UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

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CENTRAL NEW YORK FAIR BUSINESS ASSOCIATION, CITIZENS EQUAL RIGHTS ALLIANCE, DAVID R. TOWNSEND, New York State Assemblyman, MICHAEL J. HENNESSY, Oneida County Legislator, D. CHAD DAVIS, Oneida County Legislator, and MELVIN L. PHILLIPS,

Plaintiffs,

CIVIL ACTION NO.
6:08-cv-00660-LEK-GJD

v.

KENNETH L. SALAZAR, individually and in his official capacity as Secretary of the U.S. Department of the Interior; P. LYNN SCARLETT, in her official capacity as Deputy Secretary of the U.S. Department of the Interior; JAMES E. CASON, in his official capacity as Associate Deputy Secretary of the Interior; FRANKLIN KEEL, the Regional Director for the Eastern Regional Office of the Bureau of Indian Affairs; JAMES T. KARDATZKE, Eastern Regional Environmental Scientist; and ARTHUR RAYMOND HALBRITTER, as a real party in interest as the Federally Recognized Leader of the Oneida Indian Nation,

Defendants.

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**UNITED STATES' REPLY IN SUPPORT OF**
**MOTION FOR PARTIAL DISMISSAL OF AMENDED COMPLAINT**

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Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, the Federal Defendants, by undersigned counsel, hereby submit this Reply in support of their Motion for Partial Dismissal of Amended Complaint. The Federal Defendants seek dismissal of a number of claims raised in Plaintiffs Central New York Fair Business Association ("CNYFBA"), Citizens Equal Rights Alliance ("CERA"), and Michael J. Hennessy's Amended Complaint.[1/] Plaintiffs' challenge to the transfer of an approximately 18 acre parcel from the Department of the Air Force to the Department of the Interior should be dismissed because CNYFBA fails to show either a waiver of the United States' sovereign immunity allowing them to bring this claim or standing to invoke this Court's subject matter jurisdiction. Moreover, the claim should be dismissed as a matter of law for failure to state a claim. Plaintiffs' newly-raised separation of powers claim also should be dismissed for failure to state a claim along with all of Plaintiffs' civil rights claims. Finally, Plaintiffs' lack standing to bring a claim pursuant to National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370, challenging the Secretary of the Interior's decision to accept land into trust for the Oneida Indian Nation of New York.

**ARGUMENT**

Plaintiffs have failed to establish that this Court has subject matter jurisdiction over their challenge to the congressionally-mandated transfer of 18 acres of federal property into trust for the Oneida Indian Nation of New York. The Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, does not waive the United States' sovereign immunity to claims seeking to challenge the status of Indian trust lands and the Supreme Court has made clear that the QTA's bar to suit cannot be avoided by Plaintiffs' attempted resort to an "officer's suit." Moreover, Plaintiffs lack standing

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[1/] Collectively, this group of Plaintiffs are referred to as "Plaintiffs" or "CNYFBA" hereafter.

to pursue the challenge because they have not alleged any particularized and personal injury they have suffered as a result of the 18 acre transfer. In any event, Plaintiffs' claim fails as a matter of law, premised as it is upon the faulty and unsupported notion that the federal Indian reservation, which the Second Circuit has held was never disestablished, in fact never existed. Plaintiffs' so-called "separation of powers" claim also fails as a matter of law. This claim is premised on a belief that the transfer of land into trust effectively ousts state jurisdiction and creates a federal territory. The argument, even if correct, does not demonstrate a transgression of the constitutional separation of powers because the Supreme Court's jurisprudence in this area has been confined to containing "encroachment and aggrandizement" by one Branch of the federal government at the expense of another. Mistretta v. United States, 488 U.S. 361, 382 (1989). Moreover, the claim has no basis in fact. Lands held in trust are not removed from a State, and thus the act of taking land into trust does not violate any constitutional doctrine or provision. Along similar lines, Plaintiffs' civil rights claims must be dismissed, premised as they all are on the wild and implausible notion of a decades-long conspiracy by the Executive Branch to aggrandize itself by using Indians and federal Indian law as a vehicle to discriminate against everyone else. Finally, Plaintiffs' NEPA claim should be dismissed for lack of standing because they have failed to establish that they have suffered an environmental harm.

**1. The Court lacks subject matter jurisdiction over Plaintiffs' challenge to the Section 523 transfer.**

*A. The United States has not waived its sovereign immunity.*

Plaintiffs contend the Quiet Title Act's sovereign immunity provision does not govern their challenge to the December 30, 2008 transfer of approximately 18 acres into trust pursuant to

40 U.S.C. § 523. They allege, without support, that the land is not federal land because it was temporarily ceded to the United States by New York for the limited purpose of being used as a military base. Where subject matter jurisdiction is at issue, as it is when there is a question whether the United States has waived its sovereign immunity to suit, the Court need not accept such baseless allegations at face value. See Filetech S.A. v. France Telecom S.A., 157 F.3d 922, 932 (2d Cir. 1998) (court may resort to evidence outside pleadings to resolve disputed jurisdictional facts). The United States purchased the land comprising the 18 acre parcel in 1952 from a private owner. See Miskinis Affirmation of July 7, 2009, Attachment 1 (Report of Excess Property) (Docket No. 67-4) at 5 (property acquired in fee from Raymond W. Winterton). The State ceded nothing to the United States and had no occasion or authority to condition the terms on which the United States could purchase the parcel from a third party.

