UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ONEIDA NATION,

Plaintiff,

v. Case No. 16-CV-1217

VILLAGE OF HOBART, WISCONSIN

Defendant.

DEFENDANT'S RESPONSES TO PLAINTIFF ONEIDA NATION'S STATEMENT OF PROPOSED UNDISPUTED MATERIAL FACTS

Defendant, Village of Hobart, Wisconsin (the "Village"), by its attorneys, respectfully submits its responses to Plaintiff's, Oneida Nation (the "Nation"), Statement of Proposed Undisputed Material Facts:

GENERAL OBJECTIONS

1. The Village objects to the Nation's Statement of Proposed Undisputed Material Facts to the extent any proposed statements are not relevant to the pending motions. The Village puts the Nation to its burden of strict proof regarding all proposed facts that fail to provide evidentiary support for the propositions contained therein.

2. The Village also objects to the Nation's Statement of Proposed Undisputed Material Facts to the extent that the proposed statements make arguments, recite opinions as "facts," editorialize documents without evidentiary support, speculate as to the meaning of documents or testimony without foundation, and draw inferences rather than reciting evidence. *See* Civil L.R. 56(b)(1)(C)(i); *S.C. Johnson & Son, Inc. v. Nutraceutical Corp.*, No. 11-C-861, 2014 WL 131114 at *2 n.2 (E.D. Wis., Jan. 14, 2014) ("Arguments or colored words included in proposed findings of fact are not facts and have been omitted."); *see Schneiker v. Fortis Ins. Co.,*

200 F.3d 1055, 1057 (7th Cir. 2000) (disregarding responses to proposed findings of fact that were "chock-full of misstatements, unsupported allegations, and legal argument"); *Poulos v. Village of Pleasant Prairie*, No. 10-C-394, 2012 WL 946916 at *2 (E.D. Wis., Mar. 20, 2012) ("[A]rguments have no place in proposed findings of fact or responses to such findings.").

3. The Village incorporates these general objections into its responses as set forth below.

RESPONSES TO THE NATION'S STATEMENT OF PROPOSED UNDISPUTED MATERIAL FACTS

1. The Nation is a federally recognized Indian tribe entitled to the privileges and immunities of that status. Notice of the Indian Entities Recognized and Eligible to Receive Services from the United States Department of the Interior, Bureau of Indian Affairs, 83 Fed. Reg. 4235, 4238 (Jan. 30, 2018); 82 Fed. Reg. 4915, 4917 (Jan. 17, 2017); 81 Fed. Reg. 26826, 26829 (May 4, 2016); 80 Fed. Reg. 1942, 1945 (Jan. 14, 2015); 79 Fed. Reg. 4748, 4751 (Jan. 29, 2014); 78 Fed. Reg. 26384, 26387 (May 6, 2013); 77 Fed. Reg. 47868, 47870 (Aug. 10, 2012); 75 Fed. Reg. 60810, 60812 (Oct. 1, 2010); 74 Fed. Reg. 40218, 40220 (Aug. 11, 2009); 73 Fed. Reg. 18553, 18555 (Apr. 4, 2008); 72 Fed. Reg. 13647, 13650 (Mar. 22, 2007); 70 Fed. Reg. 71194, 71196 (Nov. 25, 2005); 68 Fed. Reg. 68179, 68182 (Dec. 5, 2003); 67 Fed. Reg. 46327, 46330 (Jul. 12, 2002); 65 Fed. Reg. 13298, 13300 (Mar. 13, 2000); 63 Fed. Reg. 71941, 71943 (Dec. 30, 1998); 62 Fed. Reg. 55270, 55272 (Oct. 23, 1997); 61 Fed. Reg. 58211, 58213 (Nov. 13, 1996); 60 Fed. Reg. 9250, 9253 (Feb. 16, 1995); 58 Fed. Reg. 54364, 54367 (Oct. 21, 1993); 53 Fed. Reg. 52829, 52831 (Dec. 29, 1988); 47 Fed. Reg. 53130, 53132 (Nov. 24, 1982); 44 Fed. Reg. 7235, 7236 (Jan. 31, 1979).

Response: Disputed in part. Undisputed that the Nation is listed in the Notice of the Indian Entities Recognized and Eligible to Receive Services from the United States Department

of the Interior, Bureau of Indian Affairs, 83 Fed. Reg. 4235, 4238 (Jan. 30, 2018). The "privileges and immunities" to which the Nation is entitled as a result of its inclusion in that list represents a legal conclusion, not a statement of fact. The Village further disputes that being listed as a federally recognized Indian tribe by the Bureau of Indian Affairs ("BIA") is dispositive of the legal question of the tribe's status.

2. The Village of Hobart ("Village") is a municipality of the State of Wisconsin located wholly within the boundaries of the tract reserved by the Treaty of February 8, 1838, 7 Stat. 566. (Declaration of Paul R. Jacquart in Support of Plaintiff Oneida Nation's Motion for Summary Judgment (hereafter "Jacquart Dec.") ¶ 37, Ex. 36, Laws of Wisconsin, Ch. 339 (1903) at ON-EDM000481-82.)

Response: Disputed in part. The Village does not dispute that the Village is a municipality of the State of Wisconsin, but clarifies that the Village was first created as a town government until its incorporation as a Village in 2002. *Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis.*, 542 F. Supp. 2d 908, 913 (E.D. Wis. 2008). It is also undisputed that the Village is located wholly within the boundaries of the area set aside by the Treaty of February 8, 1838, but the Village disputes whether the Treaty of 1838 was intended to set aside a single tract to be a reservation held in common by the Nation.

3. On February 8, 1831, the United States treated with the Menominee Tribe to acquire a tract of land to be "set apart as a home to the several tribes of the New York Indians" to be apportioned among the New York tribes "so as not to assign to any tribe a greater number of acres than may be equal to one hundred for each soul actually settled upon the lands" and to be held by those tribes "under such tenure as the Menomonee Indians now hold their lands . . . " (Jacquart Dec. ¶ 11, Ex. 10, *Treaty with the Menominee, 1831*, signed Feb. 8, 1831, 7 Stat. 342,

Art. First, at ON-EDM00158.)

Response: Disputed in part. It is undisputed that ON-EDM00158 contains the language quoted in Plaintiff's Statement of Proposed Undisputed Material Facts ("PSUMF") ¶ 3, but the Village disputes PSUMF ¶ 3 to the extent the Nation claims it reflects an intent to create a reservation held in common by the Nation in the February 3, 1838 Treaty between the United States and the First Christian and Orchard Parties of the Oneida. (*See* Ex. 154 to July 19, 2018 Kowalkowski Decl., ECF No. 89-154 at 6-9.)

4. The Treaty of February 8, 1831, stated the United States' and the Menominee Tribe's understanding regarding the tenure of the land to be held by the New York tribes: "It is distinctly understood, that the lands hereby ceded to the United States for the New York Indians, are to be held by those tribes, under such tenure as the Menomonee Indians now hold their lands, subject to such regulations and alteration of tenure, as Congress and the President of the United States shall, from time to time, think proper to adopt." (*Id.* (7 Stat. 342, Art. First))

Response: Undisputed that ON-EDM00158 contains the language quoted in Plaintiff's Statement of Proposed Undisputed Material Facts ("PSUMF") ¶ 4, but the Village disputes PSUMF ¶ 4 to the extent the Nation claims it reflects an intent to create a reservation held in common by the Nation in the February 3, 1838 Treaty between the United States and the First Christian and Orchard Parties of the Oneida. (*See* Ex. 154 to July 19, 2018 Kowalkowski Decl., ECF No. 89-154 at 6-9.)

5. The Treaty of February 8, 1831, also described a tract of land reserved from the cession and set aside for Menominee Tribe as the "reservation" for them. (*Id.* at ON-EDM00159 (7 Stat. 342, Art. Fourth).)

Response: Disputed in part. It is undisputed that ON-EDM00159 contains the word

"reservation," but the Village disputes PSUMF ¶ 5 to the extent it suggests that the term "reservation" was used in the Treaty of February 8, 1831 to describe the tract of land set aside for the New York tribes. In actuality, the February 8, 1831 treaty uses the term "reservation" to describe the tract of land "being made to the Menominee Indians…" (Jacquart Dec. ¶ 11, Ex. 10, *Treaty with the Menominee, 1831*, signed Feb. 8, 1831, 7 Stat. 342, Art. Fourth, at ON-EDM00159.)

6. On February 17, 1831, the United States treated with the Menominee Tribe to amend the February 8 treaty to extend the three-year deadline by which the New York tribes were to relocate to the ceded Menominee tract. Article *First* of the February 17 provides that "the President of the United States shall prescribe the time for the removal and settlement of the New York Indians upon the lands thus provided for them; and, at the expiration of such reasonable time, he shall apportion the land among the actual settlers, in such manner as he shall deem equitable and just." (Jacquart Dec. ¶ 12, Ex. 11, *Treaty with the Menominee, 1831*, singed [sic] Feb. 17, 1831, 7 Stat. 346, Art. Second, at ON-EDM00164.)

