

No. \_\_\_\_\_

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IN THE

# Supreme Court of the United States

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DANIEL PHILLIPS, AS ADMINISTRATOR OF THE  
ESTATE OF MELVIN L. PHILLIPS, SR. AND AS SUCCESSOR  
TRUSTEE OF MELVIN PHILLIPS, SR./ORCHARD PARTY TRUST,

*Petitioner,*

—v.—

ONEIDA INDIAN NATION,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

What is the effect of the ruling in this case on the hundreds of Indian and non-Indian titles conveyed by the Orchard Party to, New York State and the subsequent conveyances to the public now that the Treaties of 1838 and Canandaigua are not legal authority for the actions of the State of New York in buying and reselling the Orchard Party reservation reservation?

Were the decisions of the District Court and the Court of Appeals an abuse of discretion in that: the 19.6 acres was under the exclusive control of the Orchard Party/Pagans by agreement with the other Oneida Indian Tribes in 1805, by treaty with the State of New York in 1842 under authority from the federal government and exclusively possessed owned and occupied by Orchard Party the for 200 years and it is developed and as a the tribal worship site?

Does the Orchard Party on the facts of this case including state ratification by treaty of the ownership of Lot 3 by the Orchard Party under federal authority of the treaties, 200 year delay of Plaintiff in asserting its rights, a partition agreement in which the tribe agreed that the land was the Pagans (the predecessors of the Orchard Party), the development of the parcel, that the parcel was under the exclusive control of the Defendants for 200 years with no action taken by the Plaintiffs, and the rest of the facts of this case create an equitable defense to the claim of ownership by the Plaintiff Oneida Indian Nation?

Should the case be remanded for additional discovery rather than a judgment on the pleadings to determine:

1. whether there was federal ratification of the of the Treaty of 1838?
2. that Oneida Nation did not think it owned this parcel for the last 200 years.
3. that the Orchard Party the legal successor to its portion of the original partitioned Oneida Nation since the BIA found that they are the only Oneida tribe that has existed and resided on its land (including Lot 3) continually?
4. whether or not the Oneida Indian Nation formerly the Oneida Indian Nation of New York have standing to prosecute this case?
5. the effect of the partition agreement on the court ruling that the Oneida Indian Nation of New York is the successor to the Original Oneida Nation.
6. What is the legal status of the 19.6 acres?
7. that there was federal authority for the State of New York to enter into the Treaty of 1805 creating Lot 3.

## **RULE 60**

Did the Defendant appellant satisfy the requirements of Rule 60?

Is the Rule 60 motion timely under Rule 60(b)(6) and (4)?

Is the Rule 60 motion timely under Rule 60(b)(1), (2), (3)?

How does Law of the Case affect the appeal in relation to Rule 60?

Is the Northern District of New York Rule 7.1 relevant and how does it relate to Rule 83?

Since the Lower Court dismissed on the merits and the Second Circuit Court of Appeals affirmed does the

rule in *Lora v O'Heaney*, 602 F3d 196 (S.D.N.Y. 2011) saying that the court cannot review the merits of what was decided relate to this appeal?

Did the Defendant present new evidence under Rule 60?

Did the Defendant create a question of fact on subject matter jurisdiction on the issue of State of New York ownership of the parcel on the tax roles?

Was an injustice created under Rule 60(b)(6) by taking a reservation from a tribe who had resided on said parcel from time immemorial, had a partition agreement with the rest of the tribe that the 19.6 acres was their land, had a Treaty from the State of New York recognizing the 19.6 acres as their land done under federal authority, and the Oneida Indian Nation claiming it owns said parcel has done no act in 200 years in regard to said parcel?

### **ADDITIONAL ISSUES**

Does the Oneida Indian Nation formerly the Oneida Indian Nation of New York have standing to sue regarding Lot 3 when said Defendant cannot produce any evidence of an interest, ownership or an act of control after the partition in 1805?

Was the court correct in applying general indian law on possessory ownership rather than the Orchard Party specific customs and practices after the land was transferred to the Orchard Party?

Does the No Precedent clause of the Oneida Landclaim Settlement preclude the Oneida Indian Nation formerly the Oneida Indian Nation of New York from using any of the landclaim rulings in this lawsuit?

Is any federal authority or State authority needed for the Orchard Party to own Lot 3 when it was always owned and controlled by them since the fracture of the Oneida Nation in 1805 and under the partition agreement between the two tribes since they resided on the land since time immemorial?

Does the voluntary partition of Orchard Party land in the 1840's affect the ownership of Lot 3 under Orchard Party Custom and Usage?

Is Lot 3 owned by the individuals or by the Orchard Party at the time of the Chapter 386 of the year 1849 by the New York legislature reimbursing the wronged individuals?

#### **LIST OF PARTIES TO THE PROCEEDING**

Oneida Indian Nation formerly the Oneida Indian Nation of New York, Plaintiffs

Melvin Phillips individually (deceased)

Melvin Phillips as trustee

Melvin Phillips as spokesperson of the Orchard Party

Daniel Phillips individually

Daniel Phillips as trustee

Daniel Phillips as head of the Orchard Party, Defendants

**LIST OF ALL PROCEEDINGS  
IN THE LOWER COURTS**

Original Action

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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5:17-CV-1035

ONEIDA INDIAN NATION, Plaintiff,

v.

MELVIN L. PHILLIPS, SR., Individually  
and as Trustee; and MELVIN L. PHILLIPS,  
SR. / ORCHARD PARTY TRUST,

Defendants,

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Judgment entered: 7/31/19

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Appeal of the Original action to Court of  
Appeals

UNITED STATES COURT OF APPEALS  
UNITED STATES OF AMERICA

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19-2737

ONEIDA INDIAN NATION, Plaintiff,

v.

MELVIN L. PHILLIPS, SR., Individually  
and as Trustee; and MELVIN L. PHILLIPS,  
SR. / ORCHARD PARTY TRUST,

Defendants,

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Judgment entered: 11/24/2020

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Certiorari petition to the United States  
Supreme Court

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20-1675

Melvin L. Phillips, Individually and as  
Trustee for Melvin L. Phillips, Sr., et al.,  
Petitioners

v.

Oneida Indian Nation,  
Respondent

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Denied: 6/28/2021

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Motion for rehearing in the District Court

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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5:17-CV-1035

ONEIDA INDIAN NATION, Plaintiff,

v.

MELVIN L. PHILLIPS, SR., Individually  
and as Trustee; and MELVIN L. PHILLIPS,  
SR. / ORCHARD PARTY TRUST,

Defendants,

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Judgment entered: 11/10/22

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Surrogate Court Proceeding Appointing  
Daniel Phillips as executor of the estate  
when Melvin died

In Re: the Estate of Melvin Phillips  
Case No: 2023-604

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Appeal of Motion for rehearing to the Court  
of Appeals

SECOND CIRCUIT COURT OF APPEALS  
UNITED STATES OF AMERICA

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Case No. 22-3130  
ONEIDA INDIAN NATION,  
Plaintiff-Counter Defendant Appellee

v.

DANIEL PHILLIPS AS ADMINISTRATOR  
OF THE ESTATE OF MENVIN PHILLIPS  
SR. AND AS SUCCESSOR TRUSTEE  
OF MELVIN PHILLIPS/ORCHARD  
PARTY TRUST

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Order and judgment docketed on: 3/14/2024

**DIRECTLY RELATED PROCEEDINGS**

The Plaintiff Oneida Indian Nation brought a motion to Dismiss the Answer pursuant to Rule 12 (6) for a Judgment on the Pleadings in the Northern District of New York case (Docket Number 5:17-cv-01035-GTS-ATB).

Final Judgment of dismissal was entered on 7/31/19 in favor of the Oneida Indian Nation in the

Northern District of New York. Appendix A, 7a, Appendix F, 37a.

The Defendant Melvin Phillips, Sr. individually and as trustee of Melvin Phillips Sr/Orchard Party Trust appealed to the United States Court of Appeals for the Second Circuit, Docket number: 19-2737 with the same caption.

Final Judgment of dismissal was entered on 11/24/20 in favor of the Oneida Indian Nation. The Defendant Melvin Phillips, Sr. individually and as trustee of Melvin Phillips Sr/Orchard Party Trust Petitioned for a Rehearing and En Banc Hearing in Docket number: 19-2737 with the same caption. A denial of the petition was entered on 12/30/20. Appendix G at 58a.

Defendant filed a Certiorari petition to the United States Supreme Court. Melvin L. Phillips, Individually and as Trustee for Melvin L. Phillips, Sr., et al., Petitioners v. Oneida Indian Nation Denied: 6/28/2021. Case No: 20-1675

Defendants then moved in District Court for a rehearing putting in numerous items showing ownership and chain of title to the parcel under Rule 60 (Docket number 5:17-cv-01035-GTS-ATB). The court denied vacating the judgment entered said order on 11/10/22. Appendix B 6a

Defendants appealed to the Second Circuit Court of Appeals. Final Judgment of dismissal was entered on 3/14/2024 in favor of the Oneida Indian Nation. Case No. 22-3130. Appendix A at 1a

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## **BASIS FOR JURISDICTION IN SUPREME COURT**

The Defendants appeal from a final judgment of the Second Circuit Court of Appeals on rehearing dated 3/14/24 regarding a dispute over land on an Indian reservation. The Court has jurisdiction over the claim under 28 U.S.C. §§ 1331 & 1362, asserting a tribal right to possession of land under the Indian Commerce Clause, federal treaties and statutes, and federal common law; Article III section 2 clause 2 and 28 USC 1254.

This is a dispute over Indian land on the Orchard party Indian Reservation formerly federally recognized not a state Indian tribes reservation between Indians.

However a jurisdiction issue is presented by the State of New York being listed as the owner on the tax rolls.

There has been no order for a rehearing of the recent Court of Appeals decision of 3/14/2023.

Plaintiff did move for rehearing on the original order and the Decision by the Second Circuit as stated above.

### **RELEVANT PROVISIONS FROM TREATIES AND STATUTES**

#### **TREATY OF 1838 BUFFALO CREEK**

#### **SPECIAL PROVISIONS FOR THE ONEIDAS RESIDING IN THE STATE OF NEW YORK**

**ARTICLE 13.** The United States will pay the sum of four thousand dollars, to be paid to

Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida.

**TREATY BETWEEN NEW YORK STATE AND  
THE ORCHARD PARTY DATED 6/25/1842  
IDENTIFYING AND EXEMPTING LOT 3:  
PARAGRAPH 4:**

Article 4. It is hereby stipulated and agreed that such of the Orchard Party as are enrolled on the attested list marked B do hereby release quit claim and forever release to the said Indians who are enrolled on the attested list marked A and to those who may succeed them in their right all right, title, claim and demand whatsoever in and to the remainder of said reserved lands known and distinguished on the map field book of Nathan Burchard as Lot Number three, containing Seventy six 16/100 acres of land **which lands so reserved for such of the Orchard Party as intending to remain in the State is to be had, held, enjoyed and occupied by them collectively in the same manner and with the same right, title and interest therein as appertained**

to them, the the party so remaining before the execution of this treaty.

### CHAPTER 386 OF THE 72 SESSION OF THE NEW YORK LEGISLATURE

Chap. 386.

AN ACT for the relief of the Indian owners of lot number three, Oneida purchase, under the treaty of June, 1842.

Passed April 11, 1849,  
“three-fifths being present.”

The People of the State of New York, represented in Senate and . Assembly, do enact as follows:

§ 1. The treasurer shall pay on the warrant of the comptroller to be to the Indian owners of lot number three of the Oneida purchase made in the year one thousand eight hundred and forty-two, being in the town of Vernon in the county of Oneida, the sum of one hundred and forty dollars in full satisfaction of any wrongful allotment and partition of lands that formerly belonged to the Orchard party of Oneida Indians.

§ 2. This act shall take effect immediately  
Money to be paid to Indian owners of lot No. 3

### 2/24/1982 MEMORANDUM OF THE BIA

Not withstanding the above, most of Marble Hill people are descendants of the “Home Parties” of the 1840’s. Therefore, because their tribal affiliations can be traced to the two Home Parties of the 1840 treaties, they are the only historically

**identifiable “tribal” Oneidas in New York.** This is not to say that the Onondaga group are not Oneida. They are however individual not tribal. They arrived on Onondaga as individual's or in small groups and not recognized as “bands” or “Tribes”.

## **THE ONEIDA LANDCLAIM SETTLEMENT NO PRECEDENT CLAUSE**

**G. No Precedent.** The parties agree that no provision of this settlement shall be interpreted to be an acknowledgment of the validity of any of the allegations or claims that have been made in any litigation covered by this agreement. This settlement does not constitute a determination of, or admission by any party to any underlying allegations, facts or merits of their respective positions. The settlement of the litigation covered by this agreement is limited to the circumstances in those actions alone and shall not be given effect beyond the specific provisions stipulated to. This settlement does not form and shall not be claimed as any precedent for, or an agreement by the parties to any generally applicable policy or procedure in the future.

## **RULE 83**

(2) *Requirement of Form.* A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

## **BIA HISTORY**

By 1805 the division between the two major factions was so intense that the Oneida territory was divided into two separate parcels.

The amount and type of interaction between the Oneida on the Onondaga Reservation and those who remained in Oneida and Madison counties is difficult to ascertain with the information presently available. It is known, however, that they have always considered themselves as two separate groups. Furthermore, the annual treaty cloth due the Oneidas from the Federal government was divided between the two groups until 1977 when such distributions were withheld pending resolution of the tribal government issue.

## **CONCISE STATEMENT OF THE CASE**

Orchard Party has been recognized to exist by the courts for at least 150 years including *US v. Boylan*, 256 F. 468 (N.D.N.Y. 1919), *NY Indians v. United States*, 170 US 1 (1898), *NY Indians v. United States*, 40 Ct Cl 448 (1905). The Orchard Party was formerly the Pagan party and are also called the Marble Hill Oneidas. The Orchard Party are a distinct sub-tribe of the original Oneida Nation which voluntarily partitioned itself into the Pagans and Christians in 1805. The Christians are now known as the Oneida Indian Nation formerly the Oneida Indian Nation of New York formed in the 1970's from the disorganized remnants of the Christian parties on the Onondaga

Reservation. The Orchard Party is a recognized Indian tribe by the State of New York. Appx. E, 35a

Melvin Phillips, the spokesperson of the Orchard Party, filed a deed and trust agreement leaving the 19.6 acres to the Orchard Party in trust in perpetuity.

The Oneida Indian Nation, formerly the Oneida Indian Nation of New York formed circa 1970's filed suit to strike the deed and trust after two years. The Defendant lost at the district level. Appx. C, 7a

The District Court reasoned that since the Oneida Indian Nation, formerly the Oneida Indian Nation of New York formed in the 1970's, was the successor to the Original Oneida Indian Nation and that the treaties of 1838 and Canandaigua did not contain sufficient authority for New York to negotiate the with the Orchard Party for the 19.6 acres. So therefore these Treaty were void. These Treaties stated:

**ARTICLE 13. The United States will pay the sum of four thousand dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian territory, as soon as **they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida.****

The Treaty of June 25, 1842 with the Orchard Party was one of the satisfactory arrangements made under this treaty. Said Treaty of June 25, 1842 deals with who is moving west and who is staying in New York under the Treaties of 1838 and Canandaigua in the great move west in the Orchard Party. Lot 3 was one of the arrangements and it has its own paragraph at paragraph 4. see supra The Treaty lists every person in the tribe and whether they are going west or staying and the arrangements for their land in New York if leaving. Court of Appeals record: A-317.

Using the aforesaid reasoning the lower courts declared that the Oneida Indian Nation owned the 19.6 acres. The Orchard Party answer was dismissed on the pleadings without discovery. The Defendant Orchard Party seeks a remand to do discovery to obtain the documents from the federal and state repositories, the Oneida Indian Nation, (who has a large historical collection of documents that will prove that the Oneida Indian Nation has never had any right title or interest in the property and lost any interest in the land in the partition agreement). The Oneida Indian Nation has not produced and cannot produce a single document or act showing that it ever at any time exerted any control over the 19.6 acres since 1805 when the reservation was partitioned. The Orchard Party also claims an equitable defense based on the long lapse of time the Oneida Indian Nation did not claim ownership or do anything regarding this parcel. The Plaintiff also contests standing of the Oneida Indian Nation to bring the lawsuit.

As a result the Defendant has been deprived of obtaining information that may help its case.

The Orchard Party (the Pagans) and the Oneida Indian Nation (Christians) were both formed in the partition agreement of 1805. The Oneida Nation remained but its members agreed to divide the land and be politically separate: the Christians and the Pagans are separate tribes of the same nation. The Oneidas Indian Nation reservation is in the valley, and the Orchard Party is above it on Marble Hill.

Further, the Orchard Party has resided on the 19.6 acres from time immemorial long before even the Treaty of 1798 and is an equal heir to the rights of the original Oneida Nation just like the Oneida Indian Nation formerly the Oneida Indian Nation of New York. The Bureau of Indian affairs found in 2/24/82 that: Appx. E, 35a

Notwithstanding the above, most of Marble Hill people are descendants of the "Home Parties" of the 1840's. **Therefore, because their tribal affiliations can be traced to the two Home Parties of the 1840 treaties, they are the only historically identifiable "tribal" Oneidas in New York.** This is not to say that the Onondaga group are not Oneida. They are however individual not tribal. They arrived on Onondaga as individual's or in small groups and not recognized as "bands" or "Tribes". (see attached memorandum)

The Defendant alleges the Oneida Land Claim Settlement as a source of its authority over the 19.6 acres. Further the Oneida Landclaim Settlement has a no precedent clause. Supra In the landclaim the Orchard Party was court ordered to allow the Oneida Indian Nation to represent them against their will to prevent them from ever bringing a landclaim. (They

did not sue on the landclaim) The court gave the Oneida Indian Nation the right to settle the land claim on behalf of the Orchard Party and nothing more. The No Precedent clause states:

**G. No Precedent.** The parties agree that no provision of this settlement shall be interpreted to be an acknowledgment of the validity of any of the allegations or claims that have been made in any litigation covered by this agreement. This settlement does not constitute a determination of, or admission by any party to any underlying allegations, facts or merits of their respective positions. The settlement of the litigation covered by this agreement is limited to the circumstances in those actions alone and shall not be given effect beyond the specific provisions stipulated to. This settlement does not form and shall not be claimed as any precedent for, or an agreement by the parties to any generally applicable policy or procedure in the future.

The Defendant claims that laches or some other equitable defense stops the lawsuit. But the Oneida Indian Nation claims that it does not apply due to the Indian tribe only having a possessory interest in the land. The court of appeals refused to apply the "Sherrill defense". This is legal error. Laches is an equitable doctrine that applies to any unreasonable delay that prejudices someone. In this case a 200 year delay in asserting any alleged rights to the land. The proof indicates that the Oneida Indian Nation never did a single act or exerted control over this parcel for over two centuries. The land has been developed, used for farming and various tribal matters and the

tribe and the individual-owners are prejudiced by its loss. R. Court of Appeals 88.

Based on the aforesaid the District Court and the Court of Appeals enjoined the Orchard Party from using and occupying the 19.6 acres of its traditional reservation. The parcel had been occupied by the Orchard Party since time immemorial. The Orchard Party has complete control of the 19.6 acres for two centuries. The parcel is special because it is the last piece of the original Oneida Nation reservation that was never conveyed to New York and has been under the Orchard Party's exclusive control since 1810 when the other Pagans left for Canada. The 19.6 acres was never sold to New York. Supra The Orchard Party uses it for ceremonial purposes.

The defendant lost on appeal. The ruling caught the Defendant by surprise and much proof was omitted. Plaintiff got more proof, but various repositories were unavailable due to corona virus.

Not wishing to delay further the Plaintiff took what he had and brought a rehearing motion.

On rehearing the Defendant Orchard Party claimed that the Plaintiff Oneida Indian Nation lacked standing, the State of New York was a necessary party, the no precedent clause in the landclaim agreement had to be considered, nor does the Oneida Indian Nation have a single piece of paper saying they owned the property (except their unfound self-serving representations in the landclaim agreement), Further, they have been unable to produce any evidence that Oneida Indian Nation had an interest or even a single act of control over the parcel in 200 years and Defendant Orchard Party presented additional proof showing the Orchard Party was the only tribe remaining on its ancestral

land and was a proper sub tribe of the Ancient Oneida Nation but not the sub tribe of the Oneida Indian Nation formerly the Oneida Indian Nation of New York.

The Defendant lost in the District Court, who stated that: Appx. B, 6a

1. the application was untimely
2. the Plaintiff failed to comply with 7.1 of the rules of the Northern District of New York
3. Law of the case decided the issues
4. the new claims were meritless.

Defendant appealed to the Second Circuit Court of Appeals which denied the rehearing motion stating: Counsel had not argued abuse of discretion, that they had already decided the same and each and every ground stated in the district court was a reason for dismissal including lack of merit.

The Court of Appeals was wrong as follows.

### **Timeliness**

Rule 60 has a catch all section: Rule 60(b)(6) which has a reasonable time to file and subject matter jurisdiction Rule 60(b)(4) which has no limitation on filing. *Richard's Clearview LLC v. Starr Surplus Lines Ins. Co.*, 2023 U.S. Dist. LEXIS 19115 (E.D. La. 2023) states:

Unlike the rest of Rule 60(b), “Rule 60(b)(4) motions leave no margin for consideration of the district court’s discretion as the judgments themselves are by definition either legal nullities or not.”<sup>11</sup> Further, as “the mere passage of time cannot convert an absolutely void judgment into a valid one,” Rule 60(b)(4) motions are not subject to a

time limit, and the court must void the judgment if it finds that subject matter jurisdiction was lacking.<sup>12</sup>

There is a question of fact regarding whether the New York State owns the property because New York State is listed as the owner on the tax rolls. R.Court of Appeals A-73, a-74

The time Plaintiff waited to bring the motion under 60(b)(6) and 60(b)(1-3) is reasonable because an appeal was pending, trial counsel had failed to include various elements of proof and the records had to be researched during corona virus which made getting into the depositories very difficult. So the one year statute should be tolled and this be considered when calculating a reasonable time. Further trial counsel did not put in any proof of some items.

