IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE DELAWARE NATION, Plaintiff,	:	CIVIL ACTION
v.	:	
COMMONWEALTH OF PENNSYLVANIA, et al., Defendants.	:	NO. 04-CV-166

MEMORANDUM AND ORDER

J. M. KELLY, J. **NOVEMBER 30, 2004**

Presently before the Court are nine Motions to Dismiss filed by the following groups of defendants: (1) Jack and Jean Reese (Doc. No. 55), (2) Forks Township, John Ackerman, David Kolb, Donald H. Miller, David W. Hof, and Henning Holmgaard (Doc. No. 56), (3) Binney & Smith, Inc., the Follett Corporation, Carol A. Migliaccio, Nic Zawarski and Sons Developers Inc., Daniel O. Lichtenwalner, and Joan B. Lichtenwalner (the "Binney & Smith defendants") (Doc. No. 57), (4) the Commonwealth of Pennsylvania (Doc. No. 58), (5) Audrey Baumann (Doc. No. 60), (6) W. Neill Werkheiser, Warren F. Werkheiser, Carl W. and Gail N. Roberts, Robert and Mary Ann Aerni, and Mark and Cathy Sampson (Doc. No. 62), (7) the County of Northampton, Pennsylvania and the nine members of Northampton County Council in their official capacity, who are named as J. Michael Dowd, Ron Angle, Michael F. Corriere, Mary Ensslin, Margaret Ferraro, Wayne A. Grube, Ann McHale, Timothy B. Merwarth and Nick R. Sabatine, (Doc. No. 63), (8) the

Honorable Edward G. Rendell (Doc. No. 64), and (9) the County of Bucks, Pennsylvania (Doc. No. 66) (collectively, the "Defendants") requesting that this Court dismiss Plaintiff The Delaware Nation's ("Plaintiff") Complaint against the Defendants pursuant to Federal Rule of Civil Procedure 12(b)(6) for Plaintiff's failure to plead facts sufficient to support a claim to the parcel of land at the center of this dispute.[1] Also before the Court are Plaintiff's Responses to the Motions to Dismiss (Doc. Nos. 84, 85, 86, 87, 88, 89, 90, 91, & 92), the Defendants' Replies (Doc. Nos. 93, 94, 95, & 101), and Plaintiff's Sur-Reply thereto (Doc. No. 105).

In addition, on October 6, 2004, the Court heard oral argument on the Motions to Dismiss and circulated a memorandum that posed specific questions to which the Court allowed the parties time to respond if they so desired. To the extent that they present considerations appropriate to the Motions to Dismiss, those responsive papers are also before the Court (Doc. Nos. 110, 111, 112, 113, & 114).

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[1] The parties stipulated to the dismissal of Defendants the County of Bucks, Pennsylvania, and the Commonwealth of Pennsylvania. (See Doc. Nos. 116, 117.) Defendant Audrey Baumann and the Binney & Smith defendants also move to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 19 arguing that the Commonwealth is an indispensable party to Plaintiff's suit.

In this action, Plaintiff, The Delaware Nation, a federally recognized Native American tribe seeks to recover possession of 315 acres of land purchased from the Proprietors of Pennsylvania in 1741. For the following reasons, the Defendants' Motions to Dismiss are **GRANTED.**

I. BACKGROUND

Plaintiffs' Complaint alleges the following facts.

A. The 1681 Charter of the Province of Pennsylvania

On March 4, 1681, King Charles II granted a request from William Penn ("Penn") for a charter (the "Charter") to establish a British colony in North America, which later was named the Province of Pennsylvania. Through the Charter, King Charles vested Penn and his heirs with control of Pennsylvania's land. Therefore, much of the recorded Proprietor history of the Commonwealth of Pennsylvania begins with its founder, Penn.

Penn was born in London, England in the year 1644. In 1696, Penn married his second wife, Hannah Callowhill, who prior to her death in 1727 bore Penn three sons, John, Thomas and Richard.

B. Pennsylvania's Early Inhabitants

When Penn first visited North America to settle Pennsylvania, he found that Germans, Dutch and Native Americans

already inhabited the territory without any particular governmental framework. In contrast to the Germans and Dutch inhabitants, however, Native Americans lived in Pennsylvania for centuries prior to Penn's first visit. Among these Native American tribes with historic roots in Pennsylvania is The Delaware Nation, which inhabited large portions of the eastern seaboard.

The Delaware Nation is the political continuation of the Lenni Lenape tribe. Members of the Lenni Lenape tribe living on land bordering the Delaware River were referred to by the European explorers and settlers as the "Delaware" Indian Tribe, as a consequence of their geographic location. Over time, the Lenni Lenape became known as The Delaware Nation and is recognized as such by the United States government.

C. William Penn's Government

The Charter vested Penn and his heirs with all of the land thereunder as the Proprietor of the Province of Pennsylvania. Penn was to be accountable directly to the King of England. In addition, the Charter required Penn to make yearly payments to the Crown consisting of "two beaver skins and a fifth of any gold and silver mined within the territory." With respect to land claims, Section XVII through XIX of the Charter established a

proprietary government that "gave Penn broad powers in selling or renting his lands. Those purchasing land from him must have his approval of any method they themselves might use to sell the land to others." (Compl. ¶ 31.)