Response: Undisputed.

7. On October 27, 1832, the United States treated with the Menominee Tribe to amend the February 8 treaty again to alter the boundaries of the tract ceded to the United States for the benefit of the New York tribes. (Jacquart Decl. ¶ 13, Ex. 12, *Treaty with the Menominee, 1832*, signed Oct. 27, 1832, 7 Stat. 405, Art. Second., at ON-EDM00172-73.) This treaty expressly provided that eh terms of the February 8, 1831 treaty, as a mended, were otherwise confirmed. (*See id.*)

Response: Undisputed.

8. By the Treaty of February 3, 1838, the "First Christian and Orchard Parties of the

Indians" ceded to the United States all their title and interest in the 1831 Menominee cession, as amended, for the New York tribes, reserving "to the said Indians to be held as other Indian lands are held a tract of land containing one hundred (100) acres, for each individual, and the lines of which shall be so run as to include all their settlements and improvements in the vicinity of Green Bay." (Jacquart Dec. ¶ 4, Ex. 13, *Treaty with the Oneida, 1838,* signed Feb. 3, 1838, 7 Stat. 566, Arts. 1 and 2, at ON-EDM00228.)

Response: Disputed in part. It is undisputed that ON-EDM00228 contains the language quoted in PSUMF ¶ 8, the Village disputes PSUMF ¶ 8 to the extent the Nation claims it reflects an intent to create a reservation held in common by the Nation rather than having granted land to individuals. (*See* Ex. 154 to July 19, 2018 Kowalkowski Decl., ECF No. 89-154 at 6-9; Ex. 3 to Sept. 5, 2018 Kowalkowski Decl., ¶ 2 at VH-GRE003701.)

9. The Treaty of February 3, 1838, obliged the United States to survey the tract set aside: "The United States further agree to cause the tracts reserved in the 2d article to be surveyed as soon as practicable." (*Id.* at ON-EDM00228-29 (7 Stat. 566, Art. 3))

Response: Disputed in part. It is undisputed that the Treaty of February 3, 1838 contains the language quoted in PSUMF ¶ 9. The Village disputes the Nation's characterization that the Treaty obliged the United States to survey the "tract" set aside, as the Treaty specifically refers to "tracts."

10. In December 1838, John Suydam surveyed the tract set aside in the Treaty of February 8, 1838. Suydam's map and field notes show a single tract as constituting the Oneida Reservation. (*See* Jacquart Dec. ¶ 15, Ex. 14, John Suydam Survey, Map of Oneida Reservation, Dec. 1838, at ON-HOX00772-73; *id.* at ¶ 16, Ex. 15, John Suydam, Field Notes of Survey of Oneida Reserve, Dec. 15, 1838, at ON-HOX00774-76.)

Response: Disputed in part. It is undisputed that ON-HOX00774-76 contains John Suydam's field notes and map that were created after he surveyed the area set aside in the Treaty of February 8, 1838, and that the map and field notes show a single tract as constituting the area set aside in the Treaty of 1838. The Village disputes PSUMF ¶ 10 to the extent it suggests that the Treaty of February 8, 1838 was intended to set aside a single "tract" as opposed to 100-acre "tracts" for individuals. (*See* Ex. 154 to July 19, 2018 Kowalkowski Decl., ECF No. 89-154 at 6-9; Ex. 5 to Sept. 5, 2018 Kowalkowski Decl., ¶ 2 at VH-GRE003740, 747.)

11. On February 7, 1839, Commissioner of Indian Affairs Crawford wrote to Secretary of War Poinsett to advise that the terms of the Treaty of 1838 had been carried out. Commissioner Crawford noted that Indian Agent Baird was "instructed to take a census of the tribe to ascertain the number of persons entitled, and the aggregate amount of land, and next to run the exterior lines of the whole body of land so as to include all their improvements." Further, he noted that Baird had employed John Suydam to produce "a survey or plat showing the entire Indian reservation at 65,400 acres." Crawford also observed, "At first blush, it would seem that we covenanted to survey the several tracts, but upon consideration I am satisfied that it is not so." Finally, Crawford concluded that the whole duty had been "discharged with ability and fidelity, and . . . agreeably and satisfactorily to the Oneidas." (Jacquart Dec. ¶ 61, Ex. 60, Letter from Commissioner of Indian Affairs Crawford to Hon. J. R. Poinsett, Secretary of War (Feb. 7, 1839), at ON-HOX000893-94).

Response: Disputed in part. It is undisputed that ON-HOX000893-94 contains the language quoted in PSUMF ¶ 11, but the Village disputes PSUMF ¶ 11 to the extent it suggests that the failure by John Suydam to survey the individual tracts within the land set aside for the Oneida Reservation is proof that the Treaty of 1838 was intended to set aside land for the

Oneidas to be held in common rather than individual tracts of land being granted to individuals. (*See* Ex. 154 to July 19, 2018 Kowalkowski Decl., ECF No. 89-154 at 6-9; Ex. 5 to Sept. 5, 2018 Kowalkowski Decl., ¶ 2 at VH-GRE003740, 747.)

12. In 1871, Congress enacted "An Act granting the Right of Way to the Green Bay and Lake Pepin Railway Company for its Road across the Oneida Reservation, in the State of Wisconsin," subject to "the conditions of an agreement made by the chiefs and headmen of the Oneida tribe of Indians . . ." (Jacquart Dec. ¶ 62, Ex. 61, Act Granting Right-of-Way Across the Oneida Reservation, Act of Mar. 3, 1871, 16 Stat. 588.)

Response: It is undisputed that Jacquart Declaration Exhibit 61 contains the language quoted in PSUMF ¶ 12.

13. In 1874, the United States Supreme Court held that, because the lands were commonly held, timber could not be removed from the Oneida Reservation for the benefit of individual tribal members. *See United States v. Cook,* 86 U.S. 591 (1974) [sic].

Response: Disputed. The Court in *United States v. Cook* (1873) did not find that "because the lands were commonly held, timber could not be removed from the Oneida Reservation for the benefit of individual tribal members." PSUMF ¶ 13. Rather, the Court found that "[t]he Indians having only a right of occupancy in the lands, the presumption is against their authority to cut and sell the timber." *United States v. Cook,* 86 U.S. 591, 594 (1873). The Court also noted: "The timber taken off by the Indians in such clearing may be sold by them. But to justify any cutting of the timber, except for use upon the premises, as timber or its product, it must be done in good faith for the improvement of the land. The improvement must be the principal thing, and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized." *Id.* at 593. At issue in *Cook* was the cutting of timber

for no reason other than its sale. The Court concluded that timber could only be sold by tribal members when the timber was cut for the purpose of improving the land.

14. On September 16, 1887, the Commissioner of Indian Affairs Atkins wrote the Secretary of the Interior to recommend that "the President be asked to authorize allotments in severalty to be made to the Indians on the Oneida Reservation, in Wisconsin, under the Act of February 8, 1887 (24 Stat. 388) . . ." (Jacquart Dec. ¶ 17, Ex. 16, Letter from Commissioner of Indian Affairs J.D.C. Atkins to the Secretary of the Interior (Sep. 16, 1887), at VH-GRE000042-43.)

Response: Undisputed.

15. In his recommendation to the Secretary of the Interior on allotment of the Oneida Reservation, Commissioner Atkins observed that the Oneida Reservation was created by the Treaty of February 3, 1838, and consisted of 65,430 acres. (*Id.* at VH-GRE000039.)

Response: Undisputed, except that the cited document identifies "a reservation . . . containing by actual survey, 65,540 acres, being an excess of 140 acres above the quantity due to the individual Indians named in said Census." (Jacquart Dec. ¶ 17, Ex. 16, at VH-GRE000039.)

16. In his recommendation to the Secretary of the Interior on allotment of the Oneida Reservation, Commissioner Atkins said, "The provision in the treaty, reserving 100 acres for each individual, was not regarded as authorizing allotments in severalty but as authorizing the measure of the quantity of land to be reserved for the bands in common." (*Id.*)

Response: It is undisputed that the exhibit mentioned above contains the language quoted in PSUMF ¶ 16, but the Village disputes PSUMF ¶ 16 to the extent it suggests that there was universal consensus regarding the meaning of Article 2 of the February 3, 1838 treaty. (*See* Ex. 154 to July 19, 2018 Kowalkowski Decl., ECF No. 89-154 at 6 ("[H]istorical documents

including petitions, correspondence, and an unratified treaty from the period immediately following the ratification of the February 1838 treaty indicate that the tribe and U.S. officials believed that it had created individually rather than collectively held land."); Ex. 10 to Sept. 5, 2018 Kowalkowski Decl., ¶ 2 at VH-GRE003770-73.)