Plaintiffs also appear to contend, despite failing to do so in their Amended Complaint, that since they are bringing an "officer's suit," the Federal Defendants cannot assert sovereign immunity. Pl. Resp. 7. Plaintiffs cite Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388 (1971), although that case explicitly did not address the question of whether suits targeting federal officers alleged to have acted *ultra vires* can be barred by the United States' sovereign immunity. Id. at 397-98 (declining to address sovereign immunity issue because the Court of Appeals did not address it).[2/] Sovereign immunity and the logic of Bivens itself bars claims from being brought against government officials in their *official* capacity. See Kentucky v. Graham, 473 U.S. 159, 165-66 (1985) (official capacity suit is suit against the government).

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[2/] The Court subsequently found that federal officers targeted by a Bivens cause of action may not have absolute immunity from suit. See Butz v. Economou, 438 U.S. 478, 486 (1978).

Regardless, the Supreme Court has established, in the context of the QTA, that a plaintiff may not make an end run around the limits of the QTA's waiver of sovereign immunity by pleading its case as an officer's suit targeting federal officials rather than the United States. Block v. North Dakota squarely confronted this question and concluded that in "light of [the QTA's] legislative history, we need not be detained long by [the] contention that [a plaintiff] can avoid the QTA's statute of limitations and other restrictions by the device of an officer's suit," because otherwise "all of the carefully-crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted." 461 U.S. 273, 284-85 (1983). The Court added, "If we were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the Indian lands exception to the QTA would be rendered nugatory." Id. at 285. Accordingly, the United States' sovereign immunity bars CNYFBA's challenge to the 18 acre transfer, even if it styles its claim as an officer's suit.

*B. Plaintiffs lack standing to raise their claim.*

Plaintiffs claim standing to challenge the transfer of 18 acres between federal agencies "based on the proximity to the alleged removal of lands from state jurisdiction and the disruption that will cause to them." Pl. Resp. 8. However, they do not explain what "disruption" has resulted from the transfer of the parcel from the Department of the Air Force to the Department of the Interior or how that "disruption" personally injures Plaintiffs. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (explaining that "injury in fact" requirement of standing means a "particularized . . . injury [which] must affect the plaintiff in a personal and individual way"). Plaintiffs allege that the 18 acre transfer somehow affects their "right to self-governance," Pl. Resp. 8, but fail to explain how that right is implicated by federal ownership of 18 acres of land

held in trust for a tribe. Neither the fact that one federal agency, instead of another, now holds the land nor its status as Indian trust land has any cognizable impact on Plaintiffs and, accordingly, Plaintiffs cannot allege a concrete injury sufficient to support standing to bring a challenge to the 18 acre transfer.

**3. Plaintiffs' challenge to the Section 523 transfer should be dismissed for failure to state a claim.**

CNYFBA correctly asserts that the "primary question" regarding their challenge to the § 523 transfer is whether the Oneidas have a federal Indian reservation. Pl. Resp. 3. The Second Circuit has spoken to that issue and its holding on that issue has not been overturned. See Oneida Indian Nation of New York v. City of Sherrill, 337 F.3d 139, 159-65 (2d Cir. 2003) (holding Oneida reservation was not disestablished or diminished). CNYFBA's reliance on the Supreme Court's City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005), is unavailing. The Court expressly stated that it did not reach the question of whether the Oneida's reservation was disestablished. Id. at 215 n.9. The Court made clear, however, that the Oneida reservation was subject to federal protection. See id. at 204-05 & n.2 (Oneida reservation lands protected by the Nonintercourse Act which "governed Indian lands within the boundaries of the original 13 States" and by the Treaty of Canandaigua). Accordingly, Plaintiffs' claim that the Section 523 transfer of 18 acres into trust for the Oneidas was invalid because there was never a federal Oneida reservation should be dismissed for failure to state a claim.[3/]

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[3/] Plaintiffs contend that the General Services Administration should have been guided by 40 U.S.C. § 549, a provision they consider typical of federal public land laws in providing for return of "Indian lands that were from a state reservation back to state jurisdiction." Pl. Resp. 3. However, Section 549 does nothing of the sort and, in fact, only applies to personal property, not real property. See 40 U.S.C. § 549(b)(2)(A) (defining the property to be disposed in that section as "personal property"). Section 549 is titled "Donation of personal property through state