Shortly after his arrival in North America, Penn formed a government consisting of three branches: (1) governor with limited powers, (2) a legislative Council, which was empowered to propose legislation, and (3) a General Assembly, which was empowered to approve or defeat the legislative initiatives proposed by the legislative Council. Among other rights that were created, Penn's government provided for "secure private property." (Id. ¶ 32.)

Penn's government and practices apparently differed sharply from the Puritan-led governments of the other American colonies. The most striking difference was Penn's ability to cultivate a positive relationship based on mutual respect with the Native Americans inhabiting the province. While the Puritans "stole from the Indians . . . Penn achieved peaceful relations with the Indians." (Id. ¶ 33.)

The Charter provided the foundation for Penn's authority over the Province of Pennsylvania for nearly a century following its issuance by King Charles II. The Charter was then nullified by the American colonies following the signing of the Declaration

of Independence, the Revolutionary War, and the Treaty of Paris of 1783, pursuant to which the province became an independent state known as the Commonwealth of Pennsylvania.

D. William Penn's Native American Dealings

Upon his arrival in America, Penn entered into numerous property agreements with the Lenni Lenape, who inhabited areas of the Province of Pennsylvania. Although Penn accepted title to the land from the English King, "he took steps to establish peaceful relations with the Indians. He was careful to acquire the land from them by purchase [(rather than conquest)], and to this end he and his agents held frequent conferences with the local Delaware chiefs and their retinue." (Compl. ¶ 35.) Penn recognized the aboriginal land claims of the Native Americans, and "from the very beginning, he acquired Indian land through peaceful, voluntary exchange." (Id.) By way of example, shortly after his arrival in 1682, Penn entered into "The Great Treaty" with Delaware Chief Tamanend, pursuant to which he paid the Indians a "fair value" for the use of the land by the settlers. (Id.)

Although no written copies of The Great Treaty are known to exist, it is known to have been a treaty of friendship and is indicative of mutual respect between Penn and members of the

Lenni Lenape Tribe. Penn's fair treatment of the Tribe benefitted the entire province. "Penn's policy of dealing fairly with the region's native peoples protected European settlers from hostilities during his lifetime and after, until 1755. By then, the growing number of English colonists arriving on the eastern seaboard had alarmed the native peoples, many of whom allied with the French for survival of their ancestral lands." (Id. ¶ 36.)

In addition to The Great Treaty, Penn brokered at least eight other land transactions with the Lenni Lenape leaders, including the first written treaty dated July 15, 1682. For Penn, "the only practical and legal way to get their land and secure their friendship was the treaty. The treaty also demonstrated Penn's claim to the land to his investors, who would have been much less interested in the venture without clear title." (Id. ¶ 37.) Consequently, Penn and his agents began the process of buying land from its Native "holders." These "holders" were various Lenni Lenape chiefs. Penn's fair dealings with the Lenni Lenape earned him their respect and loyalty.

After Penn's death, "the new government was impatient for expansion. New immigrants were arriving, filling up the cities and clamoring to officials for land in order to earn a living and support their families. Settlement of Indian lands increased, often taken by force, causing much friction with the [Indians]."

(Id.) Following a stroke in 1712, William Penn's second wife, Hannah, assumed proprietary authority over the province until her death in 1727. Penn's sons and grandsons then became the Proprietors of the province. As the Proprietors of Pennsylvania, Penn's sons executed the "Walking Purchase of 1737" pursuant to which they acquired 1,200 square miles of Lenni Lenape land within the Delaware River Basin of Pennsylvania.

E. The Walking Purchase of 1737

Penn's sons were less interested than their father in cultivating a friendship with the Lenni Lenape. Thomas Penn, in particular, is reportedly responsible for executing The Walking Purchase of 1737, pursuant to which Thomas Penn approached the Lenni Lenape Chiefs and "falsely represented an old, incomplete, unsigned draft of a deed as a legal contract." (Compl. ¶ 38.) Thomas Penn represented to the Lenni Lenape Chiefs that some fifty years prior, the ancestors of the Lenni Lenape had signed documents stating that the "land to be deeded to the Penns was as much as could be covered in a day-and-a-half's walk." (Id.) Believing that their forefathers had made such an agreement, the Lenni Lenape Chiefs agreed to the terms of the deed and consented to the day-and-a-half walk.

The Lenni Lenape Chiefs trusted that the "white men" would take a leisurely walk through the tangled Pennsylvanian forests along the Delaware. The Chiefs were not aware that they were about to lose a significant amount of land. Unbeknownst to the Lenni Lenape, Thomas Penn took measures to ensure that the distance covered by his "walkers" would be as large as possible. Among other things, Thomas Penn had a straight path cleared through the forests and hired three of the fastest runners in the province. "[H]e and his agents spent weeks mapping their route--which went northwest rather than north as the treaty specified--hacking trails out of the woods." (Id. ¶ 39.) In addition, Thomas Penn promised that the fastest runner would receive five pounds sterling and 500 acres of land. In the end, the runners of the Walking Purchase of 1737 procured 1,200 square miles of Lenni Lenape land in Pennsylvania. Included in the land procured was land commonly referred to as the "Forks of the Delaware," which contained the parcel of land at the center of this dispute, "Tatamy's Place."