17. On May 20, 1889, the Secretary of the Interior relayed Commissioner Atkins' recommendation regarding allotment of the Oneida Reservation to President Benjamin Harrison and concurred in the recommendation. (*See* Jacquart Dec. ¶ 18, Ex. 17, Letter from Secretary of Interior John W. Noble to President Benjamin Harrison (May 20, 1889), at ON-EDM00421.)

Response: Disputed in part. The Village does not dispute that on May 20, 1889, Secretary of the Interior Noble relayed a recommendation from Commissioner of Indian Affairs Atkins that the area set aside in the Treaty of 1838 be allotted under the Dawes Act. The Village disputes, however, that the referenced recommendation is the September 16, 1887 recommendation referenced in PSUMF ¶¶ 14-16. The May 20, 1889 letter from Secretary Noble refers to "a letter of 18th instant" containing the recommendation of Commissioner Atkins, which would not be the recommendation from September 16, 1887.

18. President Harrison approved the recommendation regarding allotment of the Oneida Reservation and on June 18, 1889, Special Agent Dana C. Lamb was assigned to conduct the allotment of the Oneida Reservation. (Jacquart Dec. ¶ 19, Ex. 18, FIFTY-EIGHTH ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR (1889) (ARCIA), at ON-EDM00423.)

Response: Undisputed.

19. In 1891, a schedule containing 1,530 allotments on the Oneida Reservation was recommended for approval. (Jacquart Dec. ¶ 20, Ex. 19, SIXTIETH ANNUAL REPORT OF THE

COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR (1891) (ARCIA), at ON-EDM00431.)

Response: Disputed only to the extent the cited document reflects that a schedule containing 1,530 allotments was *submitted* for approval. Otherwise, undisputed.

20. The Bureau of Indian Affairs agent with supervisory authority over the Oneida Reservation in 1891 described the Oneida Reservation as follows in his annual report to the Commissioner of Indian Affairs: "**Oneida Reservation**, situated between the counties of Brown and Outagamie, about 40 or 50 miles in a southeasterly direction from this office, contains a little less than three townships, 65,540 acres, allotted in severalty by Special Agent Lamb, which allotment was completed a little more than a year ago." (*Id.* at ON-EDM00432 (emphasis in original).)

Response: Undisputed, except the Village notes that the quoted document actually states "about *45* or 50 miles . . ." (Jacquart Dec. ¶ 20, Ex. 19 at ON-EDM00432) (emphasis added).)

21. Trust patents dated June 13, 1892, were issued to Oneida allottees, to remain in trust for twenty-five years in accordance with the General Allotment Act. (Jacquart Dec. ¶ 39, Ex. 38, Letter from Secretary Franklin K. Lane to the President of the United States (May 3, 1918), at VH-GRE002784.)

Response: Undisputed.

22. Approximately eighty acres were reserved from allotment on the Oneida Reservation for use as a tribal boarding and day school. (Jacquart Dec. ¶ 40, Ex. 39, 68-a CONG. REC. 5876-77 (1927) (Letter from Commissioner Chas. A. Burke to Henry Doxtater and Joseph Smith (Jan. 16, 1926)), at VH-GRE002828.)

Response: Disputed only to the extent the cited document states that approximately

eighty acres were reserved from allotment "for boarding-school and day-school purposes." Otherwise, undisputed.

23. There were small amounts of unallotted land reserved from allotment on the Oneida Reservation for use in the satisfaction of additional claims to entitlement to receive an allotment. (*See* Jacquart Dec. ¶ 41, Ex. 40, Letter from Acting Commissioner of Indian Affairs to the Secretary of the Interior (Jan. 22, 1909), at ON-EDM00451.)

Response: Disputed in part. It is undisputed that there were small amounts of unallotted land reserved from allotment on the Oneida Reservation. The Village disputes PSUMF ¶ 23 to the extent it fails to recognize that these small amounts of unallotted land remained because the amount of land originally set aside under the February 3, 1838 treaty was insufficient in area to afford each allottee with the amount of land provided for in the Act of February 8, 1887.

24. In 1900, the Bureau of Indian Affairs' supervision over the Oneida Reservation was transferred from the Green Bay Agency to the Oneida School agency. (Jacquart Dec. ¶ 21, Ex. 20, ANNUAL REPORTS OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1900 (hereinafter "ARCIA" preceded by the fiscal year in which the coverage in each respective Report ends, i.e. "1900 ARCIA" for the ARCIA for the Fiscal Year Ended June 30, 1900), at ON-EDM00475.)

Response: Undisputed.

25. In the Oneida School Superintendent's first report to the Commissioner of Indian Affairs, as included in the 1900 Annual Report of the Commissioner of Indian Affairs, the superintendent described the Oneida Reservation as follows: "The Oneida Reservation contains 65,440 acres, all allotted, a large part still in forest from which the best timber has been removed." (*Id.*)

Response: Disputed in part. Undisputed that ON-EDM00475 contains the language quoted in PSUMF ¶ 25, but disputed to the extent the Nation relies on the quoted passage as "a considered jurisdictional statement" regarding the status of the area set aside by the Treaty of 1838. *Cf. Yankton Sioux v. Gaffey*, 188 F.3d 1010, 1029 n.11 (8th Cir. 1999) ("The use of the term 'Yankton Sioux Reservation' in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands."); *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250, 1259 (N.D. Okl. 2009) ("Although the Act mentions the 'Osage Indian Reservation,' as do some subsequent enactments, it plainly does so only to describe a known geographic area.").

26. The 1900 Annual Report of the Commissioner of Indian Affairs included a "Schedule showing the names of Indian reservations, agencies, etc." Under Wisconsin, Oneida, this schedule included a listing for Wisconsin, Oneida, and under the column titled, "Date of treaty, law, or other authority establishing reserve," stated: "Treaty of Feb. 3, 1838, vol. 7, p. 566. 65,402.13 acres allotted to 1,501 Indians. Remainder, 84.08 acres, reserved for school purposes." (*Id.* at ON-EDM00476.)

Response: Disputed in part. It is undisputed that ON-EDM00475 contains the language quoted in PSUMF ¶ 26, but disputed to the extent the Nation relies on the quoted language as "a considered jurisdictional statement" regarding the status of the area set aside by the Treaty of 1838. *Cf. Yankton Sioux v. Gaffey*, 188 F.3d 1010, 1029 n.11 (8th Cir. 1999) ("The use of the term 'Yankton Sioux Reservation' in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands."); *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250, 1259 (N.D. Okl. 2009) ("Although the Act mentions the 'Osage Indian Reservation,' as do some

subsequent enactments, it plainly does so only to describe a known geographic area."). The Village further notes that the schedule included in ON-EDM00476 is blank when listing "Area in acres" and "Square miles" in reference to the "Wisconsin, Oneida," thereby suggesting that the Oneida Reservation contained zero acres at that time.

27. By virtue of declarations of competency during the trust period, the sale of allotments of deceased allotees, and the sale of allotments following expiration of the trust period, thousands of acres of Oneida allotments were lost to the possession of the Oneida allottees in the early twentieth century. (*See, e.g.*, Jacquart Dec. ¶ 22, Ex. 21, 1903 ARCIA at ON-EDM00530; *id.* at ¶ 23, Ex. 22, 1904 ARCIA at ON-EDM00532; *id.* at ¶ 24, Ex. 23, 1905 ARCIA at VH-GRE00296; *id.* at ¶ 25, Ex. 24, 1906 ARCIA at VH-GRE000457; *id.* at ¶ 26, Ex. 25, 1907 ARCIA at VH-GRE000573; *id.* at ¶ 27, Ex. 26, 1908 ARCIA at VH-GRE000759; *id.* at ¶ 28, Ex. 27, 1909 ARCIA at VH-GRE000999; *id.* at ¶ 29, Ex. 28, 1911 ARCIA at VH-GRE0001390; *id.* at ¶ 30, Ex. 29, 1912 ARCIA at VH-GRE001645; *id.* at ¶ 31, Ex. 30, 1913 ARCIA at VH-GRE001877; *id.* at ¶ 32, Ex. 31, 1914 ARCIA at VH-GRE002084; *id.* at ¶ 33, Ex. 32, 1915 ARCIA at VH-GRE002277; *id.* at ¶ 34, Ex. 33, 1916 ARCIA at VH-GRE002463; *id.* at ¶ 35, Ex. 34, 1917 ARCIA at VH-GRE002745; ¶ 36, Ex. 35, 1920 ARCIA at 103; *id.* at ¶ 38, Ex. 37, Letter from Superintendent of Oneida Indian School Joseph C. Hart to the Commissioner of Indian Affairs (Mar. 16, 1908), at ON-EDM00649.)