Besides the Plaintiff is subject to a permanent injunction which he can move to lift at any time as long as the injunction is in force if he has grounds.

Exceptional circumstances exist because the decision voids several ancient treaties which are the foundation of titles across the Upstate New York, including many Indian titles and grants and further takes land from a person who controlled it for 200 years and gives it to the Oneida Indian Nation who had nothing to do with it for 200 years.

So the application is timely. Plaintiff asserts research difficulties due to corona virus as delaying the motion as to the remaining statute of limitations. Further the Plaintiff is subject to a permanent injunction which he seeks to lift which has no time limitation as long as the injunction is in effect. He can move to lift it at any time.

**Northern District of New York Rule 7.1**

The Plaintiff adequately briefed matters in the lower court. See Defendants Brief at 53 and 57 of the docket in 5:17 cv 01035 The Plaintiff filed the briefs. The only cases I could find dismissing a case for violating 7.1 was when no memorandum was submitted at all. Further Rule 83 has to be considered. *Colledge v. Steelstone Grp., LLC*, 2023 U.S. Dist. LEXIS 105818 (E.D.N.Y. 2023). Any other issue is dealt with by Rule 83.

**Rule 83 states:**

(2) *Requirement of Form.* A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a non willful failure to comply.

**Law of the Case**

The Court of Appeals ruled that it had already considered and rejected the basis for the 60 B motion the Second Circuit affirmed the denial by the district court. Defendant appellant restates again since he met Rule 60 standards that is the rule that governs. Appellate courts are not bound by the law of the case and the courts can change law of the case at any time or any more than they want to be.

*Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988)

A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the

absence of extraordinary circumstances such as where the initial decision was “clearly erroneous and would work a manifest injustice.” *Arizona v. California*, *supra*, at 618, n. 8 (citation omitted). Thus, even if the Seventh Circuit’s decision was **law of the case**, the Federal Circuit did not exceed its power in revisiting the jurisdictional issue, and once it concluded that the prior decision was “clearly wrong” it was obliged to decline jurisdiction. Most importantly, **law of the case** cannot bind this Court in reviewing decisions below. A petition for writ of certiorari can expose the entire case to review. *Panama R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 283-284, 41 L. Ed. 1004, 17 S. Ct. 572 (1897). Just as a district court’s adherence to **law of the case** cannot insulate an issue from appellate review, a court of appeals’ adherence to the [\*\*\*\*38] **law of the case** cannot insulate an issue from this Court’s review. See *Messenger, [\*818] supra*, at 444; *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 257-259, 60 L. Ed. 629, 36 S. Ct. 269 (1916).

**Lora v. O’Heaney, 602 F3d 196 (S.D.N.Y. 2011)  
RULE ON RECONSIDERATION**

**Lora v. O’Heaney, 602 F3d 196 states:**

It is well settled that “[a]n appeal from an order denying a Rule 60(b) motion brings up for review only the denial of the motion and not the merits of the underlying judgment for errors that could have been asserted on direct appeal.” *Id.* at 704 (citing *Browder v.*

*Dir., Dept of Corr., 434 U.S. 257, 263 n. 7, 98  
S.Ct. 556, 54 L.Ed.2d 521 (1978))*

In this case however the District Court and Court of Appeals denied the motion on the merits (Appx. A, 1a and Appx. B, 6a) in its decision so the merits were part of the denial of the Rule 60 motion and can be reached by the appellate court. The court did not consider any of the additional proof and reaffirmed the district court and its prior decision.

The Supreme Court has rendered no decision on the matter to be bound by the law of the case (which it could change if it wanted to anyway). Therefore the Supreme Court is free to reach any result regardless of any prior ruling.

**Merits:**

**DISCOVERY**

**The case should be remanded for discovery.  
Discovery will show:**

**Plaintiff was not allowed discovery to show that the interpretation of the clause 13 in the Treaty of 1838 as to the authority granted New York to negotiate with the Oneidas and whether the New York exceeded its authority in the Treaty of 6/25/1842.**

**Whether the Treaty of 6/25/1842 was ratified federally and/or by the State of New York and what knowledge they have of said Treaty.**

**Importantly is the record of treaty cloth delivery to the Orchard Party by New York and the Bureau of Indian affairs. The tribe that receives the annual cloth payments from the**

federal and state government is the tribe that is recognized for much of the history.

Oneida Indian Nation records: the State of New York transferred all its record Of Oneida History to the Oneida Indian Nation. Plaintiff does not have access to them absent court order.

The petition agreement also needs discovery as it is a bit obtuse.

On the issue of the Orchard Party status under the treaties, partition agreement, the Bureau of Indian affairs and the State of New York

#### **ERRONEOUS FACTUAL FINDINGS**

Plaintiff has made a substantial showing that the Orchard Party was a state recognized tribe with equal or better history to claim that they are an heir to the original Oneida Nation with the Oneida Indian Nation. The Orchard Party has the same claims as the Oneida Indian Nation to be an heir of the original Oneida Indian Nation and thereby to this 19.6 acres. As such the Oneida Indian Nation cannot take it from us.

The Orchard Party has been on this land from time immemorial and is entitled to claim to be the legal successor of original Oneida Nation just like the Oneida Indian Nation who claims to be the legal successor of the original Oneida Nation. The Oneida Indian Nation has not proved a single act they have ever done in regard to this property except their fraudulent claims in the landclaim.

## LEGAL ERRORS

The Plaintiff has a equitable defense based on its 200 year possession of said property, which date from time immemorial his rights under the partition agreement in 1805, the Treaty of 6/25/42 which defined the parcel and was done under the color of federal approval from the Treaties of 1838 and Canandaigua, no action toward the parcel for 200 years by the Oneida Indian Nation, The parcel is developed. Under these circumstances it is inequitable and disrupts the status quo to take the land from the Persons possessing it for 200 years. A remedy needs to be fashioned and laches is the closest thing. (*City of Sherrill v. Oneida Indian Nation*, 544 US 197 (2005))

This is a classical situation for an equitable remedy. Call it what you will. Defendant acted in good faith, 200 years later a treaty is declared to not grant authority for the under lying State Treaty and gives the parcel to a person who has had no contact with it for 200 years.

If the land is under the control of the Orchard Party then Orchard Party law takes over. The Orchard Party partitioned itself into individual ownership and this parcel is owned by the individuals collectively as shown by Appx. D, 30a

No consideration was given to the local Orchard Party customs and law regarding the land who owns it: Under Orchard Party Custom and usage the land is individually owned as such general Indian Law is in applicable

## QUESTION OF FACT

The Plaintiff and Defendant disagree on almost everything. The Plaintiff claims title through dicta in the landclaim decisions claiming Oneida Indian Nation formerly the Oneida Indian Nation of New York has all the rights of the original Oneida Nation. The Orchard Party claims that they own the 19.6 acres by the partition agreement plus the Treaty of 6/5/42 done under the express authority of the Federal government, plus its 200 year history of administering the parcel and lack of any contact in the Defendant.

There is a question of fact as to whether the Orchard Party is also the legitimate successor to the Original Oneida Nation based on its pedigree which is better than the Oneida Indian Nation formerly the Oneida Indian Nation of New York which was formed from remnants of the Christian parties in the 1970's.

There is a question of interpretation of the Treaty of Canandaigua and 1838 regarding the authority granted New York in negotiating deals with the Oneidas in The Treaty of Canandaigua and 1828.

There is a question of the interpretation of the contents of the Oneida Land claim Settlement in relation to the no precedent clause and the self-serving declarations of the Oneida Indian Nation that OIN owns our reservation despite a 200 year hiatus an partition agreement that puts in the pagan area, a state treaty that gives it to us.

The tax rolls show that the 19.6 acres is not held in trust by the Oneida Indian Nation but owned by Fish and Wildlife of the State of New York. Defendant contends that this creates a question of fact as to ownership of the 19.6 acres. This create a question of

fact as to jurisdiction because the State of New York cannot be sued in federal court.

### **ORIGINAL ONEIDA NATION GOVERNMENT**

The Oneida Nation has no central government. Two factions with equal authority but separate governments are the Oneida Nation in New York: the Orchard Party a/k/a Marble Hill and the Oneida Indian Nation.

This arrangement was created by mutual consent in 1805 by private agreement between the sub tribes when the reservation was partitioned. This is structure in the congressionally ratified Treaty of 1838 and Canandaigua when both sub tribes signed separately. A-356

Therefore there is no deed transferring land between them because the both sub tribes did not transfer anything they kept what they had.

### **REASONS FOR ALLOWING CLAIM**

#### **POLICY CONSIDERATIONS**

The Orchard Party conveyed over 100 of square miles of land to New York State under the authority given New York in the Treaty of 1838 and the Treaty of Canandaigua. New York State in turn conveyed said former reservation land to the private landowners. If these treaties are void it is a serious problem. The decision threatens the partitioned lands on Marble Hill and the surrounding residents.

The titles for the rest of the reservation on Marble Hill may be affected also. Traditionally this problem has been solved by Laches but the lower courts have refused to apply laches to this case. Laches is based

on a possessory interest so the cases cited by the Defendant are do not apply. These principals discriminate against Indians which is discrimination under the United States Constitution. Further the new proof proves that the Oneida Indian Nation has a complete failure of proof that it every exerted any control over 19.6 acres.

Many, many people could be adversely affected by this decision including the occupants of the Orchard Party Reservation and the surrounding land sold to non Indians.

Worse voiding the transactions with New York under the Treaties of 1838 and the Treaty of Canandaigua goes across the whole of Upstate New York and every Indian tribe in Upstate New York. This is just madness.

The decision represents a major disruption of the status quo.

## **FACTUAL ERROR**

The Orchard Party actually has a better claim to being a successor to the original Oneida Nation than the Oneida Indian Nation who ceased to be a tribe for a while before reforming for a casino. The Orchard Party has resided on the 19.6 acres from time immemorial just like the Oneida Indian Nation have resided on their reservation the Boylan parcel in the valley. Everything they have we have for only better for being a successor to the Oneida Nation.

The no precedence clause in the Oneida Landclaim Settlement was not applied. The settlement was limited to itself. There is no transfer of title in or out of the Orchard Party in the Landclaim Agreement.

the Oneida Indian Nation involuntarily represented for the purposes of the lawsuit and that is it.

This land was never transferred under the partition agreement the parties kept the land they resided on. It was like two feuding housemates drawing a line in paint down the middle of the house. Technically that may be a transfer and in that case the partition agreement did it.

### **DISCOVERY NEEDED**

Discovery is needed to see if the federal government knew of the Treaty of 1828 and what authority was granted New York to negotiate with the Oneidas.

1. Whether there was federal ratification of the treaty of 1838, Canandaigua and state Treaty of 1838?
2. Is the Orchard Party the legal successor to its portion of the original partitioned Oneida Nation since the BIA found that they are the only Oneida tribe that has existed and resided on its land (including Lot 3) continually?
3. Does the Oneida Indian Nation formerly the Oneida Indian Nation of New York have standing to prosecute this case?
4. What is the effect of the partition agreement on the court ruling that the Oneida Indian Nation of New York is the successor to the Original Oneida Nation?
5. What is the legal status of the 19.6 acres?
6. That there was federal authority for the State of New York to enter into the Treaty of 1805 creating Lot 3.

This is a profound injustice that the land a tribe has used and dwelled on since time immemorial and

can prove clear title to is taken from them and given to another tribe who has not done a single act in relation to the parcel for 200 years because of dicta in the landclaim decision making it represent the existing Oneidas.

Wherefore the defendant Orchard Party requests that the court grant certiorari and review the facts of the case and such other relief as the court deems just and proper.

Dated June 12, 2024

Respectfully submitted,

Woodruff L. Carroll  
*Counsel of Record*  
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## **APPENDIX**

Appendix A

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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SUMMARY ORDER

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RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14<sup>th</sup> day of March, two thousand twenty-four.

PRESENT: RAYMOND J. LOHIER, JR.,  
STEVEN J. MENASHI,  
*Circuit Judges,*  
LEWIS J. LIMAN,  
*District Judge.\**

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No. 22-3130-cv

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ONEIDA INDIAN NATION,  
*Plaintiff-Counter-Defendant-Appellee,*

—v.—

DANIEL PHILLIPS, as administrator of the Estate of  
Melvin L. Phillips, Sr. and as successor trustee of  
Melvin Phillips, Sr./Orchard Party Trust,  
*Defendant-Counter-Claimant-Appellant.*

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FOR APPELLANT:

WOODRUFF LEE CARROLL,  
Woodruff Lee Carroll P.C., Syracuse, NY

FOR APPELLEE:

MICHAEL R. SMITH (David A. Reiser, *on the brief*),  
Zuckerman Spaeder LLP, Washington, DC

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\* Judge Lewis J. Liman, of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Northern District of New York (Glenn T. Suddaby, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court is AFFIRMED.

Daniel Phillips, as administrator of the Estate of Melvin L. Phillips, Sr., and as successor trustee of the Melvin L. Phillips, Sr./Orchard Party Trust (the “Defendant”) appeals from an order of the United States District Court for the Northern District of New York (Suddaby, *J.*) denying his motion to vacate a 2019 judgment. That judgment declared that the Oneida Indian Nation (the “Nation”) has title to a disputed parcel of land and permanently enjoined Melvin Phillips (“Phillips”) and his trust from asserting any ownership interest in the property.

We assume the parties’ familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

This suit arises out of a dispute between Phillips and the Nation over the ownership of a 19.6-acre parcel of land in Oneida County, New York. In 2015 Phillips filed a quitclaim deed purporting to transfer the parcel from himself as grantor to a trust of which he is the sole trustee. In *Oneida Indian Nation v. Phillips*, 981 F.3d 157 (2d Cir. 2020), this Court recounted the Nation’s litigation against Phillips and his trust that followed. We assume familiarity with that decision, emphasizing only that we determined there that the disputed parcel is within the Oneida reservation and that neither Phillips nor his ancestors has ever had title to it. *See id.* at 165–66.

Notwithstanding our decision and mandate, in late June 2022 the Defendant moved to vacate the District Court's 2019 judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The District Court denied the Rule 60(b) motion by text order. This appeal followed.

Because the Defendant appeals from an order denying his Rule 60(b) motion, we may "review only the denial of the motion and not the merits of the underlying judgment for errors that could have been asserted on direct appeal." *Lora v. O'Heaney*, 602 F.3d 106, 111 (2d Cir. 2010) (quotation marks omitted). The District Court gave four independent reasons for denying the Defendant's motion to vacate: untimeliness, the law-of-the-case doctrine, failure to comply with Local Rule 7.1, and lack of merit.

On appeal, the Defendant challenges at most two of the reasons given by the District Court and fails to dispute the others. Instead, the Defendant's arguments focus almost entirely on relitigating the underlying merits of the land dispute. The Defendant has therefore abandoned any argument that the District Court's order reflected an abuse of discretion with respect to the reasons that the Defendant did not challenge. *See Moates v. Barkley*, 147 F.3d 207, 209 (2d Cir. 1998) ("[P]ursuant to [Federal Rule of Appellate Procedure] 28(a) we need not, and normally will not, decide issues that a party fails to raise in his or her appellate brief."). On this basis alone, given that each reason provided by the District Court for denying the motion to vacate independently constituted sufficient grounds for denial of the Defendant's Rule 60(b) motion, we may affirm.

Even if the Defendant had not abandoned any of his arguments, however, we see no abuse of

discretion in the District Court’s denial of his motion to vacate. One of the reasons for the denial was “the law-of-the-case doctrine (given the Second Circuit’s Mandate of January 6, 2021).” Where, as here, the underlying judgment was affirmed on direct appeal, the mandate rule “forecloses relitigation of issues expressly or impliedly decided by the appellate court.” *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (quotation marks omitted).

Before the District Court and on his first appeal, the Defendant asserted two different theories of ownership over the disputed parcel, both of which we rejected. *See Oneida Indian Nation*, 981 F.3d at 165–67. Neither this appeal nor the Rule 60(b) motion offers a new theory of ownership or points to newly discovered evidence affecting title that was not previously addressed in earlier rulings. Because we have “already considered and rejected the basis for” the Defendant’s Rule 60(b) motion, we affirm the District Court’s denial. *DeWeerth v. Baldinger*, 38 F.3d 1266, 1270 (2d Cir. 1994).<sup>1</sup>

We have considered the Defendant’s remaining arguments and conclude that they are without merit. For the foregoing reasons, the order of the District Court is AFFIRMED.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court

[SEAL]

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<sup>1</sup> Because the District Court correctly applied the mandate rule, we need not reach the District Court’s other bases for denying the motion.

Appendix B

**DISTRICT COURT ORDER DATED 11/10/22  
AND FILED ON 11/10/22**

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TEXT ORDER denying 53 Defendant's motion to vacate for each of the four alternative reasons set forth in Plaintiff's opposition memorandum of law: (1) untimeliness (without a showing of good cause for delay); (2) the law-of-the-case doctrine (given the Second Circuit's Mandate of January 6, 2021, affirming this Court's Decision and Order of July 31, 2019); (3) non-compliance with Local Rule 7.1 (due to its failure to submit a memorandum of law that states with particularity the grounds for seeking the order, specifies the subparts of the rule upon which the motion is based, cites relevant judicial decisions, and performs a legal analysis, and its reliance on an affidavit that improperly contains legal argument), and (4) lack of merit. (Dkt.

Appendix C

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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DECISION OF THE NORTHERN  
DISTRICT OF NEW YORK

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5:17-CV-1035  
(GTS/ATB)

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ONEIDA INDIAN NATION,  
*Plaintiff,*  
—v.—

MELVIN L. PHILLIPS, SR., individually and as  
trustee, MELVIN L. PHILLIPS, SR./  
ORCHARD PARTY TRUST,  
*Defendants.*

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APPEARANCES:	OF COUNSEL:
ONEIDA INDIAN NATION Co-Counsel for Plaintiff 5218 Patrick Road Verona, New York 13478	MEGHAN MURPHY BEAKMAN, ESQ.
ZUCKERMAN SPAEDER LLP Co-Counsel for Plaintiff 1800 M Street, N.W., Suite 1000 Washington, DC 20036- 5802	MICHAEL R. SMITH, ESQ.
ARNOLD & PORTER KAYE SCHOLER LLP Counsel for Defendants 250 West 55th Street New York, New York 10019	ERIC NEVINS WHITNEY, ESQ. GLENN J. POGUST, ESQ.
GLENN T. SUDDABY, Chief United States District Judge	

**DECISION and ORDER**

Currently before the Court, in this real property action filed by the Oneida Indian Nation (“Plaintiff”) against Melvin L. Phillips, Sr., individually and as Trustee (“Defendant Phillips”), and Melvin L. Phillips, Sr./Orchard Party Trust (“Defendant Trust”) (collectively “Defendants”), is Plaintiff’s motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). (Dkt. No. 32.) For the reasons set forth below, Plaintiff’s motion is granted.

## **I. RELEVANT BACKGROUND**

### **A. Procedural History**

On November 15, 2018, the Court issued a Decision and Order that summarized Plaintiff's claims and dismissed Defendants' counterclaim. (Dkt. No. 30.) Familiarity with Plaintiff's Complaint, Defendants' Answer, and the Court's Decision and Order of November 15, 2018, is assumed in this Decision and Order, which is intended primarily for the review of the parties.

On June 11, 2019, the Court issued a Text Order denying Defendants' motion (Dkt. No. 39) to strike section "C" of Plaintiff's reply memorandum of law (Dkt. No. 38), but granting Defendants' alternative request for leave to file a sur-reply, which they have done. (Dkt. Nos. 41, 42.)