The Lenni Lenape complained to the King of England about the execution of the "walk" by Penn and his agents to no avail. In response, the Lenni Lenape began their movement westward in compliance with their ancestors' purported agreement to the terms of the Walking Purchase's deed. Over a hundred years later,

experts examining this deed concluded that the deed was a forgery. As a result of the Walking Purchase, members of the Lenni Lenape tribe, now recognized as The Delaware Nation, were segregated into pockets or parcels of land surrounded by non-tribal settlers. Such is what occurred with respect to a grant of land to Chief Tetamy and his band of Delawares.

F. The Tetamy Patents

At the time of the Walking Purchase, Chief Tetamy was a respected inhabitant of the Forks of the Delaware area. He has been described as "a Delaware Indian diplomat, chieftain, messenger, interpreter, landowner and Christian." He and his wife were the first Indians to be baptized in the Forks area. In total, twelve members of the dwindling Indian community living in the Forks area were baptized, five of whom were members of Chief Tetamy's family. Following his conversion to Christianity, Chief Tetamy was commonly referred to as "Moses" Tundy Tetamy. Chief Tetamy enjoyed a reputation of being "a friend to the white man," and often served as an interpreter for agents of the Proprietors, including the Governor of the province.

In 1738,[2] the Proprietors, in consideration of their "love and affection" of Chief Tundy Tetamy and in recognition for his services as a messenger and interpreter for the Penn family, granted to Tundy Tetamy and his heirs, a Patent to the land which became known as Tatamy's Place. Further evidence of the respect garnered by Chief Tetamy, is the town of Tatamy, Pennsylvania, which takes its namesake from the Delaware Chief and is not far from the property known as Tatamy's Place.

Tundy Tetamy's name first appears in official Pennsylvania land records under the date of March 24, 1733, when he applied for his land grant to Tatamy's Place. The application states: "Tattemy an Indian has improv'd a piece of Land of about 300 Acres on the forks of Delaware--he is known to Wm Allen & Jere: Langhorne–he desires a Grant for the said Land." (Compl. ¶ 43 (citing, Pennsylvania Land Records, Applications 1732-33:17).) Two prominent men in the province endorsed Tundy Tetamy's application for the land grant: (1) Jeremiah Langhorne served as chief justice of the province from 1726 until his death in 1742; and (2) William Allen, an assemblyman at the time, served as

[2] Paragraph forty-two of Plaintiff's Complaint contains a typographical error. This paragraph incorrectly states that the first recorded land patent was granted to Tundy Tetamy in 1736. Paragraph forty-four and Exhibit E of the Complaint, however, correctly state the first recorded patent was granted in 1738.

chief justice from 1750 to 1774. Both men became well-known, early landowners in the Forks area. On December 13, 1736, a warrant (the "Warrant") duly recorded in the Warrant Application Books of Bucks County, at T-14, was issued by the Proprietors. The Warrant required that a survey of Tatamy's Place be forwarded to the Secretary's Office in furtherance of a land grant to Tundy Tetamy. Pennsylvania Land Records indicate that an August 10, 1733 survey of Tatamy's Place was certified by the surveyor and forwarded to the Secretary's Office on May 12, 1737, pursuant to the Warrant. (Id. ¶ 43 (citing, Pennsylvania Land Records, Survey Book A-24, Page 109).)

Tatamy's Place was granted to Tundy Tetamy by descendants of William Penn through the issuance of a valid Patent on April 28, 1738 (the "First Tetamy Patent") (Patent Book A-8, Page 405), and was reaffirmed on January 22, 1741 (the "Second Tetamy Patent") (Patent Book A-9, Page 530), which together with the First Tetamy Patent collectively are referred to as the "Tetamy Patents." (Id. ¶ 44.)

The Tetamy Patents document Tundy Tetamy's fee simple ownership of Tatamy's Place. Chief Tundy Tetamy died in 1761 and is believed to be buried in the old cemetery at Forks U.C.C. Church. Neither he nor his heirs ever conveyed their interest in Tatamy's Place.

The first recorded instrument concerning Tatamy's Place following the Tetamy Patents is a duly recorded deed that purports to convey 318 acres and indicates that the land is known as Tatamy's Place. This conveyance is not a grant from Tundy Tetamy or his heirs. Rather, the conveyance is from Edward Shipper, the Executor of the Estate of William Allen, to Henry and Mathias Strecher. (Id. ¶ 46 (citing, Deed Book 2, at page 242).) The deed grant indicates that Mr. Allen purportedly agreed to sell the parcel to Melchior Strecher some forty years earlier, although no such conveyance is evidenced by any written instrument. In fact, the Deed makes specific reference to the absence of an instrument that would have memorialized Mr. Allen's conveyance. As such, the Deed attempts to consummate an alleged transaction that transpired forty years earlier to benefit the heirs of the original grantee, Melchior Strecher.