Response: Disputed to the extent a "declaration[] of competency" would not result in an Oneida allottee's loss of possession of land, but would instead only result in the issuance of a fee simple patent to the allottee. (Ex. 156 to July 19, 2018 Kowalkowski Decl., ECF No. 89-156 at 37.) Further disputed to the extent the sale of allottments of deceased allottees does not result in the loss of possession of the land by the allottee, but rather the loss of possession by the allottee's

heir upon the decision of the heir to sell the land. (*Id.*) Further disputed to the extent that the proposed statement of fact does not account for the fact that many Oneida received fee patents as a result of their own application for such patents. (*Id.* at 38.) The Village does not dispute that the vast majority of land within the exterior boundaries of the area set aside by the Treaty of 1838 passed out of Indian ownership in the early twentieth century. (*See, e.g.*, DSUMF ¶¶ 30, 97, ECF No. 91.)

28. In 1909, individual Oneidas objected to the formation of towns within the Oneida Reservation by the State of Wisconsin. Charles Davis, appointed by the Bureau of Indian Affairs to investigate the question, reported on October 16, 1909, as follows: "At first, it seemed to me that there might be a federal question in the matter of whether the State could go ahead and organize municipal territory included in an Indian reservation where no formal opening of surplus lands or obliteration of reservation lines had ever taken place, but on further inquiry and examination I found decisions of the State Court of Wisconsin based on decisions of the U.S. Supreme Court which seemed to leave no doubt whatever as to this question . . ." (Jacquart Dec. ¶ 63, Ex. 62, Charles L. Davis, Supervisor of Indian Schools, *Report on Complaints of Amos Baird and Paul Doxtator* (Oct. 16, 1909), at VH-GRE000885.)

Response: Disputed in part. It is undisputed that VH-GRE000885 contains the language quoted in PSUMF ¶ 28, but the Village disputes PSUMF ¶ 28 to the extent it fails to acknowledge that the letter it quotes specifically states that the majority of the complaints received "concerning the organization of town government on the east half of the Oneida Reservation" came "mostly from two members of the tribe." (Jacquart Decl. ¶ 63, Ex. 62 at VH-GRE000884.) Moreover, VH-GRE000885 also states that in creating the town governments, "the State [of Wisconsin] has proceeded within its proper and lawful bounds. Charles L. Davis,

the author of the letter quoted in PSUMF ¶ 28 goes on to explain that the State of Wisconsin "has acted wisely both as to its own interests and the future interests of the Indians" in creating the town governments. (*Id.* at VH-GRE000885.)

29. On March 24, 1917, a three-person competency commission recommended that fee patents be issued immediately to ten named Oneida allottees, that trust patents be issued to an additional twenty-two named Oneida allottees upon the expiration of the trust period on June 12, 1917, and that the trust period for all other allottees be extended. (Jacquart Dec. ¶ 42, Ex. 41, Letter from O.M. McPherson, Special Indian Agent and Member Competency Board, to the Secretary of the Interior (Mar. 24, 1917), at ON-HOX01670-72.)

Response: Disputed. On March 24, 1917, a three-person competency commission recommended that fee patents be issued immediately to ten named Oneida allottees, that *fee* patents be issued to an additional twenty-two named Oneida allottees upon the expiration of the trust period on June 12, 1917, and that the trust period for all other allottees *still holding allotments in trust on the area set aside in the Treaty of 1838* be extended. (Ex. 162 to July 19, 2018 Kowalkowski Decl., ECF No. 89-162 at ON-HOX-01670-72.)

30. On May 19, 1917, President Wilson signed an executive order extending the trust period of all remaining Oneida allotments for one year, with the exception of twenty-three named Oneida allottees. (*See* Jacquart Dec. ¶ 43, Ex. 42, Executive Order No. 2,326 (May 19, 1917), at ON-EDM00811.)

Response: Undisputed, other than to clarify that the executive order extended the trust period of all remaining Oneida *trust* allotments for one year, with the exception of twenty-three named Oneida allottees.

31. On July 24, 1917 the competency commission was ordered to return to Oneida and

consider the possible issuance of fee patents to all allottees who held trust patents. (Jacquart Dec. ¶ 44, Ex. 43, Letter from Commissioner of Indian Affairs Cato Sells to Major James McLaughlin, Special Inspector, Department of the Interior, and Frank E. Brandon, Special Supervisor, Indian Service (Jul. 24, 1917), at ON-HOX1702.)

Response: Disputed in part. The Village disputes PSUMF ¶ 31 to the extent that ON-HOX1702 does not state that the competency commission was to consider the possible issuance of fee patents to all allottees who held trust patents, but was actually tasked with investigating the "necessity for a further extension of the period of trust covering allotments made to the Oneida Indians" because the trust period was scheduled to expire on June 18, 1918. (Jacquart Decl. ¶ 44, Ex. 43 at ON-HOX1702.)

32. On August 31, 1917, and following two meetings on the Oneida Reservation with tribal members, the competency commission filed a report with the Secretary of the Interior. The commission found 106 trust allotments remained on the Reservation (exclusive of heirship lands). (Jacquart Dec. ¶ 45, Ex. 44, Letter from Inspector James McLaughlin, et al. to the Secretary of the Interior (Aug. 31, 1917), at ON-EDM00833-37.)

Response: Disputed to the extent the proposed statement of fact assumes the continued existence in 1917 of the Oneida Reservation as defined by the area set aside in the Treaty of 1838. Further disputed to the extent the Nation relies on references to the Oneida Reservation in the cited document as "a considered jurisdictional statement" regarding the status of the area set aside by the Treaty of 1838. *Cf. Yankton Sioux v. Gaffey*, 188 F.3d 1010, 1029 n.11 (8th Cir. 1999) ("The use of the term 'Yankton Sioux Reservation' in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands."); *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 597 F.

Supp. 2d 1250, 1259 (N.D. Okl. 2009) ("Although the Act mentions the 'Osage Indian Reservation,' as do some subsequent enactments, it plainly does so only to describe a known geographic area."). Otherwise undisputed.

33. The 1917 competency commission recommended that the trust period be extended on eighteen allotments on the Oneida Reservation and that fee patents be issued for all others. (*Id.* at ON-EDM00833-36.)

Response: Disputed to the extent the proposed statement of fact assumes the continued existence in 1917 of the Oneida Reservation as defined by the area set aside in the Treaty of 1838. Further disputed to the extent the Nation relies on references to the Oneida Reservation in the cited document as "a considered jurisdictional statement" regarding the status of the area set aside by the Treaty of 1838. *Cf. Yankton Sioux v. Gaffey*, 188 F.3d 1010, 1029 n.11 (8th Cir. 1999) ("The use of the term 'Yankton Sioux Reservation' in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands."); *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250, 1259 (N.D. Okl. 2009) ("Although the Act mentions the 'Osage Indian Reservation,' as do some subsequent enactments, it plainly does so only to describe a known geographic area."). Otherwise undisputed.

34. On May 4, 1918, President Woodrow Wilson signed an executive order extending the trust period for thirty-five named allottees "on the Oneida Reservation in Wisconsin" for nine years. (Jacquart Dec. ¶ 46, Ex. 45, Executive Order No. 4,600 (Mar. 1, 1927), at ON-HOX01747.)

Response: Disputed in part. The Village disputes that PSUMF ¶ 34 refers to Executive Order No. 4600. Rather, it should refer to Executive Order No. 2856. (Jacquart Decl. ¶ 46, Ex.

45 at ON-HOX01747-48.) The Village further disputes PSUMF ¶ 34 to the extent it suggests that the Executive Order provided for an extension of the trust period for named allottees "on the Oneida Reservation in Wisconsin" in 1918. The language of the Executive Order No. 2856 refers to the "Oneida Reservation in Wisconsin" as of the Act of February 8, 1887 (24 Stat. 388). (ON-HOX01747-48) ("It is hereby ordered, under authority contained in section five of the Act of February 8, 1887 (24 Stat. 388), that the trust period on the following allotments made to Indians on the Oneida Reservation in Wisconsin, which trust expires June 12, 1918, be and is hereby extended for a period of nine from said date . . ."). Further disputed to the extent the proposed statement of fact assumes the continued existence in 1918 of the Oneida Reservation as defined by the area set aside in the Treaty of 1838. Further disputed to the extent the Nation relies on references to the Oneida Reservation in the cited document as "a considered jurisdictional statement" regarding the status in 1918 of the area set aside by the Treaty of 1838. *Cf. Yankton Sioux v. Gaffey*, 188 F.3d 1010, 1029 n.11 (8th Cir. 1999) ("The use of the term 'Yankton Sioux Reservation' in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands."); *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250, 1259 (N.D. Okl. 2009) ("Although the Act mentions the 'Osage Indian Reservation,' as do some subsequent enactments, it plainly does so only to describe a known geographic area."). Otherwise undisputed.