### **B. Parties' Briefing on Plaintiff's Motion for Judgment on the Pleadings**

#### **1. Plaintiff's Memorandum of Law-in-Chief**

Generally, in support of its motion for judgment on the pleadings, Plaintiff argues that, for the same reason that the Court dismissed Defendants' counterclaim, Plaintiff is entitled to judgment as a matter of law in the form of declaratory and injunctive relief to quiet title to the 19.6 acre tract (the "Property"), which has a cloud on its title caused by Defendant Phillips' recordation of a quitclaim deed that he manufactured. (Dkt. No. 32, Attach. 1 [Pl.'s Mem. of Law].) More specifically, Plaintiff argues that, in its Decision and Order of November 15, 2018, the Court accepted Plaintiff's argument that the Property is part of the Oneida Nation's

reservation based on unextinguished Indian title, and rejected Defendants' claim to the Property. (*Id.*) Plaintiff further argues that its right to the Property was acknowledged in the 1794 Treaty of Canandaigua, its right is federally protected, it has never alienated the Property with federal approval or otherwise, and therefore, Defendants have no claim to the Property on behalf of Orchard Party, who, in any event, are members of the Oneida Nation and thus lack independent tribal rights to the Property. (*Id.*)

## **2. Defendants' Opposition Memorandum of Law**

Generally, in opposition to Plaintiff's motion, Defendants assert the following three arguments. (Dkt. No. 37 [Defs.' Opp'n Mem. of Law].)<sup>1</sup>

First, Defendants argue that the standard for dismissing a counterclaim for failure to state a claim is significantly different than the standard for granting a motion for judgment on the pleadings. (*Id.*) More specifically, Defendants argue that granting the motion to dismiss the counterclaim for failure to state a claim required Plaintiff to demonstrate only that Defendants had not alleged facts plausibly suggesting a claim for relief—pursuant to *Iqbal* and *Twombly*—whereas, granting Plaintiff's motion for judgment on the pleadings requires a showing that (a) there exists no issue of material fact, (b) the Answer fails to meet the minimal

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<sup>1</sup> The Court notes that, on the cover page of their motion, Defendants state “ORAL ARGUMENT REQUESTED.” (Dkt. No. 37, at 1 [emphasis removed].) However, Defendants' request was not supported by a showing of cause for such oral argument.

requirements of notice pleadings pursuant to Fed. R. Civ. P. 8(b), or (c) the disputed factual issues raised in the Answer are immaterial or too implausible to ever be supported by discovery. (*Id.*) Defendants argue that their counterclaim alleged that they were affirmatively entitled to relief, whereas their denials and affirmative defenses contained in the Answer dispute that Plaintiff is entitled to relief and raise issues of material fact, which bar Plaintiff's motion for judgment on the pleadings. (*Id.*) Moreover, Defendants argue that they assert arguments "sounding in real property law regarding successors-in-interest, possession, and abandonment" that have not been addressed by Plaintiff. (*Id.*) Finally, Defendants argue that, if there is even a chance that they will be able to offer facts supporting their defenses and undermining Plaintiff's claims at trial, they are entitled to seek discovery; and therefore Plaintiff's motion for judgment on the pleadings must be denied. (*Id.*)

Second, Defendants argue that the Court's Decision and Order of November 15, 2018, determined that Defendants' counterclaim failed to allege facts plausibly suggesting entitlement to relief but it did not make any findings of fact or conclusions of law in the case. (*Id.*) More specifically, Defendants argue that the Court's Decision and Order of November 15, 2018, did not find that Plaintiff had affirmatively proven any facts or imply that Defendants will never be able to offer evidence supporting their defense. (*Id.*) Defendants argue that disputed issues of fact remain to be resolved at trial including the validity and interpretation of the deed documents that Defendant Phillips executed. (*Id.*) As a result, Defendants argue that this case should

proceed on the normal path to trial, where Plaintiff can attempt to carry the burden to prove its claims. (*Id.*)

Third, Defendants argue that numerous disputes of fact preclude judgment on the pleadings. (*Id.*) More specifically, Defendants argue as follows: (a) Plaintiff fails to frame its arguments in the context of the higher burden required for a motion for judgment on the pleadings, which makes it difficult for Defendants to meaningfully respond; (b) disputed issues of fact exist regarding whether the Property (i) was ceded or abandoned by Plaintiff, (ii) was ever possessed by Plaintiff, and (iii) was possessed by Plaintiff within ten years before commencement of this action; and (c) disputed issues of fact exist regarding Defendants' rights to the land at issue pursuant to real property law which does not require tribal sovereignty. (*Id.*)

### **3. Plaintiff's Reply Memorandum of Law**

Generally, in reply to Defendants' opposition, Plaintiff asserts the following three arguments. (Dkt. No. 38 [Pl.'s Reply Mem. of Law].)

First, Plaintiff asserts that it agrees with Defendants that the standard for granting judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) is that "the disputed factual issues raised by the Answer are either immaterial or too implausible to ever be supported by discovery" or that there remain no material issues of fact. (*Id.*)

Second, Plaintiff argues that Defendants' admissions and the controlling law entitle Plaintiff to judgment as a matter of law because there are no factual disputes that could alter the outcome. (*Id.*) More specifically,

Plaintiff argues that Defendants admit the following facts: (a) the Property was part of the original Oneida reservation acknowledged at the 1794 Treaty of Canandaigua; (b) the Property was never conveyed to New York State, with or without federal approval, (c) Indian title can be extinguished only with federal consent; and (d) the Orchard Party Oneidas could not acquire Indian title to Plaintiff's land because there was no federal consent to do so and tribal members do not acquire rights in tribal land by living on it. (*Id.*) In addition, Plaintiff argues that (a) the Court has already dismissed, as a matter of law, Defendants' claim to the Property, which is the defense that their Answer attempts to establish, and (b) based on the Answer, it is not plausible that there are facts which, if proven, could establish Defendant's ownership defense. (*Id.*) Furthermore, Plaintiff argues that the discovery Defendants seek does not concern any material fact for the following reasons: (a) the 1794 Treaty of Canandaigua clearly states that the Property is reserved to the Oneida and is Oneida property; (b) no transfer of the Property is alleged; (c) Defendants' concession that they are members of the Oneida Nation establishes that Oneida Nation members have continuously lived on the Property, and thus the Oneida Nation has not abandoned it, and tribal members do not acquire tribal land by living on it; and (d) the 1838 Treaty of Buffalo Creek was made with the Oneidas, not the Orchard Party Oneidas. (*Id.*)

Third, Plaintiff argues that Defendants' affirmative defenses fail as a matter of law, and therefore discovery is not necessary. (*Id.*) More specifically, Plaintiff argues as follows: (a) the Eleventh Amendment limits federal jurisdiction over states and is irrelevant here;

(b) Defendants did not join any other party to their counterclaim, which mirrored Plaintiff's claim, and there is nothing to indicate that any other party claims ownership of the Property; (c) there is no applicable federal statute of limitations for tribal enforcement of federally protected land rights; (d) the doctrines of collateral estoppel and res judicata depend on a particular judgment and the Answer and Defendants' opposition memorandum of law fail to identify any; (e) release and accord and satisfaction are inapplicable here because only a federal statute or treaty can affect tribal land rights; (f) Defendants fail to identify an act of Congress that could affect Plaintiff's right to judgment and discovery is not needed to exchange public statutes or treaties; (g) with respect to the defense of laches, (i) Defendants do not assert prejudice from the timing of this lawsuit, which was filed two years after they filed the trust and deed papers, and (ii) Defendants cannot invoke "laches" as the term was used in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), which referred to the disruptive effect of disturbing title to land occupied for generations by non-Indians in reliance on the validity of 200-year-old state land transactions because (1) Defendants assert rights based only on occupancy by members of the Oneida Nation on tribal land, and (2) Defendant Phillips had to manufacture and file a quitclaim deed in the county records because no prior title or chain of titles to the Property existed; (h) Defendants do not provide any reason that it would be impossible for the Court to quiet title to the Property, and Plaintiff does not seek to evict anyone; (i) tribal claims to preserve federal protection of tribal lands are justiciable; (j) Defendants answered Plaintiff's Complaint, rather than moving

to dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6), and in their Answer, Defendants admitted that the Property was within the Oneida Nation's reservation pursuant to the 1794 Treaty of Canandaigua and was not thereafter conveyed to New York State; (k) as a matter of law, Plaintiff cannot be said to have acquiesced in Defendants' filing of the deed and trust because (i) Defendants conceded that there is no claim that Orchard Party is a separate tribe from the Oneida Nation, (ii) tribal members do not acquire rights to tribal land by living on it, (iii) Plaintiff brought this lawsuit two years after Defendants filed the challenged deed and trust, and (iv) Plaintiff's interest in land protected by a federal treaty cannot be extinguished without federal approval; and (l) abandonment is not applicable here where Defendants admit that generations of Orchard Party Oneida descendants have continuously occupied the Property, and the Orchard Party Oneidas are part of, and not broken away from, the Oneida Nation. (*Id.*)

#### **4. Defendants' Sur-Reply Memorandum of Law**

Generally, in their sur-reply, Defendants assert the following two arguments. (Dkt. No. 42 [Defs.' Sur-Reply Mem. of Law].)

First, Defendants argue that Plaintiff has failed to carry its burden to show that Defendants' affirmative defenses fail as a matter of law. (*Id.*) More specifically, Defendants argue that Plaintiff has improperly attempted to shift the burden of persuasion to Defendants by arguing that Defendants have failed to "explain" or "sustain" their affirmative defenses, although the burden is on the moving party to

establish its entitlement to judgment as a matter of law. (*Id.*) In addition, Defendants argue that their affirmative defenses bar Plaintiff's motion for the following reasons: (a) they properly and timely raised the defense of failure to join an indispensable party identifying the United States, State of New York, Oneida County, and Town of Vernon as indispensable parties; (b) as a basis for the defenses of release and accord and satisfaction, Defendants identified the 1838 Treaty of Buffalo Creek, which extinguished Plaintiff's rights to the Property and recognized Defendants' proprietary interest in the land; (c) they appropriately raised as an affirmative defense in their Answer, failure to state a claim and Plaintiff carries the burden—but failed to rebut—this invulnerable defense; (d) they raised the defense of acquiescence and estoppel, which is not dependent on any claim of independent sovereignty by the Orchard Party but instead relates to the Property rights that were conveyed by Plaintiff to the Orchard Party in the 1838 Treaty of Buffalo Creek; and (e) they raised the defense of abandonment and (i) the Court's dismissal of Defendant's counterclaim did not imply a determination that Defendants can prove no set of facts to support of this defense, and (ii) Plaintiff's theory that Defendants' occupation of the Property supports Plaintiff's continuity of occupation fails to consider discontinuities between the historical Oneida tribe and the modern Oneida Indian Nation. (*Id.*)

Second, Defendants argue that material facts are in dispute that require the development of the factual record and an examination of the historical context of treaties prior to resolution. (*Id.*) More specifically, Defendants argue that issues of material fact exist in the following regards: (a) Plaintiff abandoned the

Property, which is evinced by discontinuities between the historical Oneida tribe and the modern day Oneida Indian Nation; and (b) Defendants obtained the Property through the 1838 Treaty of Buffalo Creek Treaty (in which the United States recognized that the Orchard Party had a proprietary interest in the Property and authorized Orchard Party chiefs to make arrangements with New York for the purchase of their lands) and through the 1842 Treaty with New York State (in which the Orchard Party chiefs sold several parcels of land surrounding the Property but made arrangements to remain on the Property). (*Id.*)

## II. GOVERNING LEGAL STANDARDS

### A. Legal Standard Governing Motion for Judgment on the Pleadings

Rule 12(c) of the Federal Rules of Civil Procedure “permits the entry of judgment as a matter of law on the basis of the pleadings alone.” *Barber v. RLI Ins. Co.*, 06-CV-0630, 2008 WL 5423106, at \*2 (N.D.N.Y. Dec. 24, 2008) (Scullin, J.) (citing *Jackson v. Immediate Credit Recovery, Inc.*, 05-CV-5697, 2006 WL 343180, at \*4 [E.D.N.Y. Nov. 28, 2006]).

“The standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion for failure to state a claim.” *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001) (collecting cases). “However, when it is a plaintiff who files such a motion, the Court accepts as true only the allegations in the complaint that the defendant has not denied.” *Edwards v. Jenkins*, 12-CV-10312, 2013 WL 8366052, at \*1 (E.D. Mich. Nov. 21, 2013) (citing

*Kule-Rubin v. Bahari Grp. Ltd.*, 11-CV-2424, 2012 WL 691324, at \*3 [S.D.N.Y. Mar. 5, 2012] [explaining that “plaintiff is entitled to judgment on the pleadings where the defendant’s answer fails to deny the elements constituting a cause of action”]; *see also Gen. Conference Corp. of the Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989) (“A plaintiff is not entitled to judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat recovery. Similarly, if the defendant raises an affirmative defense in his answer it will usually bar judgment on the pleadings.”); *Hamilton v. Yates*, 10-CV-1925, 2014 WL 4660814, at \*1 (E.D. Cal. Sept. 17, 2014) (“A plaintiff may bring the motion if the answer fails to controvert material facts alleged in the complaint.”).

In considering “plaintiff’s Rule 12(c) motion for a judgment on the pleadings, the Court must draw all reasonable inferences in favor of the non-moving party. Therefore, the plaintiff is entitled to judgment on the pleadings only if it has established that there remains no material issue of fact to be resolved and that it is entitled to judgment as a matter of law.” *United States v. Lankford*, 98-CV-0407, 1998 WL 641350, at \*1 (N.D.N.Y. Sept. 10, 1998) (McAvoy, C.J.) (citing *Shechter v. Comptroller of the City of New York*, 79 F.3d 265, 270 [2d Cir. 1996]; *Juster Assocs. v. City of Rutland*, 901 F.2d 266, 269 [2d Cir. 1990]); *see also Kertesz v. General Video Corp.*, 09-CV-1648, 2010 WL 11506390, at \*2 (S.D.N.Y. Mar. 31, 2010) (citing *Rivera v. Schweiker*, 717 F.2d 719, 722 [2d Cir. 1983]) (“A motion for judgment on the pleadings under Fed. R. Civ. P. 12[c] is designed to provide a means of disposing cases when the material

facts are not in dispute. A Rule 12[c] motion will not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law.”); *Barber*, 2008 WL 5423106, at \*2 (holding that the court must draw all inferences in favor of the non-moving party and only grant a motion for judgment on the pleadings if the movant establishes that “no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law”).

Much like a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), the Court may consider any document annexed to it as an exhibit. *Lankford*, 1998 WL 641350, at \*1 (citing Fed. R. Civ. P. 10[c]; *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 69 [2d Cir. 1996], *cert. denied* 519 U.S. 1007 [1996]); *see also Barber*, 2008 WL 5423106, at \*2 (“Pleadings include attached exhibits and documents incorporated by reference.”).

## **B. Legal Standards Governing Plaintiff’s Claims**

Because the parties to this action have demonstrated, in their memoranda of law, an accurate understanding of the relevant points of law contained in the legal standards governing Plaintiff’s claims and Defendants’ affirmative defenses in this action, the Court will not recite, in their entirety, those legal standards in this Decision and Order, which (again) is intended primarily for the review of the parties. (*See generally* Dkt. No. 32, Attach. 1 [Pl.’s Mem. of Law]; Dkt. No. 37 [Defs.’ Opp’n Mem. of Law]; Dkt. No. 38 [Pl.’s Reply Mem. of Law]; Dkt. No. 42 [Defs.’ Sur-Reply Mem. of Law].)

### III. ANALYSIS

After carefully considering the matter, the Court grants Plaintiff's motion to for judgment on the pleadings for each of the alternative reasons stated in Plaintiff's memoranda of law. (Dkt. No. 32, Attach. 1 [Pl.'s Mem. of Law]; Dkt. No. 38 [Pl.'s Reply Mem. of Law].) To those reasons, the Court adds the following analysis, which is intended to supplement but not supplant Plaintiff's reasons.

This is a rare case that does not involve issues of material fact between the parties, but rather the interpretation of statutes and post-1794 treaties. (*See, e.g.*, Dkt. No. 17, at ¶ 60 [Defs.' Answer, admitting that “[t]he property at issue in this case was part of the original Oneida reservation” pursuant to the 1794 Treaty of Canandaigua].) Based on those statutes and treaties, the Court finds that there is no issue of material fact that the Property is still part of the Oneida Indian reservation. *See, e.g.*, *Upstate Citizens for Equality v. Jewell*, 841 F.3d 556, 562 (2d Cir. 2016) (“[T]he Oneidas’ original reservation [following the 1794 Treaty of Canandaigua] was never officially ‘disestablished.’”); *Oneida Indian Nation v. Madison Cty.*, 665 F.3d 408, 443 (2d Cir. 2011) (“It remains the law of this Circuit that “the Oneidas’ reservation was not disestablished”).

In support of their argument that the 1838 Treaty of Buffalo Creek “reserved” for them the Property, Defendants rely on a provision that provides as follows:

ARTICLE 4. Perpetual peace and friendship shall exist between the United States and the New York Indians; and the United States hereby guaranty to protect and defend

them in the peaceable possession and enjoyment of their new homes, and hereby secure to them, in said country, the right to establish their own form of government, appoint their own officers, and administer their own laws; subject, however, to the legislation of the Congress of the United States, regulating trade and intercourse with the Indians. The lands secured them by patent under this treaty shall never be included in any State or Territory of this Union. The said Indians shall also be entitled, in all respects, to the same political and civil rights and privileges, that are granted and secured by the United States to any of the several tribes of emigrant Indians settled in the Indian Territory.

(Dkt. No. 17, at ¶¶ 16, 17, 64 [Defs.' Answer, citing Article 4]; Dkt. No. 17, Attach. 1, at 3 [Ex. to Defs.' Answer, attaching Article 4].) However, this Court has specifically held that after 1805—and, in particular, in the 1838 Treaty of Buffalo Creek—the United States treated the Oneidas as a single unified nation. *See Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104, 119 & n.8 (N.D.N.Y. 2002) (Kahn, J.) (“[T]he United States government, in ... [the 1838 Treaty of Buffalo Creek] with the Oneidas, treated the Oneidas as one nation.”) (citing Treaty of Buffalo Creek, Jan. 15, 1838, U.S.-New York Indians, art. 2, 7 Stat. 550). This fact fatally undermines Defendants' allegation that the Court should consider Orchard Party Oneida as a separate tribe from Plaintiff, with independent tribal rights to the Property.

The other provision of the 1838 Treaty of Buffalo Creek that Defendants rely on (to support their argu-

ment that the Property was granted to them) provides as follows:

**SPECIAL PROVISIONS FOR  
THE ONEIDAS RESIDING IN  
THE STATE OF NEW YORK**

ARTICLE 13. The United States will pay the sum of four thousand dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida.

(Dkt. No. 17, at ¶¶ 1, 8, 24, 25, 61 [Defs.' Answer, citing Article 13]; Dkt. No. 17, Attach. 1, at 5 [Ex. to Defs.' Answer, attaching Article 13].) However, by its plain language, this provision does not cede Plaintiff's right to the Property. As a result, the federal government did not, and could not, give its consent to such a transaction, as is required for the transfer of Indian land. (*Id.*) *See also* 1 Stat. 330, § 8; *Cherokee Nation v. Georgia*, 30 U.S. 1, 32 (1831) ("[T]he Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government."); *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S.

226, 231-32 (1985) (noting that the Nonintercourse Act provided that “no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution … [and] in the presence, and with the approbation of the commissioner or commissioners of the United States’ appointed to supervise such transactions”); *Oneida Indian Nation of N.Y. State v. Oneida Cty., New York*, 414 U.S. 661, 678 (1974) (holding that the Nonintercourse Act “put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States”). As a result, the Court must find, as a matter of law, that the 1838 Treaty of Buffalo Creek did not recognize any proprietary interest of the Orchard Party Oneidas in the Property—as a “faction” of Plaintiff or otherwise—to arrange for the purchase of the Property with the Governor of the State of New York.

In sum, because the 1838 Treaty of Buffalo Creek did not grant Orchard Party Oneidas any rights in the Property, the 1842 Treaty with New York State could not, and did not, reflect a proper agreement between the Governor of New York State and the Orchard Party Oneidas for the purchase of the Property.

Furthermore, while affirmative defenses usually bar judgment on the pleadings, Defendants’ defenses do not raise any issues of material fact that, if true, would bar the recovery sought by Plaintiff in its motion. *Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventists Congregational*

*Church*, 887 F.2d 228, 230 (9th Cir. 1989) (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1368 [1969]).

More specifically, Defendant assert the following fourteen affirmative defenses in their Answer: (1) the Eleventh Amendment of the U.S. Constitution; (2) the failure to join all indispensable parties including the United States, the State of New York, Oneida County and the Town of Vernon; (3) the statute of limitations; (4) the doctrine of collateral estoppel; (5) the doctrine of res judicata; (6) release; (7) accord and satisfaction; (8) Congressional act; (9) the doctrine of laches; (10) impossibility; (11) the failure to present a justiciable dispute; (12) the abandonment by Plaintiff of any rights it may have to Orchard Party Trust lands; (13) the failure to state a claim upon which relief can be granted; and (14) the doctrine of acquiescence and estoppel. (Dk. No. 17, at ¶¶ 40-53 [Defs.' Answer].)

In their motion papers, Defendants do not specifically address, and thus abandon (for purposes of this motion), their reliance on their First, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Affirmative Defenses. (See generally Dkt. No. 37, at 14-16, 23-25 [attaching pages "8" through "10," and pages "17" through "19," of Defs.' Opp'n Mem. of Law, mentioning only "abandon[ment]"]; Dkt. No. 42, at 6-12 [attaching pages "2" through "8" of Defs' Sur-Reply Mem. of Law].)<sup>2</sup> In any event, for the reasons

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<sup>2</sup> Cf. *Plahutnik v. Daikin Am., Inc.*, 10-CV-1071, 2012 WL 6108236, at \*5 (S.D.N.Y. Dec. 6, 2012) ("Arguments not made in opposition to a motion for summary judgment are deemed abandoned."); *Jain v. McGraw-Hill Cos., Inc.*, 827 F. Supp. 2d 272, 280 (S.D.N.Y. 2011) (holding that the plaintiff abandoned six claims when her brief failed to respond to the

set forth in Plaintiff's reply memorandum of law, the Court finds that these eight affirmative defenses do not bar the relief requested in Plaintiff's motion. (Dkt. No. 38, at 8-12 [attaching pages "6" through "10" of Pl.'s Reply Mem. of Law].)

The Court reaches the same conclusion with regard to the six affirmative defenses on which Defendants do specifically rely in their memoranda of law: their Second, Sixth, Seventh, Twelfth, Thirteenth and Fourteenth Affirmative Defenses. (Dkt. No. 37, at 24 [attaching page "18" of Defs.' Opp'n Mem. of Law, mentioning "abandon[ment]"]; Dkt. No. 38, at 8-12 [attaching pages "6" through "10" of Pl.'s Reply Mem. of Law]; Dkt. No. 42, at 6-12 [attaching pages "2" through "8" of Defs.' Sur-Reply Mem. of Law].)