No instrument exists that demonstrates any conveyance from Tundy Tetamy to Mr. Allen. There is no historical or official reference to any conveyance of Tatamy's Place from Tundy Tetamy or his heirs. There was no United States government approval of any Deed or other instrument from Tundy Tetamy or her heirs.

Historical and official records in the Commonwealth of Pennsylvania establish that through the Tetamy Patents, in 1738 and 1741, approximately 315 acres of land situated in what today

is Forks Township, Northampton County, Pennsylvania, was granted to Tundy Tetamy and his heirs, and that this land known as Tatamy's Place was never conveyed under authority of the United States of America.

II. STANDARD OF REVIEW

The purpose of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is to test the legal sufficiency of a complaint. Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). A complaint may be dismissed for failure to state a claim upon which relief may be granted if the facts pleaded, and reasonable inferences therefrom, are legally insufficient to support the relief requested. Commonwealth ex. rel. Zimmerman v. Pepsico, Inc., 836 F.2d 173, 179 (3d Cir. 1988). In considering whether to dismiss a complaint, courts may consider those facts alleged in the complaint as well as matters of public record, orders, facts in the record and exhibits attached to a complaint. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1391 (3d Cir. 1994). Courts must accept those facts, and all reasonable inferences drawn therefrom, as true. Hishon v. King & Spalding, 467 U.S. 69, 73 (1983). Moreover, a complaint is viewed in the light most favorable to the plaintiff. Tunnell v. Wiley, 514 F.2d 971, 975 n.6 (3d Cir. 1975). In addition to

these expansive parameters, the threshold a plaintiff must meet to satisfy pleading requirements is exceedingly low; a court may dismiss a complaint only if the plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

The Delaware Nation, as Plaintiff in this matter, claims title to approximately 315 acres of ancestral land in the Commonwealth of Pennsylvania that was acquired by the Proprietors of Pennsylvania through the Walking Purchase of 1737. The disputed land, referred to as Tatamy's Place, is situated in Forks Township, Northampton County, Pennsylvania.[3] The Delaware Nation admits that Thomas Penn, together with other Proprietors, had sovereign authority to take the land that encompassed Tatamy's Place through the Walking Purchase, but argues that because the land was taken by deception, the tribe's aboriginal title was never validly extinguished.

[3] Plaintiff expressed to the Court that the most common English spelling of the specific tract of land at issue in this matter is referred to in historical documents as "Tatamy's Pace." We presume that this tract of land was not named until sometime after it was deeded to the Native American named Tundy Tetamy. Use of the property's name throughout this Court's discussion is for property identification purposes only, and we do not mean to imply any ownership rights.

A. Aboriginal Title

The concept of "aboriginal title" is defined by the United States Supreme Court as a right of occupancy to certain lands held by the Native Americans that is not recognized as ownership.[4] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

1. Origins of Aboriginal Title

During Europe's exploration of North America, the European nations abided by the "doctrine of discovery." Johnson v McIntosh, 21 U.S. 543, 588 (1823). The "doctrine of discovery" held that the discovering European nation received fee title to the discovered North American land against all other European governments, subject to the Native Americans' right of occupancy and use. Id.; see also, Seneca Nation of Indians v. New York,

[4] We find it unfortunate that courts continue to identify Native Americans as "Indians," as this term is both antiquated and offensive. "Indian" was the name Christopher Columbus mistakenly applied to the people he encountered when he arrived in what he believed was the "Indies," the medieval name for Asia. See Webster's Ninth New Collegiate Dictionary 613 (9th ed. 1991). Out of respect for the original inhabitants of this country, when possible, we identify these inhabitants as "Native Americans" unless specifically citing other sources. As much of the legal authority is referred to as "Indian law" and still uses the term "Indians," we acknowledge that the term "Indians" may be used in this memorandum to denote "Native Americans."

206 F. Supp. 2d 448, 504 (W.D.N.Y. 2002). Termed "aboriginal title," this right of occupancy and use arose in Native American tribes that inhabited lands from time immemorial. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 233-34 (1985). Therefore, where a Native American tribe inhabited a discovered area from time immemorial, the discovering European nation and the tribe were subject to two parallel property interests: aboriginal title and fee title.

The aboriginal title holder had "a legal as well as a just claim to retain possession" of the land, but no independent power to convey his title. Seneca, 206 F. Supp. 2d at 503-04. The fee title holder to this same land would have both a right of preemption and an independent power to convey his title subject to aboriginal rights. Id. The fee title holder's right of preemption was similar to a contingent future interest in land that gave him the exclusive right to acquire the underlying Native American land should the tribe's aboriginal title be extinguished. Id. at 504.

2. Aboriginal Title may be Extinguished

a. Extinguishment By the Sovereign

It is undisputed that, the sovereign had the power to extinguish aboriginal title as a matter of law. (See Pl.'s Opp.,

Doc. No. 84, at 22; see also Defs.' Reply, Doc. No. 95, at 9.) When sovereigns discovered North American land, the rights of extinguishment and preemption were jointly held by the discovering sovereign. Mitchel v. United States, 34 U.S. 711, 756 (1835); see also Oneida Indian Nation of New York v. State of New York, 691 F.2d 1070, 1075-76 (2d Cir. 1982); Seneca, 206 F. Supp. 2d at 504.