35. In 1919, the Bureau of Indian Affairs' supervision over the Oneida Reservation was transferred from the Oneida School Superintendent back to the Keshena Agency. (Jacquart Dec. ¶ 69, Ex. 68, 1919 ARCIA at ON-EDM00991-92; *see also id.* at ¶ 6, Ex. 5, R. David Edmunds, Ph.D., *The Oneida Indian Reservation in Wisconsin - Its Land, Its People, and its Governance,*

1838-1938 (Nov. 15, 2017) (hereafter "Dr. Edmunds Opening Report") at 54.).)

Response: Disputed. In 1919, the Oneida School was abolished and supervision of the Oneidas *who still held restricted patents* was transferred to the Superintendent of the Keshena Indian School. (Ex. 69 to July 19, 2018 Kowalkowski Decl. at ON-HOX01596.) The Village disputes any suggestion that the Keshena Agency supervised the entire area set aside by the Treaty of 1838, as numerous documents acknowledge that the federal government, including the Keshena Agency, did not supervise or otherwise exercise jurisdiction over land held in fee within the area set aside by the Treaty of 1838. (*See e.g.*, Exs. 59, 60-65, 70, 72, 74, 76-78, 81-83, 86, 90-91, 96-98 to July 19, 2018 Kowalkowski Decl., ECF No. 89-59, 60-65, 70, 72, 74, 76-78, 81-83, 86, 90-91, 96-98; *see also* Ex. 153 to July 19, 2018 Kowalkowski Decl., ECF No. 89-153 at 28.) Further disputed to the extent the proposed statement of fact assumes the continued existence in 1918 of the Oneida Reservation as defined by the area set aside in the Treaty of 1838.

36. The 1919 Annual Report of the Commissioner of Indian Affairs included "Table 5. Area of Indian lands June 30, 1919." Under "State and Reservation," Table 5 listed Wisconsin, Oneida. The entry for Oneida stated: "Number of allotments 1,541. Area in acres: Allotted 65,466; Unallotted . . .; Total 65,466." (Jacquart Dec. ¶ 71, Ex. 70, 1919 ARCIA at ON-EDM000897.)

Response: Disputed in part. The Village does not dispute that ON-EDM000897 contains the language quoted in PSUMF ¶ 36, except to the extent ON-EDM000897 refers to "State and reservations" as opposed to "State and Reservation" and "Number of allotments 1,591" as opposed to "1,541." (*Id.*) Further disputed to the extent the Nation relies on references to the Oneida in the cited document as "a considered jurisdictional

statement" regarding the status in 1919 of the area set aside by the Treaty of 1838. *Cf. Yankton Sioux v. Gaffey*, 188 F.3d 1010, 1029 n.11 (8th Cir. 1999) ("The use of the term 'Yankton Sioux Reservation' in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands."); *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250, 1259 (N.D. Okl. 2009) ("Although the Act mentions the 'Osage Indian Reservation,' as do some subsequent enactments, it plainly does so only to describe a known geographic area."). The Village further notes that the document cited in PSUMF ¶ 36 also includes under "States and reservations" an entry for "Stockbridge and Munsee," a reservation that was disestablished as of 1906. *See Wis. v. Stockbridge-Munsee Comm.*, 554 F.3d 657 (7th Cir. 2009).

37. The 1920 Annual Report of the Commissioner of Indian Affairs included Table 7 titled "General Data for each Indian reservation to June 30, 1920." Under the "Name of reservation and tribe" column for Wisconsin, the following entry appeared for Oneida: "(Under Keshena School.) Tribe: Oneida; Area (unallotted) 151; Treaties, laws, or other authorities relating to reserve: Treaty of Feb. 3, 1838, vol. 7, p. 566. 65,428.13 acres allotted to 1,502 Indians; remainder, 84.08 acres, reserved for school purposes. 6 double allotments canceled containing 151 acres (see 5013-1912). Trust period on 35 allotments extended 19 years; Executive order, May 24, 1918)." (Jacquart Dec. ¶ 36, Ex. 35, 1920 ARCIA at 103.)

Response: Disputed in part. The Village does not dispute that the referenced document contains the language quoted in PSUMF ¶ 37, but disputed to the extent the Nation relies on references to the Oneida in the cited document as "a considered jurisdictional statement" regarding the status in 1920 of the area set aside by the Treaty of 1838. *Cf. Yankton Sioux v. Gaffey*, 188 F.3d 1010, 1029 n.11 (8th Cir. 1999) ("The use of the term 'Yankton Sioux

Reservation' in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands."); *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250, 1259 (N.D. Okl. 2009) ("Although the Act mentions the 'Osage Indian Reservation,' as do some subsequent enactments, it plainly does so only to describe a known geographic area."). The Village further notes that the document cited in PSUMF ¶ 37 also includes under the "Name of reservation and tribe" column for Wisconsin an entry for "Stockbridge" and "Stockbridge and Munsee," a reservation that was disestablished as of 1906. *See Wis. v. Stockbridge-Munsee Comm.*, 554 F.3d 657 (7th Cir. 2009).

38. On March 1, 1927, President Calvin Coolidge signed an executive order extending the trust period for twenty-one specified "allotments made to Indians of the Oneida Reservation in Wisconsin" for ten years. (Jacquart Dec. ¶ 47, Ex. 46, Executive Order No. 4,600 (Mar. 1, 1927), at ON-HOX01801.)

Response: Disputed in part. The Village does not dispute that President Calvin Coolidge signed an executive order on March 1, 1927 extending the trust period for ten years for twenty-one named Oneida allottees on the area set aside in the Treaty of 1838. (*Id.*) The Village disputes PSUMF ¶ 38 to the extent it suggests that the Executive Order provided for an extension of the trust period for named allottees on "the Oneida Reservation in Wisconsin" in 1927. The language of the Executive Order refers to the "Oneida Reservation in Wisconsin" as of the Act of February 8, 1887. The Executive Order provides: "It is hereby ordered under authority contained in Section 5 of the act of February 8, 1887 (24 Stat. 388), that the trust period on the following allotments made to Indians of the Oneida Reservation in Wisconsin, which trust expires during the calendar year 1927, be, and is hereby, extended for a period of ten years form the date of expiration . . ." (*Id.*) Further disputed to the extent the proposed statement of fact assumes the

continued existence in 1927 of the Oneida Reservation as defined by the area set aside in the Treaty of 1838. Further disputed to the extent the Nation relies on references to the Oneida Reservation in the cited document as "a considered jurisdictional statement" regarding the status in 1927 of the area set aside by the Treaty of 1838. *Cf. Yankton Sioux v. Gaffey*, 188 F.3d 1010, 1029 n.11 (8th Cir. 1999) ("The use of the term 'Yankton Sioux Reservation' in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands."); *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250, 1259 (N.D. Okl. 2009) ("Although the Act mentions the 'Osage Indian Reservation,' as do some subsequent enactments, it plainly does so only to describe a known geographic area.").

39. For the 1927 Annual Report of the Commissioner of Indian Affairs, reservation acreage figures were compiled. The form for Oneida showed: "Oneida Reservation. Acreage . . . 65,617.77. Allotments . . . 65,541.77. Reserved . . .76 . . . Total land area 65,617.77." (Jacquart Dec. ¶ 60, Ex. 59, 1927 ARCIA at ON-EDM01405.)

Response: Disputed in part. The Village does not dispute that the cited document includes the language quoted in PSUMF ¶ 39. The Village disputes PSUMF ¶ 39, however, to the extent it omits language from the 1927 report. The Keshena Indian Agency Annual Report for 1927 referred to the "former Oneida Indian reservation" and the "former reservation." (Ex. 84 to July 19, 2018 Kowalkowski Decl. at ON-EDM01425-26.)In addition, the same report also compiled reservation acreage figures for the Stockbridge & Munsee Reservation that show a total land area of 11,160, despite the fact that the Stockbridge & Munsee Reservation was disestablished as of 1906. *See Wis. v. Stockbridge-Munsee Comm.*, 554 F.3d 657 (7th Cir. 2009). The Village thus disputed PSUMF ¶ 39 to the extent the proposed statement of fact assumes the

continued existence in 1927 of the Oneida Reservation as defined by the area set aside in the Treaty of 1838. Further disputed to the extent the Nation relies on references to the Oneida Reservation in the cited document as "a considered jurisdictional statement" regarding the status in 1927 of the area set aside by the Treaty of 1838. *Cf. Yankton Sioux v. Gaffey*, 188 F.3d 1010, 1029 n.11 (8th Cir. 1999) ("The use of the term 'Yankton Sioux Reservation' in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands."); *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250, 1259 (N.D. Okl. 2009) ("Although the Act mentions the 'Osage Indian Reservation,' as do some subsequent enactments, it plainly does so only to describe a known geographic area.").