**4. CNYFBA's separation of powers count fails to state a claim.**

CNYFBA asserts that the separation of powers claim alleges that the "Secretary of the Interior has no authority to convert the title of state land to federal land" and incorrectly understands the placement of land in trust as the creation of "federal territorial land" outside State jurisdiction. Pl. Resp. 10-11. As an initial matter, it is unclear how this claim implicates the constitutional separation of powers between the branches of the federal government. In addition, the claim rests on a fundamental misunderstanding of the effect of the federal government's holding land in trust on the authority of a State over that same land. Placing lands in trust does not remove them from State jurisdiction or transform them into a federal territory independent of the State in which they are located. The Supreme Court has confirmed that tribal trust lands are not subject to the exclusive jurisdiction of the United States, noting that "State sovereignty does not end at a reservation's border," and the existence of the "States' inherent jurisdiction on reservations." Nevada v. Hicks, 533 U.S. 353, 361, 365 (2001). Indeed, Hicks noted that where "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land." 533 U.S. at 362. Because the placement of lands in trust does not work the egregious harms upon a State that CNYFBA contends it does, it is not an action that amounts to an unconstitutional violation of any constitutional doctrine or provision, including the Tenth Amendment. Accordingly, this claim should be dismissed for failure to state a claim.

**5. Plaintiffs' Civil Rights Claims should be dismissed.**

Plaintiffs' civil rights claims should be dismissed for the reasons stated in the Federal

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agencies."

Defendants' briefing of the Motion for Partial Dismissal. See U.S. Mem. of Law (Docket No. 21-2) at 12-19; U.S. Reply (Docket No. 52) at 4-7. To survive a motion to dismiss, more is required than the allegations in Plaintiffs' complaint suggesting a vast federal conspiracy dating back to the Nixon administration. See Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) ("To survive a motion to dismiss, a [pleading] must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face.") (internal quotations omitted). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950.

Plaintiffs direct the Court to Exhibits 1 and 3 to their Amended Complaint, contending these somehow provide evidence of a plan to mislead federal courts and foster "tribal sovereignty to deprive all other citizens of their constitutional rights." Pl. Resp. 12. Plaintiffs' exhibits only prove that their conspiracy theory consists of nothing more than baseless, conclusory allegations. Exhibit 1, a draft report dated August 29, 1974 prepared on behalf of Leonard Garment, assistant to President Nixon, discusses "the state of the 'sovereignty' possessed . . . by Native American peoples." Am. Compl. Ex. 1 at 1-2. Far from disclosing "the conspiracy of the Nixon Indian Policy," Am. Compl. ¶ 271, the report notes that "at present the Federal government has no definitive plan, as to the long-term future of dealings with the Indian community," Ex. 1 at 58, and proceeds to outline five different policy options which range from termination, id. at 59, to absolute sovereignty, id. at 69.

Exhibit 3 is a Department of Justice memorandum dated June 22, 1973 that analyzes contemporary court decisions addressing statutes benefitting Indians and concludes the "Indian Preference Statutes are not violative of the Fifth Amendment . . . and were not repealed by . . .

the 1972 Equal Employment Opportunity Act." Am. Compl. Ex. 3 at 1. The memorandum does not reflect an official position of the United States; rather it is deliberative in nature, offering a Department of Justice attorney's analysis of a legal issue for his superior's consideration. Moreover, even if it did reflect an official position, the memorandum does not advocate that the Department of Justice mislead federal courts with regard to Indians in order to further a conspiracy Plaintiffs allege has been underway for decades now. Finally, regardless of the position adopted by the memorandum, it is now settled law that statutes benefitting Indians are constitutional and that the federal government's dealing with Indians are not racially discriminatory. See Morton v. Mancari, 417 U.S. 535 (1974); United States v. Antelope, 430 U.S. 641, 646 (1977) ("Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians.'") (internal quotations omitted).

**6. Plaintiffs NEPA claim should be dismissed for lack of standing.**

In their motion, Federal Defendants explained that Plaintiffs' NEPA claim should be dismissed, because Plaintiffs rely only upon economic and jurisdictional injuries. U.S. Mem. (Docket No. 67-2) at 14-16. Plaintiffs' cursory response fails to establish otherwise. Plaintiffs contend that "harm to the human environment" will occur. Pls. Resp. 12. However, Plaintiffs continue to rely on concerns that do not fall within the zone of interests that NEPA was designed to protect. See Metropolitan Edison v. People Against Nuclear Energy, 460 U.S. 766, 772-73 (1983) (in enacting NEPA, Congress was concerned with the potential impacts of major federal actions significantly affecting the *physical* environment); Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S Department of Agriculture, 415 F.3d 1078, 1103-04 (9th

Cir. 2005) (because the plaintiff "failed to allege any connection to injury to the *physical* environment, its injury falls outside of NEPA's zone of interests") (emphasis added). Indeed, Plaintiffs fail to assert an injury to the physical environment. Pls.' Resp. 12-13 (discussing alleged disruption to the political structure). Accordingly, their NEPA claim should be dismissed.

**CONCLUSION**

For the reasons stated above, Plaintiffs' Separation of Powers claim, their claims brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985, and 1986; their NEPA claim, and their challenge to the December 30, 2008 transfer of 18 acres into trust should all be dismissed.

DATED this 10th day of August, 2009.

Respectfully submitted,

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/s/
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**Certificate of Service**

I, Steven Miskinis, hereby certify that on August 10, 2009, I served the United States' Reply in Support of Motion for Partial Dismissal of Amended Complaint and Affirmation upon all counsel in this action via the Court's electronic case filing system.

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