Upon acquiring fee title from the sovereign, however, the right of extinguishment did not automatically pass. Oneida Indian Nation of New York v. City of Sherril, New York, 337 F.3d 139, 154 (2d Cir. 2003). Individual fee title holders could not eject Native Americans with aboriginal title from their land absent some sovereign act. Id. (stating that extinguishment of aboriginal title requires sovereign consent); see, e.g., Clark v. Smith, 38 U.S. 195, 201 (1839); Beecher v. Wetherby, 95 U.S. 517, 525 (1877); Fletcher v. Peck, 10 U.S. 87, 142-43 (1810). The sovereign's right of extinguishment was an exclusive power, which the exercise thereof would terminate Native Americans' aboriginal title. U.S. v. Alcea Band of Tillamooks, 329 U.S. 40, 46 (1946).

b. Extinguishment At Will

Aboriginal title could be extinguished by the sovereign at will. Id. (stating the sovereign possessed exclusive power to

extinguish the right of occupancy at will) (emphasis added). The right of extinguishment at will gave the discovering sovereign a sweeping authority to extinguish a Native American tribe's aboriginal title "by treaty, by sword, by purchase, by exercise of complete dominion adverse to right of occupancy, or otherwise." See Oneida Indian Nation of New York v. State of New York, 520 F. Supp. 1278, 1293 (N.D.N.Y. 1981), aff'd in part, rev'd in part, 691 F.2d 1070 (2d Cir. 1982).

c. Extinguishment Must be Intentional

Regardless of the means used to extinguish aboriginal title, "the relevant question is whether the governmental action was intended to be a revocation of Indian occupancy rights." United States v. Gemmill, 535 F.2d 1145, 1148 (9th Cir. 1976). The sovereign was empowered to terminate aboriginal title without restraint, and "[t]ermination of the right by sovereign action was complete and left the land free and clear of Indian claims." Alcea Band of Tillamooks, 329 U.S. at 46. In short, the extinguishment by the sovereign must have been intentional.

3. The Extinguishment of a Prior Sovereign is Nonjusticiable

The justness of a prior sovereign's decision to extinguish aboriginal title "is not open to inquiry in the courts." See United States v. Santa Fe P. R. Co., 314 U.S. 339, 347 (1941) (citing Beecher v. Wetherby, 95 U.S. 517, 525 (1877)). The means by which a prior sovereign decided to extinguish aboriginal title raise a political question because the doctrine of discovery and the sovereign's authority thereunder precludes the existence of a judicially identifiable duty or a judicially determinable breach. See Oneida Indian Nation v. State of New York, 520 F. Supp. at 1324 (construing Santa Fe P. R. Co., 314 U.S. at 347 (1941)); see also United States v. Alcea Band of Tillamooks, 329 U.S. 40, 63 (1946) (stating that the way a sovereign extinguished Indian title is a political matter). Thus, when aboriginal title is extinguished by the sovereign, it is beyond examination of the courts.

B. The Walking Purchase Extinguished Aboriginal Title

1. The Delaware Nation Possessed Aboriginal Title

Plaintiff claims that it retains unextinguished aboriginal title to Tatamy's Place because Thomas Penn procured the land through fraud. Plaintiff contends that from time immemorial, The

Delaware Nation has possessed aboriginal title. (Compl. ¶¶ 26, 38-40.) For purposes of these motions to dismiss, we take to be true Plaintiff's allegation that The Delaware Nation once possessed aboriginal title to Tatamy's Place.

2. The Walking Purchase was Executed by Proprietor Thomas Penn

Defendants argue that Plaintiff's Complaint alone establishes that the Charter vested the Crown's proprietary authority in the Penn family and that Thomas Penn in his capacity as a Proprietor extinguished The Delaware Nation's aboriginal title through the Walking Purchase of 1737. (See Id. Ex. A.; Id. ¶ 31.) Plaintiff does not contest that Thomas Penn and the other Proprietors of the time maintained sovereign authority to extinguish this aboriginal title.

3. Thomas Penn had the Sovereign Authority to Extinguish Aboriginal Title At Will

Plaintiff argues that actions taken and condoned by Thomas Penn in executing the Walking Purchase constituted fraud, and as such, were ineffective to extinguish Plaintiff's aboriginal title to Tatamy's Place. The Complaint alleges that Proprietor Thomas Penn engaged in the following deceitful practices to bring about

The Delaware Nation's relinquishment of claims to Tatamy's Place. In implementing the Walking Purchase, Plaintiff alleges that Thomas Penn "falsely represented an old, incomplete, unsigned draft of a deed as a legal contract" to convince the Lenni Lenape to honor its terms, which deeded all land that could be covered in a day-and-a-half's walk, as purportedly agreed upon by their forefathers. (Id. ¶ 38.) Plaintiff further alleges that Thomas Penn executed the walk unfairly by hiring runners instead of walkers and by mapping a northwesterly route rather than a northern route as the treaty specified. (Id. ¶ 39.) The alleged runners of the Walking Purchase of 1737 procured 1,200 square miles of Lenni Lenape land in Pennsylvania. (Id.) Included in the land procured was land commonly referred to as the "Forks of the Delaware," which contained the parcel of land at the center of this dispute, "Tatamy's Place." (See Id. ¶¶ 37, 39, 40, 43.)