40. On December 15, 1934, Bureau of Indian Affairs conducted a federal election at which Oneida tribal members voted 688 in favor and 126 against accepting the Indian Reorganization Act. (Jacquart Dec. ¶ 48, Ex. 47, *Tally of Voting by State and Reservation on IRA, 1935*, John Collier Papers, Yale University, New Haven, Connecticut, at ON-EDM01643; *see also id.* at ¶ 2, Ex. 1, Defendant's Supplemental Objections and Responses to Plaintiff's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admissions at 44 (Response to Request for Admission Nos. 37-38); *id.* at ¶ 6, Ex. 5, Dr. Edmunds Opening Report at 113; *id.* at ¶ 3, Ex. 2, Fredrick E. Hoxie, Ph.D., *A History of Relations Between The Oneida Nation and The United States of America 1776-1934* (Nov. 15, 2017) (hereafter "Dr. Hoxie Opening Report"), at 141-42.)

Response: Disputed in part. The Village does not dispute that on December 15, 1934 an election was held in which Oneida tribal members voted 688 in favor and 126 against accepting the Indian Reorganization Act. (*Id.*) The Village disputes, however, whether Oneida tribal

members were entitled to have an election and if the election was properly and timely held. (Jacquart Dec. ¶ 2, Ex. 1 at 44 (Responses to Request for Admission Nos. 37-38).)

41. On December 7, 1935, the Bureau of Indian Affairs Agent for Tomah Indian School, Wisconsin, submitted for approval to the Commissioner of Indian Affairs a draft Oneida Constitution. (Jacquart Dec. ¶ 49, Ex. 48, Letter from Tomah Indian School Superintendent Frank Christy to the Commissioner of Indian Affairs (Dec. 7, 1935), ON-EDM01689.)

Response: Disputed in part. The Village disputes PSUMF ¶ 41 to the extent Jacquart Declaration Exhibit 48 does not contain the draft Oneida Constitution submitted for approval and reflects that the draft Oneida Constitution was submitted for approval by the Secretary of the Interior. Otherwise undisputed.

42. On December 14, 1935, Felix Cohen, the Assistant Solicitor at the Department of the Interior commented on the draft Oneida constitution. With regard to the Oneida Reservation, Assistant Solicitor Cohen commented: "2. Article 1 - Territory. Reference is made in this article to 'the original Oneida Reservation as defined in the treaty of February 8, 1838.' The reservation as defined was not the original Oneida Reservation, even in Wisconsin, but represents a diminution of the reservation established by the treaty of October 27, 1832. This matter should be referred to the land division for correction." (Jacquart Dec. ¶ 50, Ex. 49, *Criticisms of Wisconsin Oneida Constitution*, Felix Cohen Papers, Yale University, New Haven Connecticut (Dec. 14, 1935), at ON-EDM01699; *see also id.* at ¶ 3, Ex. 2, Hoxie Opening Report at 142-43; *id.* at ¶ 6, Ex. 5, Dr. Edmunds Opening Report at 116-17.)

Response: Disputed in part. It is undisputed that ON-EDM01699 contains the language quoted in PSUMF ¶ 42 and that Felix Cohen, the Assistant Solicitor at the Department of the Interior commented on the draft Oneida constitution. The Village disputes PSUMF ¶ 42,

however, to the extent it assumes the continued existence in 1935 of a reservation defined by the area set aside by the Treaty of 1838. Further disputed to the extent the Nation relies on references to the Oneida Reservation in the cited document as "a considered jurisdictional statement" regarding the status in 1935 of the area set aside by the Treaty of 1838. *Cf. Yankton Sioux v. Gaffey*, 188 F.3d 1010, 1029 n.11 (8th Cir. 1999) ("The use of the term 'Yankton Sioux Reservation' in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands."); *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250, 1259 (N.D. Okl. 2009) ("Although the Act mentions the 'Osage Indian Reservation,' as do some subsequent enactments, it plainly does so only to describe a known geographic area.").

43. On March 6, 1936, Assistant Commissioner for Indian Affairs Zimmerman transmitted Cohen's comments to the Oneida Constitutional Committee and Tomah Superintendent Christy and recommended that revisions be made to the draft constitution, including the following: "2. In Article 1 (Territory), it is provided that the jurisdiction of the Tribe shall extend to the territory within the original reservation boundaries, 'as defined in the Treaty of February 3, 1838.' It appears that the Oneida Reservation as defined in said treaty represents a diminution of the original reservation established by the Treaty of October 27, 1832, and that it is not the original reservation. In order to avoid confusion, it is suggested that the jurisdiction of the Tribe shall 'extend to the territory within the present confines of the Oneida Reservation', and that all references to the various treaties should be omitted." (Jacquart Dec. ¶ 65, Ex. 64, Letter from Assistant Commissioner William Zimmerman, Jr. to Superintendent Frank Christy (Mar. 6, 1936), at ON-HOX01935; *see also id.* at ¶ 3, Ex. 2, Dr. Hoxie Opening Report at 142-43; *id.* at ¶ 6, Ex. 5, Dr. Edmunds Opening Report at 117-18.)

Response: It is undisputed that ON-EDM01935 contains the language quoted in PSUMF ¶ 43, but the Village disputes PSUMF ¶ 43 to the extent it assumes the continued existence in 1936 of a reservation defined by the area set aside by the Treaty of 1838. Further disputed to the extent the Nation relies on references to the Oneida Reservation in the cited document as "a considered jurisdictional statement" regarding the status in 1936 of the area set aside by the Treaty of 1838. *Cf. Yankton Sioux v. Gaffey*, 188 F.3d 1010, 1029 n.11 (8th Cir. 1999) ("The use of the term 'Yankton Sioux Reservation' in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands."); *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250, 1259 (N.D. Okl. 2009) ("Although the Act mentions the 'Osage Indian Reservation,' as do some subsequent enactments, it plainly does so only to describe a known geographic area.").

44. On March 28, 1936, the Oneida Constitution Committee approved all the changes to the draft Oneida constitution recommended by Assistant Secretary Zimmerman. (Jacquart Dec. ¶ 66, Ex. 65, Letter from Tomah Indian School Superintendent Frank Christy to the Commissioner of Indian Affairs (Mar. 30, 1936), at ON-EDM01703; *id.* at ¶ 6, Ex. 5, Dr. Edmunds Opening Report at 119-20.)

Response: Disputed in part. It is undisputed that ON-EDM01703 contains language that "on Saturday, March 28, these proposed changes were studied, discussed, and unanimously agreed upon." (Jacquart Dec. ¶ 66, Ex. 65 at ON-EDM01703.) There is no support in the cited document, however, that "all the changes" were approved as "recommended by Assistant Secretary Zimmerman."

45. On April 23, 1936, Commissioner of Indian Affairs Collier recommended to the

Secretary of the Interior that a vote be held on the Oneida Reservation on adoption of the revised constitution. Commissioner Collier said the following regarding the Oneida Reservation: "By the provisions of the treaty of February 3, 1838 (7 Stat. 566), the Oneida Indians ceded to the United States all their right, title and interest in the land set apart for them on the first article of the treaty with the Menominees of February 8, 1831 (7 Stat. 405). Out of the lands thus ceded there were reserved a 100-acre tract for each individual to be held as other Indian lands are held, etc. The Oneida Reservation has been subsequently recognized as such by Executive orders of Mar [sic] 19, 1917 and May 4, 1918, extending the trust periods on certain allotments made to Indians on the Oneida Reservation in Wisconsin." (Jacquart Dec. ¶ 67, Ex. 66, Letter from the Commissioner of Indian Affairs to the Secretary of the Interior (Apr. 23, 1936), at ON-HOX01937.)

Response: Disputed in part. It is undisputed that ON-HOX01937 contains the quoted language in PSUMF ¶ 45, but the Village disputes that the "Commissioner of Indian Affairs Collier recommended to the Secretary of the Interior that a vote be held on the Oneida Reservation." Rather, Commissioner of Indian Affairs Collier submitted an order "calling a special election for the purpose of enabling members of the Oneida Indian Tribe of the Oneida Reservation in Wisconsin to vote . . . ." (*Id.*) The Village further disputes PSUMF ¶ 45 to the extent it assumes the continued existence in 1936 of a reservation defined by the area set aside by the Treaty of 1838. Further disputed to the extent the Nation relies on references to the Oneida Reservation in the cited document as "a considered jurisdictional statement" regarding the status in 1936 of the area set aside by the Treaty of 1838. *Cf. Yankton Sioux v. Gaffey*, 188 F.3d 1010, 1029 n.11 (8th Cir. 1999) ("The use of the term 'Yankton Sioux Reservation' in such documents, without more, cannot be said to be a considered jurisdictional statement regarding

the specific status of the remaining Indian lands."); *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250, 1259 (N.D. Okl. 2009) ("Although the Act mentions the 'Osage Indian Reservation,' as do some subsequent enactments, it plainly does so only to describe a known geographic area.").

