawsuit because it has declined to participate and the Court grants its request to be dismissed, any judgment declaring the respective rights to the Onondaga Nation's land will be applicable for all those lands except those to which the State claims title. Because the State's claims to title will be unaffected, the State will suffer no prejudice. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. at 110; *see, Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983) (the State of Washington is not a necessary party, and the United States is neither necessary nor indispensable party in Tribe's land claim action); *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, 460-61 (10th Cir. 1951)("equity and good conscience" require that the Tribe's claim to lands be resolved in the absence of the United States, a necessary but not indispensable party); *Sokaogon Chippewa Community v. Wisconsin,* 879 F.2d at 304 (if Tribe has good claim to land, it ought not be barred from prosecuting it by inability to sue an entity remotely involved in dispute); *Red Lake Band of Chippewas v. City of Baudette*, 730 F.Supp. 972, 980 (D.Minn. 1990) (Tribe brought land claim against State of Minnesota, a city, school district and private entities; neither State nor United States were deemed necessary or indispensable parties); *Narragansett Tribe v. Southern R.I. Land Development Corp.,* 418 F.Supp. 798, 813 (D. R.I. 1976)(United States not a necessary or indispensable party to Tribe's land claim action against State and private defendants); *see also, Oneida Indian Nation v. County of Oneida*, 414 U.S. at 783 (Rehnquist concurring) (with respect to whether U.S. is indispensable party, " . . the grant of a land patent to a private party carries with it no guarantee of continuing federal interest . . . ;" a federal source of title "does not convert an ordinary ejectment action into a federal case."); *see, Oneida Indian Nation v. County*

of Oneida, 434 F.Supp.527, 544 (N.D. N.Y. 1977)(United States not an indispensable party to land claims action and tribe should not be prevented from pursuing claim by unwillingness of United States to join in, or file on its behalf), *aff'd,* 719 F.2d 525 (2d Cir. 1983), *aff'd in part and reversed in part on other grounds*, 470 U.S. 226 (1985); *see also, Mahaffey v. Alexander*, 800 So. 2d 1284, 1286 (Ct. App. Miss. 2001) (applying State law modeled after the federal rules in land claim dispute, the court held that "persons who no longer claim any interest in the property, having conveyed it away" are neither "indispensable nor even proper parties"). The remaining Defendants suffer no prejudice in having their disputes with the Nation resolved in this action; the fact that the State may appear in the chain of title to other defendants' lands, does not make the State's participation in this action essential.[13]

2. A Declaratory Judgment Resolving the Dispute over Title to the Lands Claimed by the Onondaga Nation Would Be Adequate for the Parties Remaining in the Case

To use Honeywell again as an example, the dispute which would be resolved in the absence of the State is whether as between Onondaga and Honeywell, Honeywell's title is good despite the (admitted) connivance and unlawful conduct of Honeywell's predecessor in title. A declaratory judgment resolving that dispute would be entirely adequate for the parties remaining in the case. *See, Universal Reinsurance Co. Ltd., v. St. Paul Fire and Marine Insurance Co.*, 312 F.3d 82, 88 (2d Cir. 2002)(relief is "adequate" when, if found appropriate, the claimant will be able to "recover complete relief" from the parties before the court).

[13] The State suffers no prejudice by absenting itself from this case. The remaining Defendants suffer no prejudice by the absence of the state; they simply are required to defend against the Onondaga's evidence that their title is void. Thus, the second factor in the analysis, reducing any prejudice, is inapplicable here.

3. If this Action Is Dismissed Due to the Absence of the State, the Onondaga Nation Will Have No Adequate Remedy Elsewhere

The lack of an alternative forum weighs heavily against dismissal. *Pasco International v. Stenograph Corp.*, 637 F.3d 496, 5601 n. 9 (7th Cir. 1980); *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1260 (10th Cir. 2001) (noting that "[t]he absence of an alternative forum would weigh heavily, if not conclusively against dismissal" and finding absent Indian tribe not indispensable on that basis)(internal cites omitted). The Non-State Defendants' suggestion that the Nation may always turn to Congress and plead for legislative relief misses the point of the rule: the question here is whether the Onondaga Nation has an alternative forum which is capable of granting a declaratory judgment. *Pit River Home and Agricultural Coop. Assoc. v. United States*, 30 F.3d 1088, 1103 (9th Cir. 1994)(issue is whether there is alternative forum in which tribe may "seek injunctive and declaratory relief against the government"). There is no state or other court, or administrative forum capable of granting a declaratory judgment. *PaineWebber Inc. v. Cohen*, 276 F.3d 197, 205 (6th Cir. 2001)(state court qualifies as "alternative forum"); *Laker Airways Inc. v. British Airways*, 182 F.3 843, 849 (11th Cir. 1999)(administrative remedy is also an "alternative forum").

The Onondaga Nation seeks a forum which will resolve this dispute; the United States courts, if they hear the case on the merits, will either grant or deny the Nation's request for a declaratory judgment. Congress, on the other hand, is not compelled to listen, to weigh the evidence, or to render a judgment. There is no other forum.

In sum, the State need not be joined to achieve a just adjudication of disputes over lands in which the State claims no interest; and the State's voluntary absence from the action does not require dismissal as to remaining Defendants. The Onondaga Nation seeks to resolve disputes which have plagued the Nation, the City, County, private Defendants, and the State for many

decades. If the State succeeds in avoiding the resolution of these disputes as to its claims to land, the action may continue as to the remaining Defendants given that the State has no claim to lands to which those defendants claim title.

CONCLUSION

For the foregoing reasons, the State and Non-state Defendants' motions should be denied.

Respectfully submitted,

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