With regard to Defendants' Second Affirmative Defense (failure to join all indispensable parties), neither the Complaint nor Answer has alleged—even conclusorily—that the United States, State of New York, County of Oneida, Town of Vernon, or any other individual or entity has any claim to, or interest in, the Property, or is necessary for the Court to accord complete relief. *See Fed. R. Civ. P. 19(a)(1)* (explaining that, for a person to be joined as a required party, either the person must "claim[] an interest related to the subject of the action" or the person must be necessary for the court to "accord complete relief"). Indeed, in their Answer, Defendants admit that "the State never obtained the 19.6 acres at issue in this case." (Dkt. No. 17, at ¶ 12 [Defs.' Answer].) For all of

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defendants' arguments on those claims); *Lipton v. Cty. of Orange, N.Y.*, 315 F.Supp.2d 434, 446 (S.D.N.Y. 2004) ("[A court] may, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed.").

these reasons, the Court finds that this affirmative defense cannot bar the relief requested in Plaintiff's motion.

With regard to Defendants' Sixth and Seventh Affirmative Defenses (release and accord and satisfaction), “[u]nder New York law, an accord and satisfaction is the resolution of a disputed, unliquidated claim through a new contract ‘discharging all of part of [the parties’] obligations under the original contract,’ and constitutes a complete defense to a claim for breach of contract.” *Carnrite v. Granada Hosp. Grp., Inc.*, 175 F.R.D. 439, 449 (W.D.N.Y. 1997) (quoting *Conboy, McKay, Bachman & Kendall v. Armstrong*, 110 A.D.2d 1042, 1042 [N.Y. App. Div. 4th Dep’t 1985]). Moreover, “[a] release is a provision that intends to present abandonment of a known right or claim.” *McMahan & Co. v. Bass*, 250 A.D.2d 460, 461 (N.Y. App. Div. 1st Dep’t 1998). Here, neither the Complaint nor Answer has (even when viewed in context) plausibly alleged that such release or accord and satisfaction exist. Moreover, only a federal statute or treaty can affect tribal land rights. *See* 25 U.S.C. § 177 (“No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.”); *Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 670 (1974) (“The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13.”). For all of these reasons, the Court finds that this affirmative defense cannot bar the relief requested in Plaintiff's motion.

With regard to Defendants' Twelfth Affirmative Defense (abandonment), "an individual tribal member has no alienable or inheritable interest in the communal holding," and "no tribal member can claim a federal right against the tribe to any specific part of the tribal property." 1 *Cohen's Handbook of Federal Indian Law* § 15.02 (2019). Defendants agree that members of the Oneida Indian Nation have resided on and possessed the Property since time immemorial. (Dkt. No. 17, at ¶ 55 [Defs.' Answer].) Moreover, Defendants now agree the Orchard Party is not a separate faction. (Dkt. No. 37, at 25 [attaching page "19" of Defs.' Opp'n Mem. of Law].) Finally, as stated in the preceding paragraph, only a federal statute or treaty can affect tribal land rights. For all of these reasons, the Court finds that this affirmative defense cannot bar the relief requested in Plaintiff's motion.

With regard to Defendants' Thirteenth Affirmative Defense (of failure to state a claim), the Court finds that Plaintiff's Complaint states a claim upon which relief can be granted for all of the reasons stated in the Court's Decision and Order of November 15, 2018, and in this Decision and Order. For this reason, the Court finds that this affirmative defense cannot bar the relief requested in Plaintiff's motion.

Finally, with regard to Plaintiff's Fourteenth Affirmative Defense (acquiescence and estoppel), neither the Complaint nor Answer has (even when viewed in context) plausibly alleged that such acquiescence or estoppel occurred. Tribal members cannot acquire a proprietary interest in tribal land merely by living on it. 1 *Cohen's Handbook of Federal Indian Law* § 15.02 (2019). Moreover, as stated earlier, only a federal statute or treaty can affect tribal land rights.

For all of these reasons, the Court finds that this affirmative defense cannot bar the relief requested in Plaintiff's motion.

**ACCORDINGLY**, it is

**ORDERED** that Plaintiff's motion for judgment on the pleadings (Dkt. No. 32) is **GRANTED**; and it is further

**DECLARED** that neither Defendant Trust nor Defendant Phillips, as an individual or otherwise, does not own, or have any property interest in, the Property; and it is further

**DECLARED** that the trust document, quitclaim deed and all related documents filed by Defendant Phillips in the Oneida County land records are invalid and void to the extent they concern the Property; and it is further

**ORDERED** that Defendants are **PERMANENTLY ENJOINED** from doing the following:

- (a) claiming the Property for themselves, any beneficiary of Defendant Trust, or any other person or entity;
- (b) asserting that they or any beneficiary of Defendant Trust owns or has a property interest in the Property; and
- (c) creating or causing to be created, or filing or causing to be filed, in land records any document asserting that they, any beneficiary of Defendant Trust, or any other person or entity owns or has a property interest in the Property.

Dated: July 31, 2019  
Syracuse, NY

29a

/s/ Glenn T. Suddaby  
Hon. Glenn T. Suddaby  
Chief U.S. District Judge

## Appendix D

**BUREAU OF INDIAN AFFAIRS REPORT ON  
ONEIDA HISTORY UNDATED**

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**HISTORICAL SKETCH OF ONEIDA NATION****A. Background to 1830's**

The Oneida Nation of New York occupied the area of Oneida Lake in the present state of New York. The Nation was a member of the Iroquois Confederacy at the time of the first contact with Europeans in the seventeenth century. It was the smallest of the confederated tribes.

The Nation has a long history of internal division which began around 1700. The basis of the conflict was the rise in prestige and power, as a result of constant warfare, of the warriors within the Nation. The warriors challenged the traditional clan chiefs, whose power rested on the traditional clan mother system, for control of the Nation. By mid-century both groups had sufficient power and/or authority to prevent the exercise of authority by the other but neither could exercise positive leadership of the Nation.

In 1767 a Presbyterian minister sought to establish a mission among the Oneida. He allied himself with the warrior faction which became known as the Christian Party. The Revolutionary War further aggravated the division among the Nation with the Warrior-Christian faction taking a pro-American stance and the clan chief-traditionalist faction taking a pro-British one. In addition to these political and social tensions, the War also caused considerable

physical dislocation and destruction. After the War, the Oneida returned to their homelands but settled in five separate villages, each with its own government. All attempts to unify the Nation not only failed but seemed to increase the factionalism. By 1805 the division between the two major factions was so intense that the Oneida territory was divided into two separate parcels.

In the 1810's this situation was somewhat calmed by the arrival of an Episcopal missionary. He won the support of the warrior group which became known as the First Christian Party. He then concentrated on the opposing traditionalist group, converted them to the church, and they became known as the Second Christian Party. While these events did not unite the Nation they did tend to lessen intra-tribal tension.

In the 1820's the movement began to persuade the Oneida to sell their lands in New York and move to Wisconsin. The Nation divided again over this proposal. Some members of both the First and Second Christian Parties wanted to emigrate, while others, who called themselves the Orchard Party, refused to consider any move. Nevertheless, in 1823 a small group started westward and by 1838 over six hundred Oneidas were living in Wisconsin.

#### **B. Division of the Nation**

In 1838, as part of its nationwide "Indian Removal Policy," the United States negotiated the Treaty of Buffalo Creek (7 Stat. 555) with the New York Indians which called for them to remove to Kansas. Despite the fact that all three factions signed the Treaty, the Oneida refused to go to Kansas. The Nation was again divided into three groups: those who decided they were going to move to Ontario, Canada, to land they would purchase themselves;

those who wanted to move but did not know where; and, those who wished to remain in New York in their aboriginal area.

On June 19, 1840, the First and Second Christian Parties of the Oneida Indians in New York entered in a Treaty (Report of Special Committee to Investigate the Indian Problem of the State of New York by Appointment of the Assembly of 1888 – J.S. Whipple, Report #51 of the Assembly, February 1, 1889, pp. 309-329.) to determine the tribal assets of those who desired to emigrate and those who were going to stay. This Treaty has two basic lists of names: those who were going to move (Schedule 1, 400 persons) and those “desirous of remaining on their lands and not selling the same” (Schedule 2, 178 persons). Schedule 1 was further divided into three parties: those who were going to move to Canada, called the first emigrating party of (242) persons, and two other groups called the second emigrating party of (89) persons, and the third emigrating party of (69) persons, who, while they wanted to leave, had not yet decided where. The first emigrating party used its funds to purchase a reserve near London, Ontario, Canada, and by 1848 most of the members of the second and third emigrating parties had settled there also. Meanwhile, on March 13, 1841, (See, Whipple Report, pp. 343-355.) and May 23, 1842, (See, Whipple Report, pp. 356-363.) the State of New York signed similar treaties with the Orchard Party of Oneida to divide its assets between those who wished to go to Canada (16 in 1842) and those who desired to stay (40 in 1842).

#### C. Post 1840's

On April 18, 1843, the New York State Assembly passed an Act (Laws of New York, Ch. 185, Sec. 3

(1843)) stating: "The Oneida Indians owning lands in the counties of Oneida [the First and Second Christian Parties] and Madison [the Orchard Party] are hereby authorized to hold their lands in severalty...." This law for all practical purposes ended the official relationship between the Oneida Indians and the State of New York. Hereafter the Oneidas were treated by the State as individuals, however tribal organization in a social sense remained.

Not all of the Oneida, who in the early 1840's indicated that they were going to move out of New York, did so. Because they had acted to relinquish their rights to the tribal lands in Oneida and Madison counties (though not in accordance with the Indian Nonintercourse Act of 1834), they settled with the Onondaga on their Reservation. In addition, some of those who did emigrate either to Wisconsin or Canada returned to New York and also settled on the Onondaga Reservation. From 1850 to modern times they have maintained a separate presence on the Onondaga Reservation and its environs.

#### D. Oneidas on the Onondaga Reservation

Since their arrival, the Oneida who settled with the Onondaga on the Onondaga Reservation and their descendants have maintained a separate identity from their hosts. This identity is recognized in the Annual Reports of the U.S. Commissioners of Indian Affairs, by the State of New York in various official reports made through the nineteenth and twentieth centuries and the United States Census of 1890. The fact that they are listed separately on the BIA Census rolls from 1886 through 1901 also reinforces this identification.

The amount and type of interaction between the Oneida on the Onondaga Reservation and those who

remained in Oneida and Madison counties is difficult to ascertain with the information presently available. It is known, however, that they have always considered themselves as two separate groups. Furthermore, the annual treaty cloth due the Oneidas from the Federal government was divided between the two groups until 1977 when such distributions were withheld pending resolution of the tribal government issue.

#### E. Oneida and the IRA

After the passage of the Indian Reorganization Act in 1934, the issue arose whether the Oneida qualified to vote on the Act. The major point of controversy was whether an Indian group needed to have a "reservation" to be considered eligible to vote. The Oneida on Onondaga were considered to be residents of the Onondaga Reservation and therefore ineligible under the above requirement. Thus, the question of eligibility was focused only on those Oneida in Oneida County, which are now identified as the "Marble Hill" group. Initially they were also considered not eligible, but upon reconsideration the Department of the Interior changed its position and called for a referendum on June 17, 1936, the last day such a vote could be held. A question was then raised as to which Oneida people should be allowed to vote and if there should be one or two polling places. It was decided that there would be only one voting place at Oneida County and that the Oneida on the Onondaga would be allowed to vote "as absentee members if otherwise eligible." The vote rejected the IRA 12 to 57.

#### F. Post IRA

In the 1940's the Bureau closed its office in New York, and as a result of the termination philosophy, ceased official contact with all the New York Indians. In the 1960's contact was reestablished.

Appendix E

**BUREAU OF INDIAN AFFAIRS REPORT ON  
TRIBAL STATUS FEBRUARY 24, 1982**

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United States Department of the Interior  
BUREAU OF INDIAN AFFAIRS  
WASHINGTON D.C. 20245  
[SEAL]

IN REPLY REFER TO:  
Tribal Government Services

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Memorandum

To: Director, Office of Indian Services  
From: Michael T. Smith  
Subject: Report on the History of the New York  
Oneida Indians  
[Handwritten: February 24, 1982]

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In the early 1970's, reasoning that since they are the "Oneida Nation of New York", they also have a right to use of the 32 acre "Oneida Reservation" in Madison County, members of the Onondaga group moved on this land. This was done to the consternation of some of those who were descended from the "Band" subject to the Boylan decision. The unresolved question in this situation is: Did the Boylan decision, while reaffirming the existence of the Oneida Reservation

and the Oneida Tribe, at the same time define the Oneida Tribe in New York as only the descendants of those band assigned to lots 17 and 19? If so, then most of those who are referred to as Marble Hill Oneida and on the Cloth Payment roll kept by Emily Johnson (William Rockwell's successor in this position) should not be considered as "tribal Oneida".

Notwithstanding the above, most of the Marble Hill people are descendants of the "Home Parties" of the 1840's. Therefore, because their tribal affiliation can be traced to the two Home Parties of the 1840 treaties, they are the only historically identifiable "tribal" Oneidas in New York. This is not to say that the Onondaga group are not Oneida. They, however, are individual not tribal. They arrived on Onondaga as individual's or in small groups and not as recognized "bands" or "tribes."

Appendix F

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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**ORDER DISMISSING COUNTER CLAIM**

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5:17-CV-1035  
(GTS/ATB)

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ONEIDA INDIAN NATION,  
Plaintiff,  
—v.—

MELVIN L. PHILLIPS, SR. Individually  
and as Trustee; MELVIN L. PHILLIPS, SR./  
ORCHARD PARTY TRUST,

Defendants,

MELVIN L. PHILLIPS, SR. Individually  
and as Trustee; MELVIN L. PHILLIPS, SR./  
ORCHARD PARTY TRUST,

Counter-Claimant,

—v.—

ONEIDA INDIAN NATION,  
Counter-Defendant.

---

APPEARANCES:	OF COUNSEL:
ONEIDA INDIAN NATION Co-Counsel for Plaintiff/ Counter-Defendant 5218 Patrick Road Verona, New York 13478	MEGHAN MURPHY BEAKMAN, ESQ.
ZUCKERMAN SPAEDER LLP Co-Counsel for Plaintiff/ Counter-Defendant 1800 M Street, N.W., Suite 1000 Washington, DC 20036- 5802	MICHAEL R. SMITH, ESQ.
ARNOLD & PORTER KAYE SCHOLER LLP Counsel for Defendant/ Counter-Claimant 250 West 55th Street New York, New York 10019	ERIC NEVINS WHITNEY, ESQ. GLENN J. POGUST, ESQ.
GLENN T. SUDDABY, Chief United States District Judge	

**DECISION and ORDER**

Currently before the Court, in this real property action filed by Oneida Indian Nation (“Plaintiff”) against Melvin L. Phillips, Sr., individually and as Trustee (“Defendant Phillips”), and Melvin L. Phillips, Sr./Orchard Party Trust (“Defendant Trust”) (collectively “Defendants”), is Plaintiff’s motion to dismiss Defendants’ counterclaim for failure to state a claim upon which relief can be granted pursuant to

Fed. R. Civ. P. 12(b)(6). (Dkt. No. 24.) For the reasons set forth below, Plaintiff's motion is granted.

## **I. RELEVANT BACKGROUND**

### **A. Plaintiff's Claims**

Generally, liberally construed, Plaintiff's Complaint claims that Plaintiff has a right to possess the 19.6 acres of land in dispute as part of the Oneida reservation ("19.6 acres in dispute"), which right arises from, and is protected against infringement by, federal treaty, statutory and common law, and the U.S. Constitution, and that Defendant Phillips' conduct in executing and recording the trust declaration, quit claim deed, and other documents in county land records was an unlawful attempt to obtain possession of and control over the 19.6 acres in dispute for his and his family's personal benefit. (*See generally* Dkt. No. 1 [Pl.'s Compl.].) As relief, Plaintiff's Complaint requests a declaratory judgment and a permanent injunction. (*Id.*) Familiarity with the factual allegations supporting this claim and the relief requested in Plaintiff's Complaint is assumed in this Decision and Order, which is intended primarily for the review of the parties.

### **B. Defendants' Counterclaim**

Generally, liberally construed, Defendants counter-claims that Defendant Trust, as successor-in-interest to the historic Oneida Party, has a right to possess the 19.6 acres in dispute and other lands pursuant to the deed, which right arises from, and is protected against infringement by federal treaty, state treaty, statutory and common law, and the Constitution, and that Defendant Phillips' conduct in executing and

recording the trust declaration, quit claim deed, and other documents in county land records was a lawful action to maintain possession and control over the 19.6 acres in dispute and other Orchard Party Oneida lands identified in the deed for the benefit of the Orchard Party Oneida. (*See generally* Dkt. No. 17 [Defs.’ Answer and Countercl.].) Familiarity with the factual allegations supporting this counterclaim is assumed in this Decision and Order, which again, is intended primarily for the review of the parties.

### **C. Parties’ Briefing on Plaintiff’s Motion**

#### **1. Plaintiff’s Memorandum of Law**

Generally, in support of its motion to dismiss, Plaintiff asserts the following five arguments. (Dkt. No. 24, Attach. 2 [Pl.’s Mem. of Law].)

First, Plaintiff argues that the counterclaim does not state a claim under federal law because it fails to plausibly identify any source of federal protection of the rights of “Orchard Party Oneida” in the 19.6 acres in dispute. (*Id.*) More specifically, Plaintiff argues that, by expressly alleging that the Court possesses subject-jurisdiction over the counterclaim in the form of supplemental jurisdiction pursuant to 28 U.S.C. § 1337 (Dkt. No. 17, at ¶ 54), Defendants choose not to allege that the Court possesses subject-matter jurisdiction in the form of federal-question jurisdiction pursuant to 28 U.S.C. § 1331 or what some federal courts have referred to as “Indian tribes jurisdiction”<sup>1</sup>

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<sup>1</sup> See, e.g., *Pauma Band of Luiseno Mission Indians of the Paula and Yuima Reservation v. Unite Here Int’l Union*, 16-CV-2660, 2018 WL 4680029, at \*6 (S.D. Cal. Sept. 28, 2018); *Oglala Sioux Tribe v. C & W Enter., Inc.*, 607 F. Supp.2d 1069, 1074 (D. S.D. 2009).

pursuant to 28 U.S.C. § 1362. (Dkt. No. 24, Attach. 2.)<sup>2</sup> Furthermore, Plaintiff argues, there is no actionable state counterclaim over which the Court could possess supplemental jurisdiction, because state law plays no role in the protection of Indian land held by Indian title (which is the exclusive province of federal law). (*Id.*)

Second, Plaintiff argues that the counterclaim does not state a claim because, even if it were to identify a federal-law basis for its claim, it does not assert the rights of an Indian tribe a necessary element of a federal action to enforce ownership rights. (*Id.*) More specifically, Plaintiff argues, any allegation of separate tribal status for Orchard Party Oneida would not be plausible, and Defendants would be judicially estopped from making such an allegation because Defendant Phillips and others have previously claimed membership to the Oneida Nation and in its government. (*Id.*) In addition, Plaintiff argues, the federal government, through both the Department of Interior and the Department of Justice, has rejected the existence of an Orchard Party Tribe. (*Id.*) Finally, Plaintiff argues, District Judges Edmund Port, Neal McCurn, and Lawrence Kahn of this Court have decided that the Orchard

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<sup>2</sup> Indeed, Plaintiff argues, Defendants' counterclaim fails to allege facts plausibly suggesting that the counterclaim arises under (1) the U.S. Constitution (because the only relevant constitutional provision would be the Supremacy Clause, but that Clause protects a tribe's aboriginal possession of land at the time the Constitution became effective and the Orchard Party Oneida was not such a tribe), (2) the laws of the United States (because there is no allegation that a federal statute protects Defendants' rights), or (3) the treaties of the United States (because, while the counterclaim mentions two treaties, both were made with Plaintiff and not the Orchard Party Oneida).

Party Oneida are a part of the Oneida Nation, not a separate tribal entity. (*Id.*)

Third, Plaintiff argues that the counterclaim does not state a claim because, even if it were based on New York State law, it does not plausibly allege that New York State law gives Defendant Trust rights in the 19.6 acres in dispute. (*Id.*) More specifically, Plaintiff argues that, while the counterclaim identifies a state treaty dated June 24, 1842, it does not allege that there was federal approval and ratification of that treaty, which are requirements for a treaty to be valid in law and equity. (*Id.*)<sup>3</sup> Even setting aside the issue of validity, Plaintiff argues, the counterclaim admits that the 19.6 acres in dispute were not purchased by the state in the 1842 treaty (and thus their title stayed where it had been: with Plaintiff). (*Id.*) Indeed, Plaintiff argues, in prior Oneida land claim litigation, the Orchard Party admitted both (a) that it is part of Plaintiff and (b) that Plaintiff has a continued right to title and possession of, *inter alia*, the lands in question. (*Id.*) Finally, Plaintiff argues, even if the counterclaim were to sufficiently identify state law, that state law would not give rise to a claim by Defendants, because (a) the Orchard Party Oneida is not an Indian tribe recognized by the State in N.Y. Indian L. § 2, (b) the State has recognized (in a settlement agreement approved by Judge Kahn)<sup>4</sup> that the land in question

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<sup>3</sup> Indeed, Plaintiff argues that, when unsuccessfully trying to intervene in Oneida land claim litigation, the Orchard Party/Marble Hill Oneida alleged that the 1842 state treaty was illegal because it was made without federal approval and thereafter never federally ratified. (Dkt. No. 24, Attach. 2.)