46. In his April 23, 1936 recommendation, Commissioner Collier also noted that the "proposed Constitution and By-laws conforms to the General Outline of Tribal Constitutions an [sic] By-laws, approved March 9, 1935. Reference has also [sic] been had to the Basic Memorandum on Drafting Tribal Constitutions; Solicitor's Opinion, (M-27781), October 25[,] 'Powers of Indian Tribes,' 'Questionaire [sic] on Tribal Organization, 1934, and Solicitor's Opinion, (M-27810), December 13, 1934, on twelve questions of construction raised by the Act of June 18, 1934." Collier concluded that the "document is, in my opinion, satisfactory from the viewpoint of law and policy" and recommended final approval. (*Id.* at ON-HOX01938; *see also* Jacquart Dec. ¶ 3, Ex. 2, Dr. Hoxie Opening Report at 143.)

Response: Undisputed to the extent ON-HOX01938 contains the quoted language in PSUMF ¶ 46.

47. The Basic Memorandum on Drafting Tribal Constitutions provided: "On allotted reservations, the question will arise: Shall the tribe exercise jurisdiction over fee patented lands within the original boundaries of the reservation, and shall it exercise jurisdiction over restricted allotments? No legal obstacle is seen to the exercise of tribal jurisdiction over such lands. That is to say, members of the tribe living on such lands will be subject to the same obligations towards the tribe and subject to the same jurisdiction on the part of the tribal courts as other members. Therefore, it would be proper for any tribe, if it so desires, to designate the original boundary of its reservation in defining the territory within which the tribal constitution and the

laws passed under such constitution are to prevail. On the other hand, the tribe may find it advisable not to exercise any jurisdiction over fee patented land and may, accordingly, define its territory to include only land held in restricted Indian ownership." (Jacquart Dec. ¶ 64, Ex. 63, Basic Memorandum on Drafting Tribal Constitutions, Section 4, Felix Cohen Papers, Yale University, New Haven Connecticut (1934), at ON00007070-71.)

Response: Undisputed that ON00007070-71 contains the quoted language in PSUMF ¶ 47.

48. On May 6, 1936, Secretary of the Interior Ickes authorized Superintendent Christy, Tomah Indian School, to conduct an election on the adoption of the revised Oneida constitution in accordance with rules and regulations governing elections under the Indian Reorganization Act. (Jacquart Dec. ¶ 68, Ex. 67, Letter from Secretary of the Interior Harold L. Ickes to Tomah Indian School Superintendent Frank Christy (May 6, 1936), at ON-EDM01706.)

Response: Undisputed.

49. On November 14, 1936, the Bureau of Indian Affairs conducted an election on the proposed Oneida Constitution and it was adopted by a vote of 790 in favor and 16 against. (Jacquart Dec. ¶ 52, Ex. 51, Letter from Tomah Indian School Superintendent Frank Christy to the Commissioner of Indian Affairs (Nov. 16, 1936), at ON-EDM01714; *id.* at ¶ 2, Ex. 1, Defendant's Supplemental Objections and Responses to Plaintiff's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admissions at 44-45 (Responses to Request for Admission Nos. 39-40; *cf. id.* at ¶ 70, Ex. 69, THEODORE H. HAAS, UNITED STATES INDIAN SERVICE, TEN YEARS OF TRIBAL GOVERNMENT UNDER I.R.A. (1947), at ON-EDM001967-68.)

Response: Undisputed.

50. On December 21, 1936, the Secretary of the Interior approved the Constitution for the Oneida Reservation under the Indian Reorganization Act. (Jacquart Dec. ¶ 2, Ex. 1, Defendant's Supplemental Objections and Responses to Plaintiff's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admissions at 45-46 (Response to Request for Admission No. 41); *id.* at ¶ 53, Ex. 52, UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS, CONSTITUTION AND BY-LAWS FOR THE ONEIDA TRIBE OF INDIANS OF WISCONSIN APPROVED DECEMBER 21, 1936, at ON-EDM01717.)

Response: Disputed in part. It is undisputed that on December 21, 1936 the Secretary approved the Constitution for the people of the Oneida Tribe of Indians of Wisconsin. (*See* Jacquart Decl. ¶ 53, Ex. 52.) The Village disputes, however, whether the people of the Oneida Tribe of Indians of Wisconsin were eligible for a constitution under the IRA. But, for purposes of summary judgment the Court does not need to consider this issue as explained in the Village's response.

51. On August 21, 1981, the Wisconsin Attorney General wrote to the Secretary, Wisconsin Department of Natural Resources, to express its legal opinion that the Oneida Reservation had not been disestablished or diminished. (Jacquart Dec. ¶ 54, Ex. 53, Letter from Wisconsin Attorney General Bronson C. La Follette to Wisconsin Secretary of Department of Natural Resources Carroll Besadny (Aug. 21, 1981), at ON00033260-66.)

Response: Undisputed that in the cited document the Wisconsin Attorney General provided his opinion, "based on the evidence available at this time, that the Oneida Reservation, as originally established in 1831 still exists." The Village notes, however, that the cited document contains no reference to *Stevens, et al. v. The County of Brown*, in which a judge on the U.S. District Court for the Eastern District of Wisconsin held that the Oneida Reservation

had been discontinued. (Ex. 45 to July 19, 2018 Kowalkowski Decl. at VH-GRE002855; ECF No. 89-45 at 3.)

52. The Nation has conducted a cultural event known as the Big Apple Fest within the confines of the Oneida Reservation annually since 2009. The event is free, open to the public, and is intended to educate the public about the Nation's history and culture. (Declaration of Richard L. Figueroa in Support of Plaintiff Oneida Nation's Motion for Summary Judgment (hereafter "Figueroa Dec.") ¶¶ 5-7.)

Response: Disputed in part. It is undisputed that the Nation has conducted the Big Apple Fest annually since 2009 on land within the area set aside by the Treaty of 1838. The Village disputes that the Big Apple Fest is solely "a cultural event" that "is intended to educate the public about the Nation's history and culture." Apple-picking was the activity that drew the most visitors to the event and the Nation generated thousands of dollars of revenue from those sales. (Exs. 149, 150, 151, 152 to July 19, 2018 Kowalkowski Decl., ¶¶ 138-140, ECF No. 89-149, 150, 151, 152; *see also id.* Ex. 178, Danforth Dep. at 72:5-19, ECF No. 89-178 at 9.) The Nation's Chairwoman at the time of the event testified that the event drew "the market that we were looking for to achieve for apple picking" in order "[t]o get rid of the apples before they spoil." (Ex. 178, Danforth Dep. at 69:13-17, ECF No. 89-178 at 8.) The Village further disputes PSUMF ¶ 52 to the extent it assumes the continued existence of a reservation defined by the area set aside by the Treaty of 1838 or that all land on which the event occurred is currently part of an existing reservation.

53. The Nation conducted its 2016 Big Apple Fest on September 17, 2016, on the Nation's Cultural Heritage Grounds and Apple Orchards. Activities included apple picking, an apple pie contest, apple press demonstration, a petting zoo, children's games, face painting,

cardboard cow painting, hay rides, horse demonstrations, pottery and corn husk doll making, basket weaving, food and produce vendors (15 in total), and tours of preserved historic Oneida homes regarding the history of Oneida families in the area. (*Id.* at ¶ 8.)

Response: Undisputed, except that certain of the "food and produce vendors" were non-tribal vendors. (Ex. 177 to July 19, 2018 Kowalkowski Decl., Figueroa Dep. at 130:25-131:1-2, ECF No. 89-177, at 8.) The Village further states that certain activities associated with the 2016 Big Apple Fest occurred on land owned by the Nation in fee simple. (Ex. 148 to July 19, 2018 Kowalkowski Decl. ¶ 7; *see also* ECF No. 90, ¶¶ 10-12.)

54. Parking for the 2016 Big Apple Fest took place on the Cultural Heritage Grounds and the nearby Ridge View Plaza. Shuttles were provided by the Nation to transport people to and from event activities and parking. (*Id.* at ¶ 9.)