Plaintiff argues that extinguishment of aboriginal title can only occur through war or physical disposition, or by treaty. Plaintiff contends that it can prove that the Walking Purchase's deed was a forgery, and that the means by which it was executed were fraudulent. Plaintiff concludes that because fraud is not one of the delineated means by which aboriginal title may be extinguished, this Court must hold for purposes of these motions to dismiss that the Walking Purchase of 1737 did not validly

extinguish aboriginal title.

Contrary to Plaintiff's legal argument, previously summarized in this memorandum, stands the sweeping authority allowing Thomas Penn to extinguish the Lenni Lenape tribe's aboriginal title to Tatamy's Place. See Alcea Band of Tillamooks, 329 U.S. at 46 (stating the sovereign may extinguish aboriginal title "at will"); see also, Oneida Indian Nation of New York v. State of New York, 520 F. Supp. at 1293. Proof of fraud is not a material fact that would nullify Proprietor Thomas Penn's extinguishing act.

4. Thomas Penn Intended to Extinguish Aboriginal Title Through the Walking Purchase of 1737

Despite any deception that may have been employed to effectuate the Walking Purchase of 1737, the effect was to extinguish aboriginal title in the land acquired. The Complaint makes clear that Thomas Penn executed the Walking Purchase intending to rid the Lenni Lenape of its claims to land in Pennsylvania. (See Compl. ¶¶ 38, 39.) Included in the land procured was Tatamy's Place. (See Id. ¶¶ 37, 39, 40, 43.) Thus, the Complaint establishes that Thomas Penn had the requisite intent to effectuate a termination of The Delaware Nation's aboriginal rights that "left the land free and clear of Indian

claims." See Alcea Band of Tillamooks, 329 U.S. at 46; see also Gemmill, 535 F.2d at 1148; Seneca Nation of Indians v. New York, 382 F.3d 245, 260 (2d Cir. 2004) (stating the requirement that intent to extinguish aboriginal title must be "plain and unambiguous" is applicable to Native American treaties negotiated by a prior sovereign).

The Walking Purchase of 1737 extinguished The Delaware Nation's aboriginal title to Tatamy's Place.

5. The Justness of Thomas Penn's Walking Purchase is Nonjusticiable

Proprietor Thomas Penn's decision to extinguish aboriginal title to Tatamy's Place was equivalent to that of the sovereign. Distinct from any non-governmental individual, Proprietor Thomas Penn's decision to extinguish aboriginal title "is not open to inquiry in the courts." See Santa Fe P. R. Co., 314 U.S. at 347 (citing Beecher, 95 U.S. at 525); see also Alcea Band of Tillamooks, 329 U.S. at 63. Plaintiff has failed to plead a judicially determinable breach. See Oneida Indian Nation v. State of New York, 520 F. Supp. at 1324.

Plaintiff admits that Thomas Penn as a Proprietor of Pennsylvania was fully charged with the sovereign's proprietary authority. (Compl. ¶ 31.) Plaintiff further states that Thomas

Penn initiated, oversaw, and, consequently, approved of the execution of the Walking Purchase. (Id. ¶¶ 38-39.) The Complaint even goes further to admit that the Lenni Lenape complained to the King of England about the execution of the Walking Purchase to no avail. (Id. ¶ 40.) Nevertheless, however vile Plaintiff chooses to depict the events of the Walking Purchase, Thomas Penn's justness cannot be questioned and the outcome in this matter cannot change. The Walking Purchase of 1737 extinguished aboriginal title to the lands acquired therein.

C. The Trade and Intercourse Act and Federal Common Law Require Plaintiff to Allege a Transfer Involving "Tribal Land"

We have established that the extinguishment of aboriginal title in 1737 divested The Delaware Nation of all aboriginal land claims to Tatamy's Place. Without aboriginal title, Plaintiff fails to state a claim for which relief may be granted under the Act or federal common law. The only issue becomes whether Plaintiff has raised an issue of historical fact that aboriginal title was somehow revived.

Plaintiff brings its claims under the Trade and Intercourse Act of 1799 (the "Act"), 1 Stat. 743, 746 (1799),[5] and federal

[5] Plaintiff correctly points out that the Court must apply the version of the statute in effect at the time of the

common law. Under both the Act and federal common law, Plaintiff must plead facts sufficient to support its claim that it has an interest in the land in dispute because the land is "tribal land." Plaintiff agrees that "tribal land" is a necessary and common element under the Act and federal common law. (See Pl.'s Opp., Doc. No. 84, p. 14; Compl. ¶¶ 59, 64.)