<sup>4</sup> See *State of New York v. Jewell*, 08-CV-0644, Memorandum-Decision and Order of Approval (N.D.N.Y. filed March 4, 2014) (Kahn, J.).

belongs to Plaintiff, and (c) N.Y. Indian L. § 16 provides that the settlement agreement “supersede[s] any inconsistent laws and regulations.” (*Id.*)

Fourth, Plaintiff argues that the counterclaim does not state a claim for the alternative reason that, based on its own factual allegations, it is barred by the doctrine of *res judicata*. (*Id.*) More specifically, Plaintiff argues that, while Defendant Phillips objected to the settlement agreement, the settlement agreement was subsequently approved by Judge Kahn over Phillips’ objection, and Phillips has not filed an appeal from that order of approval (which is a necessity for challenging the “[]correct[ness]” of the settlement now). (*Id.*) Moreover, Plaintiff argues that, although Defendants correctly argue that the Orchard Party Oneida was not a party to the settlement agreement, that fact is irrelevant, because (a) Judge Kahn’s approval order required that third-party challenges to the settlement agreement be filed in that case, (b) in any event, when Defendant Phillips objected to the settlement agreement, he did so on behalf of the Orchard Party Oneida, thus putting in issue the land rights of Orchard Party Oneida in that litigation, and (c) in this action, the “Orchard Party Trust” is not even a genuine party but is merely the alter ego of Defendant Phillips. (*Id.*)

Fifth, Plaintiff argues that the counterclaim should be dismissed for the alternative reason that the Court lacks subject-matter jurisdiction over it as a result of the doctrine of tribal sovereign immunity. (*Id.*)<sup>5</sup> More specifically, Plaintiff argues that (a) the Court lacks subject-matter jurisdiction over a lawsuit against an

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<sup>5</sup> In this respect, the Court construes Plaintiff’s motion as being based not on Fed. R. Civ. P. 12(b)(6) but on Fed. R. Civ. P. 12(b)(1).

Indian tribe such as Plaintiff unless the tribe has waived its sovereign immunity or Congress has abrogated it (neither of which has happened here), (b) tribal sovereign immunity applies regardless of whether a claim is presented in a complaint or in a counterclaim (and regardless of whether the counterclaim would negate a tribe's claim for declaratory relief against the counter-claimant), and (c) while an exception exists for counterclaims that do not seek affirmative relief against a tribe, here, Defendants' counterclaim does seek affirmative relief (specifically, a declaration and a relinquishment of rights). (*Id.*)

## **2. Defendants' Opposition Memorandum of Law**

Generally, in opposition to Plaintiff's motion, Defendants assert the following three arguments. (Dkt. No. 27, Attach. 2 [Defs.' Opp'n Mem. of Law].)

First, Defendants argue that they have adequately alleged facts supporting this Court's jurisdiction and their entitlement to the relief sought. (*Id.*) More specifically, Defendants argue that the counterclaim sufficiently asserts federal jurisdiction by expressly invoking the Court's supplemental jurisdiction pursuant to 28 U.S.C. § 1337 with regard to a claim that is so related to Plaintiff's claim as to form part of the same case or controversy (and, indeed, to involve the same federal law as does Plaintiff's claim). (*Id.*) In addition, Defendants argue that the counterclaim does not require Orchard Party to be a federally recognized or state-recognized Indian tribe because the rights to and possession of the land in dispute are protected interests under federal law and the decisions in *City of Sherrill v. Oneida Indian Nation*

*of New York*, 544 U.S. 197 (2005), and *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005). (*Id.*)

Second, Defendants argue that the quitclaim deed transferring assets to Defendant Trust is valid. (*Id.*) More specifically, Defendants argue that federal or state recognition is irrelevant to the question of Defendant Phillips being a successor in interest to Orchard Party land title vested by the Treaty of Buffalo Creek. (*Id.*) Further, Defendants argue that the settlement agreement in *Jewell* does not alter Orchard Party's claim to its land because (a) the counterclaim is consistent with the terms of the settlement agreement in that the 19.6 acres in dispute is not "Nation Land" pursuant to the settlement agreement given that Plaintiff had (and has) neither title nor possession of the land in dispute and has not made any application to the Secretary of the Interior for this land to be taken into trust, and (b) in any event, the settlement agreement cannot affect the rights of non-parties such as Defendant Phillips. (*Id.*) Finally, Defendants argue that the counterclaim does not implicate the Nonintercourse Act, 25 U.S.C. § 177, because (a) no Orchard Party land is being alienated, and (b) in any event, and Defendant Phillips' quitclaim deed complies with the Act by being authorized by the congressionally approved Buffalo Creek Treaty. (*Id.*)

Third, Defendants argue that tribal sovereign immunity does not insulate Plaintiff from Defendants' counterclaim in this case. (*Id.*) More specifically, Defendants argue that the cases cited by Plaintiff are inapposite and that, as a matter of equity, a tribe should not be permitted to voluntarily bring suit and then hide behind the doctrine of sovereign immunity to protect itself from countersuit

on the exact same issues. (*Id.*) Moreover, Defendants argue that the Court should apply the immovable property exception to the doctrine of sovereign immunity in this case to overcome Plaintiff's purposed sovereign immunity defense to Defendants' counterclaim. (*Id.*)

### **3. Plaintiff's Reply Memorandum of Law**

Generally, in reply to Defendants' opposition, Plaintiff asserts the following six arguments. (Dkt. No. 28 [Pl.'s Reply Mem. of Law].)

First, Plaintiff argues that Defendants' opposition does not dispute the legal rules on which Plaintiff's motion to dismiss is based, and that the opposition concedes or does not dispute the relevant facts. (*Id.*) More specifically, Plaintiff argues that Defendants' opposition does not dispute that the legal rules that (a) where an Indian tribe holds land by Indian title that is recognized by federal treaty and acknowledged to be part of the tribe's reservation, only a federal law or treaty can extinguish that title, (b) tribal land is held by the tribe indivisibly and collectively for all members and, thus, that tribal members do not acquire rights in tribal land by living on it, and (c) federal common law and the Nonintercourse Act protect only the rights of Indian tribes with respect to Indian title. (*Id.*) In addition, Plaintiff argues that Defendants' opposition concedes or does not dispute the fact that (a) the 19.6 acres in question are part of the land recognized by the United States in the Treaty of Canandaigua as the property of Plaintiff, (b) the Orchard Party Oneida are members of Plaintiff, and (c) Defendant Phillips is an admitted member of Plaintiff and lives on Plaintiff's unceded land. (*Id.*) Finally, Plaintiff argues that these

concessions compel the conclusion that the Orchard Party Oneida could not have acquired Indian title to Plaintiff's land. (*Id.*)

Second, Plaintiff argues that Defendants' reliance on the Treaty of Buffalo Creek cannot save their counterclaim. (*Id.*) More specifically, Plaintiff argues that, while Defendants argue that the Treaty of Buffalo Creek "recognized" Orchard Party title, the Treaty did not recognize a division of Plaintiff into separate tribes; nor does the counterclaim allege that Plaintiff ceded or otherwise conveyed land to the Orchard Party Oneida in the Treaty. (*Id.*) Moreover, Plaintiff argues that, when the State of New York, Madison County, and Oneida County previously argued that the Treaty of Buffalo Creek recognized land rights in Oneida factions (such as the Orchard Party Oneida or the First Christian Party), Judge Kahn rejected that construction of the Treaty of Buffalo Creek and held that the treaty treated the Oneida as one Nation. (*Id.*) *See also Oneida Indian Nation v. State of New York*, 194 F. Supp. 2d 104, 119 (N.D.N.Y. 2002) (Kahn, J.).

Third, Plaintiff argues that Defendants' reliance on supplemental jurisdiction cannot save their counterclaim, because supplemental jurisdiction over state law claims to protect ownership by a state law trust is inconsistent with a claim of Indian title. (Dkt. No. 28.) More specifically, Plaintiff argues that Defendants' claim of Indian title can arise only under federal law. (*Id.*) In addition, Plaintiff argues that the counterclaim contradictorily alleges that Defendant Phillips can make a state law conveyance, to a state law trust, of an Indian title that is possessed by a *third-party*, i.e., the Orchard Party Oneida. (*Id.*) This is impossible, Plaintiff argues, because the "trust" is not the Orchard Party Oneida, and the Orchard

Party Oneida is not the trust beneficiary. (*Id.*) Finally, Plaintiff argues, even if the Orchard Party Oneida were deeding the land in question, there would be a violation of the Nonintercourse Act, because it is Plaintiff, and not the Orchard Party Oneida, that holds title to the land. (*Id.*)

Fourth, Plaintiff argues that Defendants have not sufficiently refuted Plaintiff's argument that Defendant Phillips objected to the settlement agreement but failed to appeal from Judge Kahn's approval order, which confirmed Plaintiff's continued title to the land in dispute. (*Id.*) More specifically, Plaintiff argues that Defendants do not dispute the fact that Defendant Phillips filed an objection to the settlement on the ground that it eliminated the Orchard Party Oneidas' land rights in question, then he lost on that objection and chose not to appeal. (*Id.*) Moreover, Plaintiff argues, although Defendants respond that their counterclaim is not precluded by Judge Kahn's approval order (specifically, the portion requiring that third-party challenges to the settlement agreement be filed in that action) because their counterclaim does not challenge the settlement agreement, Defendants are mistaken: Paragraphs 69 to 72 of the Answer allege that the settlement agreement was "incorrect[] in defining the land in question as being retained by Plaintiff (and not the Orchard Party Oneida), and was followed within 18 months by Defendant Phillips' execution of the quitclaim deed at issue in this action. (*Id.*)

Fifth, Plaintiff argues that Defendants' reliance the equitable considerations applied in the *Sherrill* and *Cayuga* decisions is misplaced because (a) those two decisions were based on reliance interests created by cessation of Plaintiff's land to non-Indians, (b) here, it is undisputed that the land in question was never

ceded by Plaintiff, and (c) in any event, equitable principles cannot be applied to transfer ownership of tribal land to tribal members who live on it. (*Id.*)

Sixth, Plaintiff argues that Defendants' attempt to evade the fatal impact of the doctrine of tribal sovereign immunity is in vain. (*Id.*) More specifically, Plaintiff argues that Defendants do no persuasively distinguish Plaintiff's tribal-sovereign-immunity cases. (*Id.*) Furthermore, Plaintiff argues that the dismissal of Defendants' counterclaim on tribal-sovereign-immunity grounds does not prohibit Defendants from defending against Plaintiff's Complaint and resisting the relief sought by Plaintiff; it merely prohibits Defendants from seeking independent, affirmative relief against Plaintiff. (*Id.*) Finally, Plaintiff argues, as for the immovable-property-exception to the doctrine of sovereign immunity (which is being litigated in a case that is now pending in the Supreme Court), there is no way to know whether the exception might or might not affect the sovereign immunity issue in this case: controlling Second Circuit authority currently holds tribal sovereign immunity applicable to litigation regarding real property. (*Id.*)

## II. GOVERNING LEGAL STANDARDS

### A. Legal Standard Governing Motion to Dismiss for Failure to State a Claim

It has long been understood that a dismissal for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6), can be based on one or both of two grounds: (1) a challenge to the "sufficiency of the pleading" under Fed. R. Civ. P. 8(a)(2); or (2) a challenge to the legal cognizability

of the claim. *Jackson v. Onondaga Cnty.*, 549 F. Supp. 2d 204, 211, nn.15-16 (N.D.N.Y. 2008) (McAvoy, J., adopting Report-Recommendation on *de novo* review).

Because such dismissals are often based on the first ground, a few words regarding that ground are appropriate. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a pleading contain “a *short and plain* statement of the claim *showing* that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) [emphasis added]. In the Court’s view, this tension between permitting a “short and plain statement” and requiring that the statement “show[]” an entitlement to relief is often at the heart of misunderstandings that occur regarding the pleading standard established by Fed. R. Civ. P. 8(a)(2).

On the one hand, the Supreme Court has long characterized the “short and plain” pleading standard under Fed. R. Civ. P. 8(a)(2) as “simplified” and “liberal.” *Jackson*, 549 F. Supp. 2d at 212, n.20 (citing Supreme Court case). On the other hand, the Supreme Court has held that, by requiring the above-described “showing,” the pleading standard under Fed. R. Civ. P. 8(a)(2) requires that the pleading contain a statement that “give[s] the defendant *fair notice* of what the plaintiff’s claim is and the grounds upon which it rests.” *Jackson*, 549 F. Supp. 2d at 212, n.17 (citing Supreme Court cases) (emphasis added).<sup>6</sup>

The Supreme Court has explained that such *fair notice* has the important purpose of “enabl[ing] the

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<sup>6</sup> Accord, *Flores v. Graphtex*, 189 F.R.D. 54, 54 (N.D.N.Y. 1999) (Munson, J.); *Hudson v. Artuz*, 95-CV-4768, 1998 WL 832708, at \*1 (S.D.N.Y. Nov. 30, 1998); *Powell v. Marine Midland Bank*, 162 F.R.D. 15, 16 (N.D.N.Y.1995) (McAvoy, C.J.).

adverse party to answer and prepare for trial” and “facilitat[ing] a proper decision on the merits” by the court. *Jackson*, 549 F. Supp. 2d at 212, n.18 (citing Supreme Court cases); *Rusyniak v. Gensini*, 629 F. Supp. 2d 203, 213 & n.32 (N.D.N.Y. 2009) (Suddaby, J.) (citing Second Circuit cases). For this reason, as one commentator has correctly observed, the “liberal” notice pleading standard “has its limits.” 2 *Moore’s Federal Practice* § 12.34[1][b] at 12-61 (3d ed. 2003). For example, numerous Supreme Court and Second Circuit decisions exist holding that a pleading has failed to meet the “liberal” notice pleading standard. *Rusyniak*, 629 F. Supp. 2d at 213, n.22 (citing Supreme Court and Second Circuit cases); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-52 (2009).

Most notably, in *Bell Atlantic Corp. v. Twombly*, the Supreme Court reversed an appellate decision holding that a complaint had stated an actionable antitrust claim under 15 U.S.C. § 1. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). In doing so, the Court “retire[d]” the famous statement by the Court in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Twombly*, 127 S. Ct. at 1968-69. Rather than turn on the *conceivability* of an actionable claim, the Court clarified, the “fair notice” standard turns on the *plausibility* of an actionable claim. *Id.* at 1965-74. The Court explained that, while this does not mean that a pleading need “set out in detail the facts upon which [the claim is based],” it does mean that the pleading must contain at least “some factual allegation[s].” *Id.* at 1965. More specifically, the “[f]actual allegations must be enough to raise a right

to relief above the speculative level [to a plausible level],” assuming (of course) that all the allegations in the complaint are true. *Id.*

As for the nature of what is “plausible,” the Supreme Court explained that “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). “[D]etermining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—that the pleader is entitled to relief.” *Iqbal*, 129 S. Ct. at 1950 [internal quotation marks and citations omitted]. However, while the plausibility standard “asks for more than a sheer possibility that a defendant has acted unlawfully,” *id.*, it “does not impose a probability requirement.” *Twombly*, 550 U.S. at 556.

Because of this requirement of factual allegations plausibly suggesting an entitlement to relief, “the tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by merely conclusory statements, do not suffice.” *Iqbal*, 129 S. Ct. at 1949. Similarly, a pleading that only “tenders naked assertions devoid of further factual enhancement” will not suffice. *Iqbal*, 129 S. Ct. at 1949 (internal citations and alterations omitted). Rule 8 “demands more than an unadorned, the-

defendant-unlawfully-harmed-me accusation.” *Id.* (citations omitted).

Finally, a few words are appropriate regarding what documents are considered when a dismissal for failure to state a claim is contemplated. Generally, when contemplating a dismissal pursuant to Fed. R. Civ. P. 12(b)(6) or Fed. R. Civ. P. 12(c), the following matters outside the four corners of the complaint may be considered without triggering the standard governing a motion for summary judgment: (1) documents attached as an exhibit to the complaint or answer, (2) documents incorporated by reference in the complaint (and provided by the parties), (3) documents that, although not incorporated by reference, are “integral” to the complaint, or (4) any matter of which the court can take judicial notice for the factual background of the case.<sup>7</sup>

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<sup>7</sup> See Fed. R. Civ. P. 10(c) (“A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.”); *L-7 Designs, Inc. v. Old Navy, LLC*, No. 10-573, 2011 WL 2135734, at \*1 (2d Cir. June 1, 2011) (explaining that conversion from a motion to dismiss for failure to state a claim to a motion for summary judgment is not necessary under Fed. R. Civ. P. 12[d] if the “matters outside the pleadings” in consist of [1] documents attached to the complaint or answer, [2] documents incorporated by reference in the complaint (and provided by the parties), [3] documents that, although not incorporated by reference, are “integral” to the complaint, or [4] any matter of which the court can take judicial notice for the factual background of the case); *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (explaining that a district court considering a dismissal pursuant to Fed. R. Civ. 12(b)(6) “may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint.... Where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, thereby rendering the document ‘integral’ to

## **B. Legal Standards Governing Plaintiff's Claims**

Because the parties to this action have demonstrated, in their memoranda of law, an accurate understanding of the relevant points of law contained in the legal standards governing Plaintiff's claims and Defendants' counterclaim in this action, the Court will not recite, in their entirety, those legal standards in this Decision and Order, which (again) is intended primarily for the review of the parties. (See generally Dkt. No. 24, Attach. 2 [Pl.'s Mem. of Law]; Dkt. No. 27 [Defs.' Opp'n Mem. of Law]; Dkt. No. 28 [Pl.'s Reply Mem. of Law].)

## **III. ANALYSIS**

After carefully considering the matter, the Court grants Plaintiff's motion to dismiss Defendants' counterclaim for each of the numerous alternative reasons stated in Plaintiff's memoranda of law. (Dkt.

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the complaint. . . . However, even if a document is 'integral' to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document. It must also be clear that there exist no material disputed issues of fact regarding the relevance of the document.") [internal quotation marks and citations omitted]; *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2009) ("The complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.") (internal quotation marks and citations omitted); *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (per curiam) ("[W]hen a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint," the court may nevertheless take the document into consideration in deciding [a] defendant's motion to dismiss, without converting the proceeding to one for summary judgment.") (internal quotation marks and citation omitted).

No. 24, Attach. 2 [Pl.'s Mem. of Law]; Dkt. No. 28 [Pl.'s Reply Mem. of Law].) To those reasons, the Court adds the following analysis, which is intended to supplement but not supplant Plaintiff's arguments.

"The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13." *Oneida Indian Nation v. Oneida County, New York*, 414 U.S. 661, 670 (1974).

The Nonintercourse Act, first passed in 1790, "provided that 'no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any state . . . unless the same shall be made and duly executed at some public treaty held under the authority of the United States.' This has remained the policy to this day." *Oneida Indian Nation v. Oneida County, New York*, 414 U.S. at 667-68. "Unquestionably it has been the policy of the federal government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." *Cramer v. United States*, 261 U.S. 219, 227 (1923) (citing *Beecher v. Wetherby*, 95 U.S. 517, 525 [1877]; *State of Minnesota v. Hitchcock*, 185 U.S. 373, 385 [1902]); *see also Johnson v. M'Intosh*, 8 Wheat. 543 (1823) (refusing to recognize land titles originating in grants by Indians to private parties in 1773 and 1775 because those grants were contrary to the accepted principle that Indian title could be extinguished only by or with the consent of the general government); *In re New York Indians*, 72 U.S. 761, 771, 769 (1866) (holding that "[a]ll agree that the Indian right of occupancy creates an indefeasible title to the reservations that may extend from generation to generation, and will cease only by the dissolution of the tribe, or their consent to sell to the party

possessed of the right of pre-emption,” and noting that New York “possessed no power to deal with Indian rights or title”).

Here, the factual allegations contained in the counter-claim fail to plausibly suggest a claim to the 19.6 acres in dispute because the allegations admit that the land was Plaintiff’s (Dkt. No. 17, at ¶ 60) and do not allege that Plaintiff ever ceded rights to the land or that the federal government gave its consent to such a transaction (see generally *id.* at ¶¶ 54-76). Instead, Defendants allege that, pursuant to a separate June 25, 1842, treaty with the State of New York (the Treaty of Buffalo Creek), the 19.6 acres in dispute were “reserved” for the Orchard Party Oneida. (Dkt. No. 17, at ¶ 64.) However, courts have held that, after 1805, the United States treated the Oneidas as a unified nation. These facts undermine Defendants’ argument that the Court should consider Orchard Party Oneida as a separate tribe from Plaintiff, with independent tribal rights to the 19.6 acres in dispute. *Oneida Indian Nation v. New York*, 194 F. Supp. 2d 104, 119 n.8 (N.D.N.Y. 2002) (Kahn, J.).<sup>8</sup>

Finally, the Court also notes that, after the parties completed their briefing of Plaintiff’s motion, the Supreme Court issued its decision in *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1650-51 (2018). That decision did not resolve the issue of whether to limit the scope of sovereign immunity with respect to immovable property. As a result, the settled precedent in the Second Circuit remains that “courts must ‘dismiss[] any suit against a tribe absent

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<sup>8</sup> Judge Khan further held that, with regard to the Treaty of Buffalo Creek, the United States government dealt with and treated the Oneidas as one nation. *Oneida Indian Nation v. New York*, 194 F. Supp. 2d at 119.

congressional authorization (or waiver)' . . . and the Supreme Court (like this Court) has 'thought it improper suddenly to start carving out exceptions' to that immunity, opting instead to 'defer' to the plenary power of Congress to define and otherwise abrogate tribal sovereign immunity from suit." *Cayuga Indian Nation v. Seneca County, N.Y.*, 761 F.3d 218, 220 (2d Cir. 2014) (citing *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030-31 [2014]).

For all of these reasons, the Court grants Plaintiff's motion to dismiss Defendants' counterclaim.

**ACCORDINGLY**, it is

**ORDERED** that Plaintiff's motion to dismiss Defendants' counterclaim (Dkt. No. 24) is **GRANTED**; and it is further

**ORDERED** that Defendants' Counterclaim (Dkt. No. 17) is **DISMISSED**; and it is further

**ORDERED** that this case is referred back to Magistrate Judge Baxter for a Rule 16 conference and the setting of pretrial scheduling deadlines.