Response: Undisputed that parking for the 2016 Big Apple Fest took place on the Cultural Heritage Grounds and the Ridge View Plaza, but the Village further states that parking occurred on fee simple land. (Ex. 148 to July 19, 2018 Kowalkowski Decl. ¶ 7; *see also* ECF No. 90, ¶¶ 10-12.) Undisputed that shuttles were provided to transport people to and from event activities and parking, but the Village further states that certain of the shuttles were operated by non-Indian vendors and that the shuttling occurred on public roads. (Ex. 177 to July 19, 2018 Kowalkowski Decl., Figueroa Dep. at 44:9-45:19, ECF No. 89-177 at 3.)

55. The Nation regulated the conduct of the 2016 Big Apple Fest under its laws, specifically its Emergency Management and Homeland Security Ordinance; the Oneida Safety Law; the Oneida Vendor Licensing Ordinance; the Oneida Food Service Code; the Nation's On-Site Waste Disposal Ordinance; the Recycling and Solid Waste Disposal Law; the Sanitation Ordinance; and Oneida Tribal Regulation of Domestic Animals Ordinance. (*Id.* at ¶ 12.)

Response: Disputed to the extent that this proposed statement of fact implies that the Nation *could* legally regulate the conduct of non-Indian attendees and vendors at the 2016 Big Apple Fest under the Nation's laws. *See Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008) (generally tribes do not possess authority over non-Indians unless an exception applies pursuant to *Montana v. United States*, 450 U.S. 544 (1981). In further response, the Village informed the Nation it needed to apply for a permit under the Village's special event ordinance or the Village would enforce the penalty provisions set forth in the Ordinance. (ECF No. 90, ¶ 18.) The Nation declined and on September 21, 2016 the Village issued the Nation a citation for failure to obtain a permit under the Village's ordinance. (ECF No. 90, ¶¶ 18, 23.) Mr. Figueroa, the Nation's Special Events Coordinator, was unable to identify how compliance with the Village's special event ordinance would make it more difficult for the Nation to enforce its ordinances. (Ex. 177 to July 19, 2018 Kowalkowski Decl., Figueroa Dep. at 124-126, ECF No. 89-177 at 6-7.)

56. Richard Figueroa, employed by the Nation as the Special Events Coordinator in the Nation's Tourism Division, was responsible for the overall planning and conduct of the Nation's 2016 Big Apple Fest[.] In the performance of his responsibilities, Figueroa coordinated the event with other divisions of the Nation's government to ensure compliance with the Nation's laws, including the Oneida Compliance Division, Oneida Risk Management Department, Oneida Environmental Health and Safety Division, Oneida Conservation, Oneida Utilities Department, and the Oneida Public Works Department, Oneida Security, and the Oneida Police Department. (*Id.* at ¶¶ 2-3, 10.)

Response: Undisputed. The Nation's proposed statement is immaterial to the parties' summary judgment motions, however.

57. The Tourism Division, and other divisions with which Figueroa coordinated in the conduct of the 2016 Big Apple Fest, are divisions of the Nation's tribal government. Each has a division director who is answerable directly to the Nation's Business Committee, the Nation's governing body under its IRA Constitution. (*See id.* at ¶ 2.)

Response: Disputed in part. The Village disputes PSUMF ¶ 57 to extent the Nation failed to identify support for the statement "the Nation's governing body under its IRA Constitution." The Village further disputes PSUMF ¶ 57 to the extent it implies the legal conclusion that the Nation was eligible under the IRA. The Village further states that the Nation's proposed statement is immaterial to the parties' summary judgment motions.

58. During the 2016 Big Apple Fest, there were Oneida Nation personnel present who were responsible for public safety (security officers and Oneida Nation police officers) and a registered nurse to address any on-site medical issues that might arise. (*Id.* at ¶¶ 13, 17.)

Response: Disputed to the extent this proposed statement of fact suggests that Oneida Nation security officers and Oneida Nation police officers are equally responsible for public safety. The cited document only supports the proposition that Oneida Nation security officers assisted in staffing a first aid booth and had received various types of first aid training. The Nation has not pointed to admissible evidence that Oneida Nation security officers are authorized to protect public safety through enforcement of state, county, and/or local law. It is also the Village's position that the Nation's proposed statement is immaterial to the parties' summary judgment motions.

59. There were no incidents, compliance issues, or health events that occurred during the 2016 Big Apple Fest. (Declaration of Richard Van Boxtel in Support of Plaintiff Oneida Nation's Motion for Summary Judgment (hereafter "Van Boxtel Dec.") ¶ 11.)

Response: Disputed as the cited document does not support this proposed statement of fact. Further, there was at least one incident identified by Oneida Police Chief, Richard Van Boxtel, "for a collision between a golf cart and a car in a parking lot that resulted in minor property damage[.]" (Van Boxtel Dec. ¶ 11.) Furthermore, additional traffic issues, such as buses and cars traveling through intersections that had been blocked off to vehicular traffic, occurred during the 2016 Big Apple Fest due to the Oneida Police Department failing to institute sufficient traffic control measures. (Ex. 13 to Sept. 5, 2018 Kowalkowski Decl., Van Noie Dep. at 58:19-63:19; Ex.14 to Sept. 5, 2018 Kowalkowski Decl., Kola Dep. at 21:23-26:20.) However, it is also the Village's position that the Nation's proposed statement is immaterial to the parties' summary judgment motions.

60. Six officers of the Oneida Police Department policed the 2016 Big Apple Fest. (*Id.* at ¶ 10.)

Response: Disputed to the extent PSUMF ¶ 60 suggests that six officers of the Oneida Police Department were all on duty at all times during the 2016 Big Apple Fest. (Ex. 15 to Sept. 5, 2018 Kowalkowski Decl., Mehoja Dep. at 14:6-15:24; Ex. 16 to Sept. 5, 2018 Kowalkowski Decl., Maxam Dep. at 14:16-23, 15:15-16:12.) Otherwise undisputed, however it is the Village's position that the Nation's proposed statement is immaterial to the parties' summary judgment motions.

61. Like all officers of the Oneida Police Department, the six Oneida officers on duty at the 2016 Big Apple Fest are certified by the Wisconsin Training and Standards Bureau and have been deputized by Brown County and Outagamie County in accordance with agreements between those counties and the Nation. As such, these officers are authorized to enforce county and state law. (*See id.* at ¶¶ 4-5.)

Response: Undisputed, however it is the Village's position that the Nation's proposed statement is immaterial to the parties' summary judgment motions.

62. The Oneida officers on duty at the 2016 Big Apple Fest filed a single incident report from the event. The incident report involved a collision between a golf cart and a parked car that resulted in minor property damage and no injuries. (*Id.* at ¶ 11.)

Response: Undisputed, however it is the Village's position that the Nation's proposed statement is immaterial to the parties' summary judgment motions.

63. Public Law 59-258, 34 Stat. 325 (the "1906 Act") does not contain language explicitly referencing cession of any lands owned by the Nation or its members, does not explicitly provide for total surrender of the interests of the Nation or its members in any land, does not explicitly provide for payment for any tribal lands, does not explicitly restore any land owned by the Nation or its members to the public domain, and does not explicitly reference the alteration, diminishment, or disestablishment of the Nation's reservation. (Jacquart Dec. ¶ 2, Ex. 1, Defendant's Supplemental Objections and Responses to Plaintiff's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admissions at 39-47 (Responses to Requests for Admission Nos. 26-36).)

Response: Disputed in part. It is undisputed that 34 Stat. 325 (the "1906 Act") does not contain the words "cession," "total surrender of all tribal interests," "total surrender of any claims," and "alteration, diminishment, or disestablishment." The 1906 Act also does not provide language that directly references "payment" to tribal members or that the 1906 Act "restore[s] any land owned by the Nation or its members to the public domain." It is also undisputed that the 1906 Act does not contain a specific reference to the words "alteration, diminishment, or disestablishment" of the reservation. The Village disputes PSUMF ¶ 63 to the

extent it provides interpretation or reference that is contrary to the express wording of the 1906 Act. The 1906 Act speaks for itself. It is disputed that the 1906 Act did not result in a diminishment or disestablishment of the Nation's historic reservation or did not contain language that could be interpreted as diminishing or disestablishing the Nation's historic reservation. Similar language in the 1906 Act, relating to the Stockbridge-Munsee Community, was found to have created a disestablishment of the reservation. *See Wis. v. Stockbridge-Munsee Comm.*, 554 F.3d 657 (7th Cir. 2009). Furthermore, payments were either previously received or the land was previously allotted to individual tribal members rather than purchased by the United States and, therefore, no additional compensation or distribution was necessary for the diminishment or disestablishment of the reservation.

64. The Nation maintains its own comprehensive general liability insurance, which covers Big Apple Fest with a $10,000,000 limit and is administered by the Nation's Risk Management Department. (Figueroa Dec. ¶ 14.)

Response: Disputed. The cited declaration is inadmissible to prove the contents of the referenced insurance policy under the original document rule, FRE 1002.

Dated: September 5, 2018.

By: *s/* Frank W. Kowalkowski

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