Courts have uniformly held that, in order to state a claim for violation of the Trade and Intercourse Act a plaintiff must show that: (1) it is an Indian or Indian tribe; (2) the land in question is tribal land; (3) the United States never consented to or approved of the alienation of the land in question; and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned. See Golden Hill Paugussett Tribe of Indians v. Weiker, 39 F.3d 51, 56 (2d Cir. 1994) (emphasis added); Epps v. Andrus, 611 F.2d 915, 917 (1st Cir. 1979); Catawba Indian Tribe v. South Carolina, 718 F.2d 1291, 1295 (4th Cir. 1983); Canadian St. Regis Mohawk Band of Mohawk Indians v. New York, 146 F.Supp.2d 170, 185 (N.D.N.Y. 2001).

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transactions that allegedly dispossessed Plaintiff of its aboriginal right to possession of Tatamy's Place. Plaintiff alleges that The Delaware Nation was dispossessed of its aboriginal right on March 12, 1803 through the Allen Strecher deed. A review of the legislative history submitted by Plaintiff indicates that the 1799 version of the Act was enacted for a term of three years. Therefore, while inconsequential to our memorandum, the 1802 version of the Act would apply.

Similarly, under federal common law, Native Americans have a right to sue to enforce their aboriginal title against trespassers on their land. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 236 (1985) (emphasis added).

During oral argument, Plaintiff correctly stated that the element termed "tribal land" is necessary to his claims before the Court and that this term is synonymous with the term "Indian title," otherwise known as "aboriginal title." See Transcript p. 33, l. 5; see also, Oneida Indian Nation of New York v. City of Sherrill, New York, 337 F.3d at 152 (defining tribal land rights). In its papers, Plaintiff further argues that the Act does not limit its applicability to aboriginal title or fee title. These representations are consistent with our finding that whatever title Plaintiff asserts to have, the title must have aboriginal rights attached in order to survive dismissal under the Act and federal common law.

Plaintiff seems to argue that aboriginal title, once extinguished, can somehow be revived. Plaintiff contends that it can prove as a historical fact that when Tundy Tetamy took fee title to Tatamy's Place he must have taken fee title for the benefit of all tribal members because The Delaware Nation did not recognize individual land ownership. (See Compl. ¶ 10.) In arguing that it has the legal right to prove a revival of

aboriginal title through "way of life, habits, and customs and usages of Indians," Plaintiff relies on case law discussing unextinguished aboriginal title. See, e.g., The Sac and Fox Tribe of Indians of Oklahoma v. United States, 383 F.2d 991, 998 (Cl. Ct. 1967), cert denied, 389 U.S. 900 (1967); Journeycake v. Cherokee Nation, 28 Ct. Cl. 281, 302 (1893), aff'd, 155 U.S. 196 (1894).[6] "While the court generally must assume factual allegations to be true, it need not assume the truth of legal conclusions cast in the form of factual allegations." United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 (9th Cir. 1986); see also Cohen v. Litt, 906 F. Supp. 957, 961 (S.D.N.Y. 1995). Unfortunately for Plaintiff, we find that the aboriginal right to possession, "once having been extinguished, could not be revived, even if title was thereafter acquired by those who originally possessed that right." Tuscarora Nation of Indians v.

[6] In apparent support of this argument, Plaintiff also relies on Alonzo v. United States, 249 F.2d 189, 197 (10th Cir. 1957), cert. denied, 355 U.S. 940 (1958). The facts of Alonzo are strikingly different than the facts before this Court. The court there imposed restrictions against alienation on Native Americans' fee titles even though these titles were deeded without restrictions. The basis for imposing these restrictions was not based not the Act, but, rather, on the terms of a particular statutory authority at issue relating to the Native Americans in that region. It is that statutory authority by which the Court reimposes land restrictions upon Native American land owners. Plaintiff's reliance on Alonzo to support its contention that the Act applies to Native Americans possessing fee title alone is misplaced.

Power Authority of New York, 164 F. Supp. 107, 113 (W.D.N.Y. 1958).

Courts have uniformly held that the sovereign has the power to "extinguish" aboriginal title. See Mitchel, 34 U.S. at 756; see also Oneida Indian Nation of New York v. State of New York, 691 F.2d at 1075-76. Webster's Ninth New Collegiate Dictionary provides the following relevant definitions for the word "extinguish:" "to bring to an end;" and "to cause extinction." Webster's Ninth New Collegiate Dictionary 440 (9th ed. 1991). Further, "[t]o hold that all land held by Indians to Tribes should be restricted . . . would be a regressive step toward regarding the relationship of the United States to Indians as that of 'guardian to ward.'" United States ex rel. Saginaw Chippewa Tribe v. Michigan, 882 F. Supp. 659, 675 (E.D. Mich. 1995) (quoting Catawba Indian Tribe, 718 F.2d at 1298-99). It is reasonable to conclude, as the court did in Tuscarora Nation of Indians that aboriginal title, once extinguished, is forever lost.