Dated: November 15, 2018  
Syracuse, NY

/s/ Glenn T. Suddaby  
Hon. Glenn T. Suddaby  
Chief U.S. District Judge

Appendix G

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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OPINION

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AUGUST TERM 2019

No. 19-2737-cv

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ONEIDA INDIAN NATION,  
*Plaintiff-Counter Defendant-Appellee,*

—v.—

MELVIN L. PHILLIPS, SR., INDIVIDUALLY AND AS  
TRUSTEE, MELVIN L. PHILLIPS, SR./  
ORCHARD PARTY TRUST,  
*Defendants-Counter Claimants-Appellants.*

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On Appeal from the United States District Court  
for the Northern District of New York

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ARGUED: JUNE 24, 2020  
DECIDED: NOVEMBER 24, 2020

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Before: CABRANES, LOHIER, and MENASHI,  
*Circuit Judges.*

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Defendants-Counter Claimants-Appellants Melvin L. Phillips, Sr. and the Melvin L. Phillips, Sr./Orchard Party Trust appeal from a July 31, 2019 judgment entered in the United States District Court for the Northern District of New York (Glenn T. Suddaby, *Chief Judge*) principally granting the motion of Plaintiff-Counter Defendant-Appellee Oneida Indian Nation of New York (“the Nation”) for judgment on the pleadings for its claims asserting a tribal right to possession of land under the Indian Commerce Clause, federal treaties and statutes, and federal common law. Phillips also appeals the District Court’s decision and order dated November 15, 2018 granting the Nation’s motion to dismiss Phillips’s counterclaim. For the reasons set forth below, the November 15, 2018 decision and order and the July 31, 2019 final judgment of the District Court is **AFFIRMED**.

Judge Menashi concurs in part and concurs in the judgment in a separate opinion.

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MICHAEL R. SMITH (David A. Reiser, *on the brief*), Washington, DC, *for Plaintiff-Counter Defendant-Appellee, Oneida Indian Nation.*

JOSEPH R. MEMBRINO, Cooperstown, NY, (Claudia L. Tenney, Clinton, NY *on the brief*), *for Defendants-Counter Claimants-Appellants, Melvin L. Phillips, Sr. and the Melvin L. Phillips, Sr./Orchard Party Trust.*

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JOSÉ A. CABRANES, *Circuit Judge:*

The principal question presented in this matter concerns the tribal right to possession of land under the Indian Commerce Clause of the U.S. Constitution,<sup>1</sup> federal treaties and statutes, and federal common law.

Defendants-Counter Claimants-Appellants Melvin L. Phillips, Sr. and the Melvin L. Phillips, Sr./Orchard Party Trust (together, “Phillips”) appeal from a July 31, 2019 judgment entered in the United States District Court for the Northern District of New York (Glenn T. Suddaby, *Chief Judge*) principally granting the motion of Plaintiff-Counter Defendant-Appellee Oneida Indian Nation of New York (“the Nation”) for judgment on the pleadings on its claims for declaratory and injunctive relief. Phillips also appeals the District

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 3 (“Congress shall have Power . . . [t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes . . . ”).

Court's decision and order dated November 15, 2018 granting the Nation's motion to dismiss Phillips's counterclaim.

On appeal, Phillips argues that the District Court erred by granting: (1) the Nation's motion for judgment on the pleadings; and the Nation's motion to dismiss Phillips's counterclaim.

We hold that: (1) the District Court correctly granted the Nation's motion for judgment on the pleadings because title was not properly transferred to Phillips, and Phillips's defenses do not raise any issues of material fact that would preclude the requested declaratory and injunctive relief sought by the Nation; and (2) the District Court did not err by declining to apply an immovable property exception to tribal sovereign immunity in dismissing Phillips's counterclaim.

Accordingly, we **AFFIRM** the November 15, 2018 decision and order and the July 31, 2019 final judgment of the District Court.

## I. BACKGROUND

We draw the facts, which are undisputed unless specifically noted, from the District Court's decisions and orders dated November 15, 2018 and July 31, 2019<sup>2</sup> and from the record before us.

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<sup>2</sup> *Oneida Indian Nation v. Phillips*, 397 F. Supp. 3d 223 (N.D.N.Y. 2019); *Oneida Indian Nation v. Phillips*, 360 F. Supp. 3d 122 (N.D.N.Y. 2018).

### A. Factual Background

This suit arises from a disputed tract of 19.6 acres of land in the Town of Vernon in Oneida County, New York, over which both the Nation and Phillips assert ownership (“the 19.6 Acre Parcel”). Before contact with Europeans, the Oneida Indian Nation owned and occupied over six million acres of land in the territory that would later become New York State.<sup>3</sup> Under the United States Constitution, Indian relations were reserved exclusively to the federal government.<sup>4</sup> Throughout the 1780s and 1790s, the United States entered into several treaties with the Nation confirming the Nation’s right of possession of their lands until the United States purchased those lands.<sup>5</sup> These treaties were incorporated into federal law by the Nonintercourse Act of 1790, subsequently codified at 25

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<sup>3</sup> See *Oneida Indian Nation of N.Y. State v. Oneida Cnty.*, N.Y., 414 U.S. 661, 663-64 (1974) (“*Oneida I*”).

<sup>4</sup> See Note 1, *ante*; *Worcester v. State of Ga.*, 31 U.S. 515, 519 (1832) (explaining that “that the whole power of regulating the intercourse with [the Indian nations], was vested in the United States”); *see also Oneida County, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 234-35 (1985) (“*Oneida II*”) (“From the first Indian claims presented, this Court recognized the aboriginal rights of the Indians to their lands.”); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (noting the “unquestioned right” of Indians to their lands); Felix S. Cohen, 1 Cohen’s Handbook of Federal Indian Law § 5.01 (2019) (explaining that the Indian Commerce Clause is the basis for laws requiring federal approval for land sales by Indian tribes). Under federal common law, the Indian tribes own their land as common property in what is referred to as “Indian title” or “aboriginal title.” *See id.* § 15.04(2). Tribal land may also be held by “recognized title,” *i.e.*, that the title is recognized by a federal statute or treaty. *See id.* § 15.04(3).

<sup>5</sup> See *Oneida I*, 414 U.S. at 664.

U.S.C. § 177, which prohibited the conveyance of Indian lands without the consent of the United States.<sup>6</sup> In 1794, by signing the Treaty of Canandaigua, the United States recognized approximately 300,000 acres of the Nation’s land as “their reservation[.]”<sup>7</sup> The 19.6 Acre Parcel disputed in this case was located within that reservation as of 1794. The State of New York has never attempted to obtain the 19.6 Acre Parcel. The United States has not withdrawn the 19.6 Acre Parcel from the Nation’s reservation.<sup>8</sup>

In 1838, the United States and various New York State Indian tribes, including the Nation, entered into the Treaty of Buffalo Creek, an agreement which “contemplated the eventual removal of all remaining Native Americans in New York to reservation lands in Kansas.”<sup>9</sup>

On June 25, 1842, New York State entered into a treaty with the Nation (the “1842 Treaty”) to purchase a portion of the Nation’s land, paying certain

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<sup>6</sup> See *id.*; *Oneida II*, 470 U.S. at 245-46.

<sup>7</sup> *Oneida II*, 470 U.S. at 231 n.1 (“The Treaty of Canandaigua of 1794 provided: ‘The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.’” (quoting 7 Stat. 45)).

<sup>8</sup> See *Oneida Indian Nation v. Madison Cnty.*, 665 F.3d 408, 443 (2d Cir. 2011) (“It remains the law of this Circuit that the [the Nation’s] reservation was not disestablished.”).

<sup>9</sup> *Id.* at 416; see generally Act of Jan. 15, 1838, 7 Stat. 550.

members of the Nation described in the treaty as “the Orchard Party of the Oneida Indians residing in the town of Vernon county of Oneida.”<sup>10</sup> Prior to entering into the 1842 Treaty, New York State surveyed part of the reservation, by which it divided the land in question into four numbered lots.<sup>11</sup> The 19.6 Acre Parcel is entirely within Lot 3 (referred to as the Marble Hill tract). The 1842 Treaty did not convey Lot 3 to New York State, but rather, listed the names of members of the Nation who intended to continue living within Lot 3.<sup>12</sup>

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<sup>10</sup> App’x 21 (A Treaty made June 25, 1842 with the Orchard Party of the Oneida Indians). We observe that the 1842 Treaty appears to have been entered into by New York State notwithstanding “Congress’ clear policy that no person or entity should purchase Indian land without the acquiescence of the Federal Government” under the Nonintercourse Act. *Oneida II*, 470 U.S. at 232; *see also* Cohen, *Handbook of Federal Indian Law* § 15.06 (citing the Nonintercourse Act and explaining that only the United States can extinguish Indian title; thus, “[a] seller or buyer of tribal land must show clear authority in federal law to allow a transfer of the interest from the tribe”). Nonetheless, the validity of the 1842 Treaty with New York State under federal law is irrelevant here because this matter concerns land—the 19.6 Acre Parcel—that was categorically *not* conveyed under the 1842 Treaty. *See* App’x 11 (Complaint, ¶¶ 15-17); *see also* Note 12, post.

<sup>11</sup> *See* App’x 37 (depicting the surveyed territory and the four lots).

<sup>12</sup> *See* App’x 27 (reciting the names of members of the Nation). The United States recognizes that the 19.6 Acre Parcel was not conveyed as part of the 1842 Treaty. *See* App’x 38 (Bureau of Land Management map, filed by the United States in Oneida land claim litigation, depicting the land within the Oneida reservation that New York State sought to obtain).

In 2013, a comprehensive settlement agreement in a civil lawsuit in the Northern District of New York, to which the United States was a party, was reached between the State of New York, Madison County, Oneida County, and the Nation to resolve all legal disputes regarding land, taxation, and governance.<sup>13</sup> This agreement provided that the land designated as Lot 3 of the 1842 Treaty: (1) was excluded from the sale in the 1842 Treaty; (2) is “Nation Land” located within the Oneida reservation; (3) is subject to the Nation’s assertion of “sovereignty” and “rights under federal law”; and (4) is not subject to state or local taxation or regulation.<sup>14</sup> This settlement was approved by the United States District Court for the Northern District of New York (Lawrence E. Kahn, *Judge*), which incorporated it into a memorandum decision and order dated March 4, 2014 and under which it thereafter retained enforcement jurisdiction.<sup>15</sup>

The Nation’s land surrounding the 19.6 Acre Parcel is called “the Orchard” or “Marble Hill.”<sup>16</sup> The United States has recognized that there is one Oneida Indian Nation in New York State, and some of its members live in Marble Hill.

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<sup>13</sup> See generally *New York v. Jewell*, 2014 WL 841764, at \*1-2 (N.D.N.Y. 2014); see also App’x 39-58 (Settlement Agreement by the Oneida Nation, the State of New York, the County of Madison, and the County of Oneida). Sally Jewell, Secretary of the United States Department of the Interior, was the named defendant in that action and the Nation participated as an intervenor-defendant.

<sup>14</sup> See App’x 40-41, 49-50, 52 (Settlement Agreement).

<sup>15</sup> See *Jewell*, 2014 WL 841764, at \*12.

<sup>16</sup> App’x 13 (Complaint, ¶ 19).

Although all parties concede that Phillips is a member of the Nation, Phillips has on several occasions asserted that the Orchard Party or Marble Hill Oneidas are a separate tribe from the Nation, and he has claimed to represent that separate tribe. On September 1, 2015, Phillips recorded a quitclaim deed with a trust declaration titled “Melvin L. Phillips, Sr./Orchard Party Trust” (the “Orchard Party Trust” or “trust”), naming himself both as grantor of the 19.6 Acre Parcel and as sole trustee of the trust.<sup>17</sup> The declaration states that Phillips “hereby transfers and conveys to the Trustee [*i.e.*, Phillips] (by deed recorded in the Oneida County Clerk’s Office) certain real property as more particularly and specifically described on the attached Schedule A....”<sup>18</sup> Schedule A of the trust instrument describes four parcels of land.<sup>19</sup> “Parcel IV” comprises the 19.6 Acre Parcel in question and the access road/driveway leading to it from Marble Road.<sup>20</sup> The trust documents state that the 19.6 Acre Parcel is composed of “tribal lands belonging to the Oneida Nation/Orchard Hill Party,” that Phillips is a “spokesman” and “representative” of the Orchard

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<sup>17</sup> App’x 60 (quitclaim deed), 103 (trust declaration) (capitalization omitted). The trust declaration does not name a grantee, but it appears that Phillips intended himself, as trustee, to serve as such.

<sup>18</sup> *Id.* at 103 (trust declaration); *see also id.* at 62-64 (Schedule A).

<sup>19</sup> *Id.* Parcels I, II and III are not in dispute nor the subject of this lawsuit.

<sup>20</sup> App’x 63-64 (Schedule A).

Party, and that the land was “under the stewardship of Melvin L. Phillips, Sr.”<sup>21</sup>

### **B. Procedural History**

The Nation filed this action in the United States District Court for the Northern District of New York on September 18, 2017, asserting, *inter alia*, its possessory rights over the 19.6 Acre Parcel identified in the trust deed and seeking: (1) declaratory relief stating that neither Phillips nor the Orchard Party Trust “owns or has any property interest in the 19.6 acres” and that the trust instrument and quitclaim deed Phillips recorded “are invalid and void so far as they concern the [19.6 Acre Parcel];” and (2) an injunction prohibiting Phillips and the trust from claiming the 19.6 Acre Parcel or clouding its title.<sup>22</sup> Phillips filed an answer and a counterclaim, which the Nation moved to dismiss under Rule 12(b)(6).<sup>23</sup> Invoking the District Court’s supplemental jurisdiction, Phillips’s counterclaim requested (1) a declaration stating that the Nation does not have a property interest in the 19.6 Acre Parcel and that the quitclaim deed and trust are valid with respect to the 19.6 Acre Parcel; and (2) that the Nation be enjoined from claiming the 19.6 Acre Parcel or clouding its title.<sup>24</sup>

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<sup>21</sup> *Id.* at 64 (Schedule A), 103 (trust declaration) (capitalization omitted).

<sup>22</sup> App’x 19; *see also Phillips*, 360 F. Supp. 3d at 125.

<sup>23</sup> *See Phillips*, 360 F. Supp. 3d at 125; *see also* App’x 112 (Phillips’s Answer and Counterclaim), 6 (District Court docket, Doc. 24, Nation’s Motion to Dismiss).

<sup>24</sup> *See Phillips*, 360 F. Supp. 3d at 125.

The parties agreed that: (1) the 19.6 Acre Parcel was within the lands recognized by the United States in the 1794 Treaty of Canandaigua as comprising the Nation’s reservation; (2) the 19.6 Acre Parcel was never conveyed to New York State; and (3) the 1842 Treaty with New York State reserved the 19.6 Acre Parcel and certain other parcels from cession and declared that members of the Nation would continue to occupy those parcels “collectively in the same manner and with the same right, title and interest therein as appertained to them, the party so remaining before the execution of this treaty.”<sup>25</sup> Accordingly, the dispute between the parties was limited to whether, after the 1842 Treaty with New York State, the tribal land rights over the 19.6 Acre Parcel belonged to the Nation, or to the Orchard Party, the purportedly separate tribe that Phillips claimed to represent.

On November 15, 2018, the District Court granted the Nation’s motion to dismiss Phillips’s counterclaim pursuant to Rule 12(b)(6).<sup>26</sup> In so

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<sup>25</sup> See Appellee’s Br. at 15; App’x 23.

<sup>26</sup> See generally *Phillips*, 360 F. Supp. 3d at 132-34. In setting forth the legal grounds and reasoning upon which it based its decisions granting both of the Nation’s two motions here on appeal, the District Court stated that it granted the motions “for each of the numerous alternative reasons stated in [the Nation’s] memoranda of law,” accompanied by the District Court’s own “analysis, which is intended to supplement but not supplant [the Nation’s] arguments.” *Id.* at 132; see also *Phillips*, 397 F. Supp. 3d at 230 (granting judgment on the pleadings “for each of the alternative reasons stated in [the Nation’s] memoranda of law.”). We have previously counseled (in other contexts) that district courts should articulate their own independent analysis and reasoning that support their rulings.

ruling, the District Court rejected Phillips's argument that the 19.6 Acre Parcel belonged to the Orchard Party.<sup>27</sup> The District Court noted in its decision that: (1) Phillips had conceded that the 19.6 Acre Parcel belonged to the Nation as of 1794; (2) Phillips did not allege a cession of the 19.6 Acre Parcel; and (3) the United States had "treated the Oneidas as a unified nation" in New York State, thereby foreclosing any "argument that the Court should consider [the] Orchard Party Oneida as a separate tribe from [the Oneida Nation], with independent tribal rights to the 19.6 acres."<sup>28</sup> The District Court also determined that Phillips's counterclaim was barred by the Nation's tribal sovereign immunity.<sup>29</sup>

The Nation subsequently filed a motion for judgment on the pleadings pursuant to Rule 12(c), which the District Court granted on July 31, 2019.<sup>30</sup> In granting judgment for the Nation, the District Court concluded that there were no

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*See, e.g., Jackson v. Fed. Exp.*, 766 F.3d 189, 198 (2d Cir. 2014) ("In all cases in which summary judgment is granted, the district court must provide an explanation sufficient to allow appellate review."); *Rudenko v. Costello*, 286 F.3d 51, 65 (2d Cir. 2002) (remarking, in the context of habeas corpus, that "[w]hether the district court's ultimate decision turns on factual determinations or on a choice between competing legal principles or on the manner in which the legal principles are applied to the facts, the district court must provide an indication of its rationale that is sufficient to permit meaningful appellate review.").

<sup>27</sup> *See Phillips*, 360 F. Supp. 3d at 132-34.

<sup>28</sup> *Id.* at 133.

<sup>29</sup> *See id.*; *see also* Note 36, *post*.

<sup>30</sup> *See Phillips*, 397 F. Supp. 3d at 225, 229-34.

disputed issues of material fact because Phillips conceded that the 19.6 Acre Parcel was located within the Nation's reservation as recognized by the 1794 Treaty of Canandaigua, and the parties' rights could be determined based solely upon the relevant statutes and treaties. The District Court rejected Phillips's contention that the 1838 Treaty of Buffalo Creek between the Nation and the United States extinguished the Nation's land in New York State, and held that the 1838 Treaty "by its plain language...does not cede [the Nation's] right to the [19.6 Acre Parcel]" and does not "recognize any proprietary interest of the Orchard Party" in the 19.6 Acre Parcel.<sup>31</sup> The District Court also reiterated its conclusions in its earlier decision that the United States recognizes "the Oneidas as a single unified Nation," and that the Orchard Party is not "a separate tribe from [the Nation]."<sup>32</sup> The judgment entered by the District Court declared: (1) that the 19.6 Acre Parcel belongs to neither Phillips nor the trust; (2) that the quitclaim deed and trust are void as to the 19.6 Acre Parcel; and (3) that Phillips and the trust were enjoined from thereafter claiming to own the 19.6 Acre Parcel.<sup>33</sup>

This timely appeal followed.

## II. DISCUSSION

We review *de novo* a district court's grant of judgment on the pleadings pursuant to Rule 12(c),

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<sup>31</sup> See *id.* at 231-32.

<sup>32</sup> *Id.* at 231.

<sup>33</sup> See *id.* at 234.

accepting the complaint’s factual allegations as true and drawing all reasonable inferences in favor of the non-moving party.<sup>34</sup> “To survive a Rule 12(c) motion, the complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face.”<sup>35</sup> Applying this same standard, we review *de novo* a district court’s order granting a motion to dismiss counterclaims under Rule 12(b)(6).<sup>36</sup>

#### **A. Judgment on the Pleadings**

##### **1. *The District Court’s Order Granting the Nation’s Motion***

On appeal Phillips contends that he owns the 19.6 Acre Parcel individually, rather than as a representative of the Orchard Party. This position flatly contradicts his prior assertions in the Orchard Party Trust, the quitclaim deed, and the answer and counterclaim before the District Court, in which he stated that he was merely a “steward” or “trustee” of the 19.6 Acre Parcel, which “belong[ed] to the Oneida Nation/Orchard Hill

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<sup>34</sup> See *Kirkendall v. Halliburton, Inc.*, 707 F.3d 173, 178 (2d Cir. 2013). Rule 12(c) provides that “[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.”

<sup>35</sup> *Kirkendall*, 707 F.3d at 178-79 (internal citation and quotation marks omitted).

<sup>36</sup> See *Menaker v. Hofstra Univ.*, 935 F.3d 20, 29-30 (2d Cir. 2019). The District Court also construed the Nation’s motion to dismiss on grounds of tribal sovereign immunity as made pursuant to Federal Rule of Civil Procedure 12(b)(1). “On appeal from such a judgment, we review factual findings for clear error and legal conclusions *de novo*.” *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (internal quotation marks omitted).

Party.”<sup>37</sup> Whether Phillips asserts individual ownership or ownership on behalf of the Orchard Party, however, we agree with the District Court that the dispute here can be resolved through analysis of the relevant treaties.

The parties agree that the Nation’s reservation recognized in the 1794 Treaty of Canandaigua includes the entirety of the 19.6 Acre Parcel. We have repeatedly stated that the Nation’s reservation has never been disestablished and, more specifically, that the 1838 Treaty of Buffalo Creek neither disestablished nor diminished it.<sup>38</sup> Phillips offers no valid reason for us to abandon or modify those conclusions. Phillips argues that Article 13 of the 1838 Treaty of Buffalo Creek reflects the transfer of the 19.6 Acre Parcel to his predecessors in interest (the Orchard Party Oneidas), but this argument is unavailing. By its plain terms, Article 13 does not effect *any* transfer

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<sup>37</sup> See, e.g., App’x 64, 72 (attachment to deed), 103 (trust declaration), 119 (Answer, ¶ 24).

<sup>38</sup> See, e.g., *Upstate Citizens for Equality v. Jewell*, 841 F.3d 556, 563 (2d Cir. 2016) (“[T]he Oneidas’ original reservation [following the 1794 Treaty of Canandaigua] was never officially ‘disestablished.’”); *Oneida Indian Nation*, 665 F.3d at 443 (noting that the Oneida’s reservation was not disestablished by the 1838 Treaty of Buffalo Creek); *Oneida Indian Nation of N.Y. v. Madison Cnty., Oneida Cnty., N.Y.*, 605 F.3d 149, 157 n.6 (2d Cir. 2010) (“Our prior holding on this question—that the Oneidas’ reservation was not disestablished, therefore remains the controlling law of this circuit.” (internal citation and quotation marks omitted)); *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 161 (2d Cir. 2003) (“Nothing in [the Treaty of Buffalo Creek] provides ‘substantial and compelling’ evidence of Congress’s intention to diminish or disestablish the Oneidas’ New York reservation.”).

of land—much less a transfer of the 19.6 Acre Parcel to the Orchard Party or to Phillips's ancestors. Article 13 provides as follows:

**SPECIAL PROVISIONS FOR  
THE ONEIDAS RESIDING IN  
THE STATE OF NEW YORK**

**ARTICLE 13.** The United States will pay the sum of four thousand dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida.<sup>39</sup>

This language clearly does not purport to cede any reservation land. Article 13 *does* contemplate future sales of land by members of the Nation who left New York. But Article 13 does not further recognize or bestow on members of the Nation (whether as individuals or subgroups) any right to sell land or exercise any other prerogatives of ownership.<sup>40</sup> Furthermore, Article 13 is entirely

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<sup>39</sup> 397 F. Supp. at 231 (quoting the 1838 Treaty of Buffalo Creek).

<sup>40</sup> Indeed, it is unclear whether Article 13 would authorize individual members of the Nation who left New York to complete land sales to New York State without the consent of

silent regarding any proprietary rights of members of the Nation—like Phillips’s predecessors in interest—who did *not* leave New York. Therefore the District Court correctly held “as a matter of law, that the 1838 Treaty of Buffalo Creek did not recognize any proprietary interest of the Orchard Party Oneidas in the Property—as a ‘faction’ of [the Nation] or otherwise—to arrange for the purchase of the Property with the Governor of the State of New York.”<sup>41</sup>

Nor does the later 1842 Treaty with New York State support Phillips’s claim to the 19.6 Acre Parcel; indeed, that treaty tends to undermine Phillips’s arguments. The 1842 Treaty does not purport to change the ownership status of the

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the Nation and the United States. *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665 (1979) (“Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.”); *see also Solem v. Bartlett*, 465 U.S. 463, 470, *reh’g denied* 466 U.S. 948 (1984) (“[O]nly Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire plot retains its reservation status until Congress explicitly indicates otherwise.”) (citing *United States v. Celestine*, 215 U.S. 278 (1909)).

<sup>41</sup> *Id.* at 232. Moreover, the 1838 Treaty demonstrates that the United States treated the Oneidas as one nation. *See App’x 132* (Article 2 of the treaty lists the following Tribes residing in New York State: “Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns”); *see also Oneida Indian Nation of N.Y. v. New York*, 194 F. Supp. 2d 104, 119 n.8 (N.D.N.Y. 2002) (observing the “United States’ post-1805 treatment of the Oneidas as a unified nation” as depicted in the 1838 Treaty of Buffalo Creek).

tribal land not ceded to New York State. Since, as is undisputed, the unceded land—the Nation’s reservation—includes the entire 19.6 Acre Parcel, the 1842 Treaty could not have transferred the 19.6 Acre Parcel to Phillips’s ancestors. Moreover, the 1842 Treaty with New York State expressly provides that the unceded land, including the 19.6 Acre Parcel, was “to be had, held, enjoyed and occupied by [members of the Nation] *collectively* in the same manner and with the same right, title and interest therein as appertained to them.”<sup>42</sup> This language suggests that until at least 1842, the 19.6 Acre Parcel was owned collectively, and not by Phillips’s ancestors as private individuals, capable of transferring the land to Phillips by a chain of inheritance or bequest.<sup>43</sup> The District Court therefore also correctly concluded that title in the 19.6 Acre Parcel was not transferred to Phillips or his ancestors under the 1842 Treaty with New York State.<sup>44</sup>

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<sup>42</sup> See App’x 23 (1842 Treaty with New York State) (emphasis added).

<sup>43</sup> See Note 40, *ante*.

<sup>44</sup> Phillips initially maintained in the District Court that the 19.6 Acre Parcel belonged to an Orchard Party tribe of the Oneidas separate from the Nation. This position contradicts the language of the treaties and historical events. The 1838 Treaty, for example, demonstrates that the United States treated the Oneidas as one nation. See Note 41, *ante*. Phillips ultimately disclaimed the “separate-tribe” theory in the proceedings below and has now abandoned it on appeal. See *Phillips*, 397 F. Supp. 3d at 233 (“[Phillips] now agree[s] the Orchard Party is not a separate faction.”); Appellants’ Br. at 26 (“[This appeal] is not about Phillips’ tribal membership or identity, or any claim by Phillips to possess tribal sovereignty or identity separate from [the Nation].”).

## 2. *The District Court's Rejection of Phillips's Affirmative Defenses*

Phillips contends that even if the 1838 Buffalo Creek Treaty and the 1842 Treaty with New York State did not transfer title in the 19.6 Acre Parcel to his ancestors, he is still entitled to relief pursuant to *City of Sherrill v. Oneida Indian Nation*.<sup>45</sup> In *Sherrill*, the Supreme Court applied a federal common law equitable defense to a claim of tribal ownership for lands that the Nation had reacquired 200 years after an allegedly unauthorized sale to New York State, and over which long chains of private landowners had held putative title.<sup>46</sup>

Phillips's invocation of *Sherrill* is unavailing because he cannot satisfy "the *Sherrill* equitable defense" factors.<sup>47</sup> First, the undisputed facts demonstrate that there is no "longstanding, distinctly non-Indian character of the [disputed land] and its inhabitants,"<sup>48</sup> given that the 19.6 Acre Parcel has been occupied or used by members of the Nation, including Phillips, for over 200 years. Second, there has been no "regulatory authority constantly exercised by New York State

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<sup>45</sup> 544 U.S. 197 (2005).

<sup>46</sup> *Id.*; see also *Stockbridge-Munsee Cnty. v. New York*, 756 F.3d 163, 165-66 (2d Cir. 2014) (recognizing "the *Sherrill* equitable defense" and enumerating relevant factors, including whether the relief sought by the tribe would be "disruptive," whether there had been a "long lapse of time, during which the [tribe] did not seek to revive [its] sovereign control through equitable relief in court," and whether there would be "dramatic changes in the character of the properties").

<sup>47</sup> *Stockbridge-Munsee*, 756 F.3d at 166 (referring to "the *Sherrill* equitable defense").

<sup>48</sup> *Sherrill*, 544 U.S. at 202.

and its counties and towns” over the 19.6 Acre Parcel,<sup>49</sup> as it has not been subject to State or local taxation. Third, there has been no “long delay in seeking judicial relief against” Phillips or his ancestors.<sup>50</sup> Indeed, none publicly claimed title until 2015, when Phillips filed his quitclaim deed, and the Nation filed this suit just two years later.

Phillips raises several other equitable defenses that he claims would defeat the Nation’s title to the 19.6 Acre Parcel, none of which succeed. He argues that the Nation’s claims are barred by release<sup>51</sup> and by accord and satisfaction.<sup>52</sup> But even assuming equitable defenses beyond those described in *Sherrill* were available here, neither Phillips’s counterclaim nor his answer to the Nation’s complaint plausibly alleges that either release or accord and satisfaction exist.

Phillips also claims as a defense that the Nation abandoned any rights it may have the 19.6 Acre Parcel. It seems Phillips’s theory is that the 1838 Buffalo Creek Treaty constituted the abandonment or discharge of the Nation’s claim to the 19.6 Acre

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> “A release is a provision that intends to present abandonment of a known right or claim.” *McMahan & Co. v. Bass*, 250 A.D.2d 460, 461 (1st Dep’t 1998).

<sup>52</sup> “Under New York law, an accord and satisfaction is the resolution of a disputed, unliquidated claim through a new contract ‘discharging all or part of [the parties’] obligations under the original contract,’ and constitutes a complete defense to a claim for breach of contract.” *Carnrite v. Granada Hosp. Grp., Inc.*, 175 F.R.D. 439, 449 (W.D.N.Y. 1997) (quoting *Conboy, McKay, Bachman & Kendall v. Armstrong*, 110 A.D.2d 1042, 1042 (4th Dep’t 1985)).

Parcel,<sup>53</sup> but that interpretation of the 1838 Treaty is incorrect, as explained above. Further, Phillips's abandonment defense is inconsistent with his own allegations, for Phillips alleges that the members of the Orchard Party have continuously occupied the land and, as Phillips now apparently concedes, the Orchard Party is part of the Nation. Finally, Phillips's position also runs counter to the law of this Circuit, according to which treaty-based or "recognized" Indian title are not lost simply because a tribe ceases to occupy a particular tract of land.<sup>54</sup> For the same reasons, Phillips's defense of acquiescence or estoppel fails.

Phillips contends that the Nation failed to join "necessary individuals" by not adding the federal, state, and county governments to the suit, who he maintains are all "indispensable parties[.]"<sup>55</sup>

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<sup>53</sup> See Appellants' Br. at 39-40.

<sup>54</sup> See, e.g., *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 270 (2d Cir. 2005) (noting with approval the district court's conclusion that the "1794 Treaty of Canandaigua conferred recognized title to the Cayugas concerning the land at issue" and that "proof of the plaintiffs' physical abandonment of the property at issue is irrelevant in a claim for land based upon reserved title to Indian land, for such title can only be extinguished by an act of Congress." (quoting *Cayuga Indian Nation of New York v. Cuomo*, 758 F. Supp. 107, 118 (N.D.N.Y. 1991)).

<sup>55</sup> Under Rule 19(a), a party is required to be joined if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest

Fed. R. Civ. P. 19(a)(1).

Phillips, however, does not offer any plausible reason for why any one of these governmental parties is required to be joined, or plausibly suggest an arguable interest in their participation as parties in this litigation.

In sum: the District Court correctly concluded that Phillips does not raise any viable affirmative defenses that would preclude judgment on the pleadings in favor of the Nation. And because the question of title is resolved by the interpretation of the relevant treaties, as discussed above, we likewise reject Phillips's meritless assertions that the Nation's complaint fails to state a claim upon which relief can be granted and that there are material facts in dispute that would preclude judgment for the Nation as a matter of law.

### **B. Dismissal of Phillips's Counterclaim**

The District Court granted the Nation's motion to dismiss Phillips's counterclaim on several alternative grounds, noting the "settled" precedent in this Circuit concerning tribal sovereign immunity.<sup>56</sup>

On appeal Phillips argues that the District Court erred in concluding that the Nation had sovereign immunity from suit. It is well settled that "courts must dismiss[] any suit against a tribe absent congressional authorization (or waiver) ... and the Supreme Court (like this Court) has thought it improper suddenly to start carving out exceptions to that immunity, opting instead to defer to the plenary power of Congress to define and otherwise abrogate tribal sovereign immunity

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<sup>56</sup> See Note 36, *ante*.

from suit.”<sup>57</sup> In arguing that the District Court erred, Phillips relies on *Upper Skagit Indian Tribe v. Lundgren*, in which the Supreme Court described an immovable property exception to sovereign immunity.<sup>58</sup> But *Upper Skagit* does not suggest, much less compel, a different result here. As we recently explained, in that case the Supreme Court expressly declined to decide whether the immovable property exception applied to *tribal* sovereign immunity, instead leaving that question for the Washington State Supreme Court to consider “in the first instance.”<sup>59</sup> Moreover, even if the exception applied to tribal sovereign immunity generally, it would not apply here, where it is undisputed that the Nation did not purchase the 19.6 Acre Parcel in “the character of a private individual” buying lands in another sovereign’s territory.<sup>60</sup> Therefore, to the extent that the District Court rested its decision to dismiss

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<sup>57</sup> *Cayuga Indian Nation of N.Y. v. Seneca Cnty., N.Y.*, 761 F.3d 218, 220 (2d Cir. 2014) (citation and quotation marks omitted) (quoting *Michigan v. Bay Mills Indian Cnty.*, 572 U.S. 782, 788 (2014)).

<sup>58</sup> See 138 S. Ct. 1649, 1653-54 (2018) (involving a dispute over land that an Indian tribe had purchased on the open market, which had previously been (but was no longer) part of that tribe’s reservation).

<sup>59</sup> *Cayuga Indian Nation of New York v. Seneca Cnty., N.Y.*, F.3d \_\_, 2020 WL 6253332, at \*4 (2d Cir. 2020); see also *Upper Skagit*, 138 S. Ct. at 1654 (“Although we have discretion to affirm on any ground supported by the law and the record that will not expand the relief granted below, . . . in this case we think restraint is the best use of discretion. Determining the limits on the sovereign immunity held by Indian tribes is a grave question ” (internal citation omitted)).

<sup>60</sup> *Upper Skagit*, 138 S. Ct. at 1654.

Phillips's counterclaim on the basis of tribal sovereign immunity, we cannot conclude the District Court erred by not applying the immovable property exception.<sup>61</sup>

On appeal Phillips does not challenge the grounds upon which the District Court granted the Nation's motion to dismiss Phillips's counterclaim pursuant to Rule 12(b)(6) for failure to plausibly state a claim for which relief can be granted. But, we note as a matter of logic that Phillips cannot prevail on his counterclaim, which purports to seek relief mirroring the relief sought by the Nation, where we conclude that the Nation was correctly entitled to judgment on the pleadings.<sup>62</sup>

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<sup>61</sup> Insofar as the parties make further arguments on appeal regarding tribal sovereign immunity, we do not further address, nor express any view about, them.

<sup>62</sup> See Part II.A, *ante*. We further note that Phillips's counterclaim, to which the Nation raised, *inter alia*, tribal sovereign immunity as a basis for dismissal, falls within supplemental jurisdiction. A federal court has authority to exercise supplemental jurisdiction under 28 U.S.C. § 1337 over claims not within federal jurisdiction only if there is a related claim that properly invokes the court's subject matter jurisdiction. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164–65 (1997); *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358, 362 (2d Cir. 2000); see also *Cushing v. Moore*, 970 F.2d 1103, 1106 (2d Cir. 1992) (explaining that “[s]upplemental jurisdiction could be exercised only if some other, related claim provides a proper basis for federal jurisdiction”). Here, it is undisputed that the Nation's claim against Phillips, which asserts a tribal right to possession of the 19.6 Acre Parcel and which is wholly independent of state law, arises under federal law. See *Oneida I*, 414 U.S. at 666. Phillips's counterclaim, which seeks relief mirroring that sought by the Nation, thus arises out of a common nucleus of operative fact, falling squarely within our supplemental jurisdiction. *Int'l Coll. of Surgeons*, 522 U.S. at 164–65.

As a final matter: our concurring colleague argues that we improperly affirm the District Court’s dismissal of Phillips’s counterclaim. In so doing, our concurring colleague appears to equate tribal sovereign immunity and subject matter jurisdiction.

As we have emphasized here, tribes possess the common-law immunity traditionally enjoyed by sovereign powers.<sup>63</sup> The Supreme Court has held that sovereign immunity is jurisdictional in nature.<sup>64</sup> We think that tribal sovereign immunity, however, is not synonymous with subject matter jurisdiction for several reasons. Tribal sovereign immunity may be waived in certain circumstances and is subject to the plenary power of Congress.<sup>65</sup> Lack of subject matter jurisdiction, on the other hand, may not be waived or forfeited.<sup>66</sup> Second, tribal sovereign immunity operates essentially as a party’s possible defense to a cause of action.<sup>67</sup> In contrast, subject

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<sup>63</sup> See Note 57, *ante*; see also *Bay Mills Indian Cnty.*, 572 U.S. at 788; *Turner v. United States*, 248 U.S. 354, 357–58 (1919).

<sup>64</sup> *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994).

<sup>65</sup> See *Bay Mills Indian Cnty.*, 572 U.S. at 788–89; see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978).

<sup>66</sup> See *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012); *New York v. Shinnecock Indian Nation*, 686 F.3d 133, 138 (2d Cir. 2012) (“Jurisdiction cannot be created by the consent of the parties.”).

<sup>67</sup> See *Okla. Tax Comm’n v. Graham*, 489 U.S. 838, 841 (1989) (noting that although “[t]ribal immunity may provide a federal defense to [the plaintiff’s] claims[,] … it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law”).

matter jurisdiction is “fundamentally preliminary” and an “absolute stricture[]” on the court.<sup>68</sup> Finally, a waiver of sovereign immunity cannot, on its own, extend a court’s subject matter jurisdiction.<sup>69</sup> We observe that there appears to be a divergence of opinion as to the precise nature of tribal sovereign immunity, but that there is no need to address, much less resolve, it here.<sup>70</sup>

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<sup>68</sup> *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979); *see also*, e.g., *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006).

<sup>69</sup> See, e.g., *Treasurer of N.J. v. U.S. Dep’t of Treasury*, 684 F.3d 382, 401–02 (3d Cir. 2012) (“To confer subject matter jurisdiction in an action against a sovereign, in addition to a waiver of sovereign immunity, there must be statutory authority vesting a district court with subject matter jurisdiction.” (quoting *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007)); *Arford v. United States*, 934 F.2d 229, 231 (9th Cir. 1991) (explaining that in order to maintain an action against the United States, there must be both “statutory authority granting subject matter jurisdiction” and “a waiver of sovereign immunity”); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986).

<sup>70</sup> Compare *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 515 n. 19 (1982) (explaining sovereign immunity is not “jurisdictional in the sense that it must be raised and decided by this Court on its own motion”); *Pistor v. Garcia*, 791 F.3d 1104, 1110–11 (9th Cir. 2015) (stating “[t]he issue of tribal sovereign immunity is [quasi-]jurisdictional,” and explaining “[s]overeign immunity’s ‘quasi-jurisdictional … nature,’ by contrast, means that ‘[i]t may be forfeited where the [sovereign] fails to assert it and therefore may be viewed as an affirmative defense’” (internal citations omitted)); *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 487 F.3d 1129, 1131 n.4 (8th Cir. 2007) (explaining that, “insofar as *Hagen* adverts to the topic of subject matter jurisdiction at all, it observes that we had previously stated that sovereign immunity is jurisdictional in nature but is not of the same character as subject matter jurisdiction” (citing *Hagen v. Sisseton-Wahpeton Cnty. Coll.*,

We thus affirm the District Court’s order dated November 15, 2018 granting the Nation’s motion to dismiss Phillips’s counterclaim.

### III. CONCLUSION

To summarize, we hold as follows:

- (1) The District Court correctly granted the Nation’s motion for judgment on the pleadings because title was not properly transferred to Phillips, and Phillips’s defenses do not raise any disputes of material fact that would preclude the requested declaratory and injunctive relief sought by the Nation;

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205 F.3d 1043 (8th Cir. 2000) and *In re Prairie Island Dakota Sioux*, 21 F.3d 302 (8th Cir. 1994)); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 28 (1st Cir. 2000) (“[A]lthough tribal sovereign immunity is jurisdictional in nature, consideration of that issue always must await resolution of the antecedent issue of federal subject-matter jurisdiction.”), *with Edelman v. Jordan*, 415 U.S. 651, 677–78 (1974) (noting that “the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court”); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011) (“We have held that tribal sovereign immunity is a threshold jurisdictional question.” (citing *Hagen*, 205 F.3d at 1044)); *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1287 (11th Cir. 2015) (“We have an obligation to make sure we have jurisdiction to hear this action, which requires us to first consider whether the defendants enjoy tribal sovereign immunity from Alabama’s claims.” (citing *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1034 (11th Cir. 2001)).

(2) The District Court correctly granted the Nation's motion to dismiss Phillips's counter-claim.

For the foregoing reasons, we **AFFIRM** the November 15, 2018 decision and order and the July 31, 2019 final judgment of the District Court.

## CONCURRENCE OF JUDGE MENASHI

MENASHI, *Circuit Judge*, concurring in part and concurring in the judgment:

I concur in Part II.A.1. of the court’s opinion, in which the court holds that neither the Treaty of Buffalo Creek nor the 1842 Treaty with New York State transferred title to the 19.6 Acre Parcel from the Oneida Indian Nation to the Orchard Party or to Melvin Phillips’s ancestors. I write separately because the court makes three errors in the remainder of its opinion.

First, the court concludes that the district court did not err in dismissing Phillips’s counterclaim on the ground of tribal sovereign immunity. *Ante* at 22-24. I agree that no “immovable property exception” to tribal sovereign immunity applies in this case. *Id.* at 23. The district court nevertheless erred, however, because the Nation waived its tribal sovereign immunity for Phillips’s counter-claim seeking the same relief as the Nation sought in its suit.

Second, the court includes extensive dicta questioning our precedents that hold tribal sovereign immunity to be a limit on our subject-matter jurisdiction. *Id.* at 24-26. The court speculates that tribal sovereign immunity should perhaps be reconceptualized as belonging to some category of jurisdiction that limits a court’s power to act but is “not synonymous with subject matter jurisdiction.” *Id.* at 25. I believe these dicta are misguided.