Similar to the facts before us, the district court in Tuscarora Nation of Indians faced the unique situation where the plaintiff Native American tribe purchased land, rather than having it ceded to the tribe. The plaintiff tribe acquired title at some point after the sovereign's right to preemption perfected

into full fee title. The court expressed that the obvious policy of the Great Britain was to extinguish aboriginal title to all but reserved lands. The court found that "if the fee is not in the state, then it is privately held." Id. at 115. The court in Tuscarora further held that "it cannot be argued that original Indian title can in any manner be revived once it has been extinguished." Id. 113. We find this reasoning compelling and applicable to the facts before us.

Therefore, tribal land rights may not be revived, and without any tribal land rights in Tatamy's Place, Plaintiff fails to state a claim for which relief may be granted under the Act or federal common law.

IV. CONCLUSION

By 1741, aboriginal title to Tatamy's Place had been extinguished, and Tundy Tetamy alone owned the land in fee. Plaintiff does not point to any subsequent legally cognizable facts indicating a sovereign grant of tribal land in Tatamy's Place. As Tatamy's Place is not tribal land, Plaintiff does not have any legally-protectable interest in Tatamy's Place under the Act or federal common law. The Defendants' Motions to Dismiss are **GRANTED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE DELAWARE NATION, Plaintiff,	:	CIVIL ACTION
v.	:	
COMMONWEALTH OF PENNSYLVANIA, et al., Defendants.	:	NO. 04-CV-166

O R D E R

AND NOW, this day of November 2004, in consideration of the nine Motions to Dismiss filed by the following groups of defendants: (1) Jack and Jean Reese (Doc. No. 55), (2) Forks Township, John Ackerman, David Kolb, Donald H. Miller, David W. Hof, and Henning Holmgaard (Doc. No. 56), (3) Binney & Smith, Inc., the Follett Corportation, Carol A. Migliaccio, Nic Zawarski and Sons Developers Inc., Daniel O. Lichtenwalner, and Joan B. Lichtenwalner (the "Binney & Smith defendants") (Doc. No. 57), (4) the Commonwealth of Pennsylvania (Doc. No. 58), (5) Audrey Baumann (Doc. No. 60), (6) W. Neill Werkheiser, Warren F. Werkheiser, Carl W. and Gail N. Roberts, Robert and Mary Ann Aerni, and Mark and Cathy Sampson (Doc. No. 62), (7) the County of Northampton, Pennsylvania and the nine members of Northampton County Council in their official capacity, who are named as J. Michael Dowd, Ron Angle, Michael F. Corriere, Mary Ensslin, Margaret Ferraro, Wayne A. Grube, Ann McHale, Timothy B. Merwarth and Nick R. Sabatine, (Doc. No. 63), (8) the Honorable Edward G.

Rendell (Doc. No. 64), and (9) the County of Bucks, Pennsylvania (Doc. No. 66) (collectively, the "Defendants") requesting that this Court dismiss Plaintiff The Delaware Nation's ("Plaintiff") Complaint against the Defendants pursuant to Federal Rule of Civil Procedure 12(b)(6) for Plaintiff's failure to plead facts sufficient to support a claim to the parcel of land at the center of this dispute; Plaintiff's Responses to the Motions to Dismiss (Doc. Nos. 84, 85, 86, 87, 88, 89, 90, 91, & 92); the Defendants' Replies (Doc. Nos. 93, 94, 95, & 101); and Plaintiff's Sur-Reply thereto (Doc. No. 105).

And in further consideration of the October 6, 2004 oral argument and the parties' responsive papers thereto (Doc. Nos. 110, 111, 112, 113, & 114), **IT IS ORDERED** that:

1. By stipulation of the parties, the Motions of the following Defendants are **DISMISSED AS MOOT:**

    a. the Commonwealth of Pennsylvania's (Doc. No. 58); and

    b. the County of Bucks, Pennsylvania (Doc. No. 66).

2. The Motions of the following groups of Defendants are **GRANTED:**

    a. Jack and Jean Reese (Doc. No. 55);

    b. Forks Township, John Ackerman, David Kolb, Donald H. Miller, David W. Hof, and Henning Holmgaard (Doc. No. 56);

c. Binney & Smith, Inc., the Follett Corporation, Carol A. Migliaccio, Nic Zawarski and Sons Developers Inc., Daniel O. Lichtenwalner, and Joan B. Lichtenwalner (Doc. No. 57);

d. Audrey Baumann (Doc. No. 60);

e. W. Neill Werkheiser, Warren F. Werkheiser, Carl W. and Gail N. Roberts, Robert and Mary Ann Aerni, and Mark and Cathy Sampson (Doc. No. 62);

f. the County of Northampton, Pennsylvania and the nine members of Northampton County Council in their official capacity, who are named as J. Michael Dowd, Ron Angle, Michael F. Corriere, Mary Ensslin, Margaret Ferraro, Wayne A. Grube, Ann McHale, Timothy B. Merwarth and Nick R. Sabatine, (Doc. No. 63); and

g. the Honorable Edward G. Rendell (Doc. No. 64).

The Clerk of Court **SHALL** enter judgment in favor of the Defendants and against Plaintiff The Delaware Nation.

BY THE COURT:

/s/James McGirr Kelly

JAMES McGIRR KELLY, J.