Third, the court correctly concludes that Phillips cannot establish a *Sherrill* equitable defense but then “assum[es],” while leaving the question open,

that “equitable defenses beyond those described in *Sherrill* [a]re available.” *Id.* at 20. I would conclude that such defenses are not available.

Despite these disagreements, I concur in the court’s judgment because Phillips’s counterclaim fails on the merits, because the court’s dicta about sovereign immunity are unrelated to its judgment, and because Phillips does not establish a *Sherrill* equitable defense.

## I

The court’s opinion concludes that the district court did not err in dismissing Phillips’s counterclaim as barred by tribal sovereign immunity. *Id.* at 22-23. Although I agree with the court that the district court did not err in declining to apply an immovable property exception to tribal sovereign immunity in this case, I would hold that the Nation waived its sovereign immunity for Phillips’s limited counterclaim, which seeks the same relief in his favor that the Nation seeks for the 19.6 Acre Parcel.

The Supreme Court held in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), that a tribe does not waive its sovereign immunity from counterclaims simply by bringing suit. Thus, the mere fact that a tribe has brought suit does not waive its immunity for all counterclaims.

Many courts have recognized, however, that a tribe *does* waive its immunity for counterclaims that arise out of the same transaction and would defeat or reduce the tribe’s requested relief. This

“recoupment” principle is well established in the context of both tribal sovereign immunity and federal sovereign immunity. The Tenth Circuit has explained the scope of the rule, which applies to the United States and “equally applies to Indian tribes”:

[W]hen the sovereign sues it waives immunity as to claims of the defendant which assert matters in recoupment—arising out of the same transaction or occurrence which is the subject matter of the government’s suit, and to the extent of defeating the government’s claim but not to the extent of a judgment against the government which is affirmative in the sense of involving relief different in kind or nature to that sought by the government or in the sense of exceeding the amount of the government’s claims; but the sovereign does not waive immunity as to claims which do not meet the “same transaction or occurrence test” nor to claims of a different form or nature than that sought by it as plaintiff nor to claims exceeding in amount that sought by it as plaintiff.

*Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982) (quoting *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967)). Phillips’s request for title in this case is the same type of relief and in the same degree as what the Nation sought for the same parcel of land, and therefore the counterclaim sounds in recoupment.

The Tenth Circuit later confirmed that the recoupment doctrine survived *Oklahoma Tax*

because the counterclaims there “were not recoupment claims,” and thus *Oklahoma Tax* “says nothing about the applicability of the recoupment doctrine as a waiver of tribal sovereign immunity when the defendant’s counterclaims do sound in recoupment.” *Berrey v. Asarco Inc.*, 439 F.3d 636, 644 n.5 (10th Cir. 2006); *see also id.* at 646 (explaining that “[b]ecause Defendants’ counter-claims arise from the same transaction or occurrence as the Tribe’s claims and seek relief of the same kind or nature, but not in excess of the amount sought by the Tribe, they are claims in recoupment,” and therefore the tribe had waived immunity as to those claims).

After *Oklahoma Tax*, other circuits have recognized similar waivers of tribal sovereign immunity to adjudicate claims that arise out of the same transaction and seek relief that is a mirror image of, or would defeat or undercut, the tribe’s requested relief. For example, in a case that cites *Oklahoma Tax*, the Eighth Circuit held that tribal sovereign immunity did not bar the defendants’ counterclaims regarding the same disputed piece of land because “[w]hen the Tribe filed this suit, it consented to and assumed the risk of the court determining that the Tribe did not have title to the disputed tracts[,]” and “[b]y requesting equitable relief, the Tribe consented to the district court exercising its equitable discretion to resolve the status of the disputed lands.” *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995); *see also Rosebud Sioux Tribe v. Val-U Const. Co. of S.D.*, 50 F.3d 560, 562 (8th Cir. 1995) (“When a tribe brings a lawsuit, it does not waive immunity for counterclaims, *except for matters asserted in*

*recouplement.”*) (emphasis added) (internal citation omitted) (citing *Oklahoma Tax*, 498 U.S. at 509).

In *Quinault Indian Nation v. Pearson for Estate of Comenout*, the Ninth Circuit held that “counterclaims to recoup damages arising from the same transaction or occurrence as a tribe’s claims do not violate the tribe’s sovereign immunity,” 868 F.3d 1093, 1099 (9th Cir. 2017), even though—based on the authority of *Oklahoma Tax*—it also recognized that tribal sovereign immunity generally extends to counterclaims and “even extends to compulsory counterclaims *in excess of the original claims*—despite the fact that compulsory counterclaims by definition arise out of the same transaction or occurrence,” *id.* at 1097 (emphasis added).

Although this court has not addressed this issue in the specific context of tribal sovereign immunity, our precedent dictates that the same rule applies here. This court has held that when the United States sues, it necessarily “waives immunity as to claims of the defendant which assert matters in recoupment”—meaning the defendant may counterclaim against the sovereign, but the counterclaim must arise out of the same underlying dispute as the sovereign’s claim, must be limited to the same type of relief sought by the sovereign, and cannot exceed the potential recovery by the sovereign. *United States v. Forma*, 42 F.3d 759, 765 (2d Cir. 1994) (quoting *Frederick*, 386 F.2d at 488). The recognition of this rule for the sovereign immunity of the United States is significant because “[t]ribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States.” *Miner*

*Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (“Indian tribes enjoy the same immunity from suit enjoyed by sovereign powers and are ‘subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.’”).<sup>1</sup> Our precedent therefore provides that the recoupment rule applies in the context of tribal sovereign immunity.<sup>2</sup>

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<sup>1</sup> See also *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940) (“[T]he suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign.”); *Spurr v. Pope*, 936 F.3d 478, 484 (6th Cir. 2019) (“[T]ribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States.”) (quoting *Miner*, 505 F.3d at 1011); *Quinault*, 868 F.3d at 1100 (“[A] tribe’s sovereign immunity is generally coextensive with that of the United States.”); *Evans v. McKay*, 869 F.2d 1341, 1345 (9th Cir. 1989) (“The common law immunity afforded Indian tribes is coextensive with that of the United States and is similarly subject to the plenary control of Congress.”); *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 773 (D.C. Cir. 1986) (“An Indian tribe’s immunity is co-extensive with the United States’ immunity.”); *Namekagon Dev. Co. v. Bois Forte Rsr. Hous. Auth.*, 517 F.2d 508, 510 (8th Cir. 1975) (“Indian tribes have always been considered to have an immunity from suit similar to that enjoyed by the federal government.”).

<sup>2</sup> Moreover, at least one district court in our circuit has applied the recoupment rule to a tribe. *Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 260 F. Supp. 3d 290, 299 (W.D.N.Y. 2017) (“[W]here an Indian tribe seeks a declaration that a particular fact is true, e.g., that its reservation still exists, it necessarily waives its sovereign immunity as to a counterclaim seeking the exact opposite declaration.”).

Absent the recoupment rule, tribes could never truly lose a case because courts would lack jurisdiction to enter a decision in favor of the defendant on a counterclaim arising from the same transaction underlying the tribe's claim. The court could say at most that the tribe did not prevail on its own claim, but the court could not say the defendant prevailed on its counterclaim for the same relief. *See Rupp*, 45 F.3d at 1245 ("We will not transmogrify the doctrine of tribal immunity into one which dictates that the tribe never loses a lawsuit. When the Tribe filed this suit, it consented to and assumed the risk of the court determining that the Tribe did not have title to the disputed tracts.") (internal citation omitted).

Applying the recoupment rule here, the Nation's action in bringing this suit effected a limited waiver of its sovereign immunity for Phillips's counterclaim, which—as the court acknowledges—"seek[s] relief mirroring the relief sought by the Nation" for the same piece of land. *Ante* at 24.<sup>3</sup>

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<sup>3</sup> Comparing the Nation's requests for relief with Phillips's requests demonstrates that both parties sought the same relief for the same parcel:

(a) The Nation: "Declar[e] that neither the trust nor Phillips, as an individual or otherwise, owns or has any property interest in the 19.6 acres." App'x 19. Phillips: "Declar[e] that [the Nation] does not own nor has any property interest in the 19.6 acres." App'x 128.

(b) The Nation: "Declar[e] that the trust document, the quitclaim deed and all related documents filed by Phillips in the Oneida County land records are invalid and void so far as they concern the 19.6 acres." App'x 19. Phillips: "Declar[e] that the trust document, the quitclaim deed and all related documents filed by Melvin L. Phillips, Sr. on behalf of the Orchard Party Oneida in the Oneida County land records are valid so far as they concern the 19.6 acres." App'x 128.

Because the court has jurisdiction over Phillips's counterclaim pursuant to the recoupment rule, the district court should not have dismissed it for lack of jurisdiction. I nevertheless would affirm the dismissal because, as the court correctly explains in Part II.A.1. of its opinion, the Nation is entitled to judgment on its claim regarding ownership of the 19.6 Acre Parcel and therefore Phillips cannot state a claim for relief.

## II

After deciding that tribal sovereign immunity bars jurisdiction over Phillips's counterclaim—and affirming the district court's dismissal of that claim under Rule 12(b)(1)—the court engages in an extended disquisition on “the precise nature of tribal sovereign immunity.” *Ante* at 26. The court

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(c) The Nation: “Enjoin[] Phillips and the trust (i) not to claim the 19.6 acres for themselves, any beneficiary of the trust or any other person or entity, (ii) not to assert that Phillips, the trust, or any trust beneficiary owns or has a property interest in the 19.6 acres, and (iii) not to create or cause to be created, or filed or cause to be filed, in land records any document asserting that Phillips, the trust, any trust beneficiary or any other person or entity owns or has a property interest in the 19.6 acres.” App’x 19. Phillips: “Enjoin[] [the Nation] (i) not to claim the 19.6 acres for itself, (ii) not to assert that [the Nation] owns or has a property interest in the 19.6 acres, and (iii) not to create or cause to be created, or file or cause to be filed, in land records any document asserting that [the Nation] owns or has a property interest in the 19.6 acres.” App’x 128-29.

(d) The Nation: “Grant[] such other relief as the Nation may be entitled to at law or in equity.” App’x 19. Phillips: “Grant[] such other relief as the Orchard Party Trust may be entitled to at law or in equity.” App’x 129.

ruminates inconclusively about the extent to which tribal sovereign immunity should be considered jurisdictional, suggesting that it falls into a jurisdictional category that is “not synonymous with subject matter jurisdiction.” *Id.* at 25. The court acknowledges that “there is no need to address” this issue, and the court admittedly does not “resolve” it, so the discussion is plainly dicta. *Id.* at 26; *see also United States v. U.S. Gypsum Co.*, 333 U.S. 364, 411 (1948) (Frankfurter, J., concurring) (“[T]he Court confessedly deals with an issue that ‘need not be decided to dispose of this case.’ Deliberate dicta, I had supposed, should be deliberately avoided.”).

Nevertheless, the discussion conflicts with our precedent and is erroneous, as far as it goes. As we have said on numerous occasions, tribal sovereign immunity deprives a court of subject-matter jurisdiction over a lawsuit, and we routinely affirm decisions of district courts to dismiss for lack of subject-matter jurisdiction on the ground of tribal sovereign immunity. *See Chayoon*, 355 F.3d at 142-43 (“We affirm the district court’s dismissal for lack of subject matter jurisdiction because [the defendant tribal officials] are immune from this suit ... Indian tribes enjoy the same immunity from suit enjoyed by sovereign powers ... and neither abrogation nor waiver has occurred in this case.”); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84-85, 88 (2d Cir. 2001) (affirming the district court’s dismissal of claims against a tribal agency “for lack of subject matter jurisdiction” because “an Indian tribe enjoys sovereign immunity from suit” absent congressional abrogation or waiver); *Laake v. Turning Stone Resort Casino*, 740 F.

App’x 744, 745 (2d Cir. 2018) (holding that “the district court properly concluded that it lacked subject matter jurisdiction over the complaint against Turning Stone [because] Indian tribes have sovereign immunity from suit” absent congressional abrogation or waiver); *Tassone v. Foxwoods Resort Casino*, 519 F. App’x 27, 28 (2d Cir. 2013) (“Tribal immunity also applies to entities, such as [defendant] Foxwoods Resort Casino, that are arms, agencies or subdivisions of the tribe. ... [T]he district court properly held that it lacked subject matter jurisdiction due to Defendants’ sovereign immunity.”); *see also Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 885 (2d Cir. 1996) (Cabranes, J.) (noting that “[t]he exercise of subject matter jurisdiction” depends in part on “whether [a federal statute] constitutes a waiver of tribal sovereign immunity”).

We have even affirmed a district court’s dismissal for lack of subject-matter jurisdiction on the ground of tribal sovereign immunity while taking care to note that an alternative ground on which the district court relied—abstention under the tribal exhaustion rule—was *not* a matter of subject-matter jurisdiction. *See Garcia*, 268 F.3d at 80 (“[T]he district court erred by treating abstention on this ground as a matter of subject matter jurisdiction.”); *id.* at 84-85, 88 (proceeding to affirm the district court’s dismissal “for lack of subject matter jurisdiction” on tribal sovereign immunity grounds).

In support of its view, the court relies on one Supreme Court case from a period, 40 years ago, in which the Supreme Court doubted that state sovereign immunity was a jurisdictional issue. *See*

*Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 515 n. 19 (1982) (“[W]e have never held that [state sovereign immunity] is jurisdictional in the sense that it must be raised and decided by this Court on its own motion.”); *id.* at 519 (Powell, J., dissenting) (“The Court holds that the limitations on federal judicial power embodied in the Eleventh Amendment and in the doctrine of sovereign immunity are not jurisdictional.”). The Court has since rejected those doubts in favor of the view that state sovereign immunity is jurisdictional. See *Alden v. Maine*, 527 U.S. 706, 730 (1999) (“[T]he constitutional principle of sovereign immunity does pose a bar to federal jurisdiction over suits against nonconsenting States.”); *see also Allen v. Cooper*, 140 S. Ct. 994, 1002 (2020) (noting “the limits sovereign immunity places upon federal jurisdiction”) (internal quotation marks and alteration omitted); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1496 (2019) (noting that, “[c]onsistent with [its] understanding of state sovereign immunity, [the Supreme] Court has held that the Constitution bars suits against nonconsenting States in a wide range of cases”); *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253-54 (2011) (noting that “we have understood the Eleventh Amendment to confirm the structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article III’s jurisdictional grant,” and therefore “absent waiver or valid abrogation, federal courts may not entertain a private person’s suit against a State”); *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 766, 769 (2002) (noting that “[s]overeign immunity does not merely constitute a defense to monetary liability or even to all types of

liability” but “provides an immunity from suit” the intrusion on which is “contrary to the[] constitutional design”); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64 (1996) (noting that it had been “well established” by 1989 “that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts’ jurisdiction under Article III” and that the Court’s decisions were “clear that the Eleventh Amendment reflects ‘the fundamental principle of sovereign immunity that limits the grant of judicial authority in Art. III’”) (alteration omitted) (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 97-98 (1984)).

The “sovereign immunity” of “the Federal Government” also “is jurisdictional in nature.” *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *see also United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (“Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity.”).

Our court has repeatedly recognized that state sovereign immunity limits our subject-matter jurisdiction. *See McGinty v. New York*, 251 F.3d 84, 90 (2d Cir. 2001) (“Whether a federal court has subject matter jurisdiction is a question that may be raised at any time by the court *sua sponte*. Thus, the district court properly considered whether ... defendants had sovereign immunity that deprived it of subject matter jurisdiction.”) (internal quotation marks, alteration, and citation omitted); *Close v. New York*, 125 F.3d 31, 38-39 (2d Cir. 1997) (“[U]nless New York waived its immunity, the district court lacked subject matter jurisdiction because [of] ... New York’s sovereign

immunity.”); *Atl. Healthcare Benefits Tr. v. Googins*, 2 F.3d 1, 4 (2d Cir. 1993) (“Although the parties do not address the Eleventh Amendment in their briefs, we raise it *sua sponte* because it affects our subject matter jurisdiction.”); *All. of Am. Insurers v. Cuomo*, 854 F.2d 591, 605 (2d Cir. 1988) (“[T]he Eleventh Amendment precludes the District Court from asserting subject matter jurisdiction over plaintiffs’ state law claim.”); *see also Bleichert v. N.Y. State Educ. Dep’t*, 793 F. App’x 32, 34 (2d Cir. 2019) (“[T]he Eleventh Amendment precludes an individual from bringing a claim against a state or state agency under the ADEA, and federal courts do not have subject matter jurisdiction over such claims.”); *Madden v. Vt. Sup. Ct.*, 236 F. App’x 717, 718 (2d Cir. 2007) (“The Eleventh Amendment precludes Madden from bringing suit against the state or state agencies, because it deprives the federal courts of subject matter jurisdiction over any action asserted by an individual against a state regardless of the nature of the relief sought.”).<sup>4</sup>

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<sup>4</sup> The Supreme Court in 1998 said that it had “not decided” but would “mak[e] the assumption that Eleventh Amendment immunity is a matter of subject-matter jurisdiction.” *Wisconsin Dep’t of Corr. v. Schacht*, 524 U.S. 381, 391 (1998). Based on this comment, some panels have suggested that the jurisdictional status of state sovereign immunity is an open question. *See, e.g., Carver v. Nassau Cty. Interim Fin. Auth.*, 730 F.3d 150, 156 (2d Cir. 2013). But our court—along with other circuits—*has* decided this issue, and only the *en banc* court may revise those precedents. “While the Supreme Court has left this question open, our court has repeatedly referred to the Eleventh Amendment’s restriction in terms of subject matter jurisdiction [O]ur earlier circuit precedent continues to bind us.” *United States v. Texas Tech Univ.*, 171 F.3d 279, 285 n.9 (5th Cir. 1999);

Our court has also said that the federal government's sovereign immunity limits our subject-matter jurisdiction. *See United States v. Bond*, 762 F.3d 255, 263 (2d Cir. 2014) ("[W]hen it comes to sovereign immunity ... express abrogation is a prerequisite to subject-matter jurisdiction."); *Dotson v. Griesa*, 398 F.3d 156, 177 (2d Cir. 2005) ("Because a finding of sovereign immunity would deprive this court of subject matter jurisdiction, we address that question first."); *Adeleke v. United States*, 355 F.3d 144, 147 (2d Cir. 2004) (holding that the plaintiff's "equitable claim for money damages should have been dismissed for lack of subject matter jurisdiction because sovereign immunity bars a federal court from ordering the United States" to provide that remedy.); *Forma*, 42 F.3d at 763 (noting that the "failure to satisfy the[] prerequisites" of the statute providing the federal government's consent to "a refund suit would normally deprive a district court of subject matter jurisdiction over any such refund action").<sup>5</sup>

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see also *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1212 (10th Cir. 2019) ("Once effectively asserted, Eleventh Amendment immunity constitutes a bar to the exercise of federal subject matter jurisdiction.") (alterations omitted); *Seaborn v. Florida Dep't of Corrs.*, 143 F.3d 1405, 1407 (11th Cir. 1998) ("An assertion of Eleventh Amendment immunity essentially challenges a court's subject matter jurisdiction.").

<sup>5</sup> Other circuits agree. *See e.g., Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 734 (5th Cir. 2019) ("Sovereign immunity deprives the court of subject matter jurisdiction."); *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1151 (10th Cir. 2015) ("The defense of sovereign immunity is jurisdictional in nature, depriving courts of subject-matter jurisdiction where applicable."); *Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 395 (3d Cir. 2012) ("Without a waiver of sovereign immunity, a court is without subject matter jurisdiction over

As noted above, tribal sovereign immunity is coextensive with federal sovereign immunity.<sup>6</sup> Like our court, other circuits have recognized that tribal sovereign immunity—like other forms of sovereign immunity—deprives a court of subject-matter jurisdiction. *See Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007) (“Tribal sovereign immunity is a matter of subject matter jurisdiction.”); *Victor v. Grand Casino-Coushatta*, 359 F.3d 782, 783 n.3 (5th Cir. 2004) (noting that “the question of tribal immunity” is a “matter[] of subject matter jurisdiction”); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1292 (11th Cir. 2001) (“[T]he Tribe’s sovereign immunity deprives the district court of subject matter jurisdiction over [the] complaint.”).

In its opinion today, the court observes that tribal sovereign immunity functionally serves as a defense to a cause of action and that a tribe may waive its sovereign immunity. But these aspects of tribal sovereign immunity do not suggest that tribal sovereign immunity is something other than a limit on a court’s subject-matter jurisdiction. Whenever a defendant challenges a court’s subject-matter jurisdiction, the defendant’s invocation of the jurisdictional limitation functionally serves as a defense to the plaintiff’s cause of action. If a plaintiff were to bring a state-law claim in federal court against a non-diverse party, the defendant would likely invoke jurisdiction as a defense. But

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claims against federal agencies or officials in their official capacities.”); *United States v. Land, Shelby Cty.*, 45 F.3d 397, 398 n.2 (11th Cir. 1995) (“Sovereign immunity of the United States is an issue of subject matter jurisdiction.”).

<sup>6</sup> See *supra* note 1 and accompanying text.

that does not mean that federal-question and diversity jurisdiction are “not synonymous with subject matter jurisdiction.” *Ante* at 25.

That a tribe may waive its immunity and thereby consent to be sued does not mean that its immunity does not limit the court’s subject-matter jurisdiction. “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*” The Federalist No. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (emphasis added); *see also Alden*, 527 U.S. at 712 (“[T]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject *nonconsenting* States to private suits.”) (emphasis added). A waiver of sovereign immunity—that is, the sovereign’s consent—has long been understood to be a precondition to the exercise of subject-matter jurisdiction. *See Poodry*, 85 F.3d at 885; *see also Meyer*, 510 U.S. at 475 (“Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.”); *United States v. Lee*, 106 U.S. 196, 204 (1882) (“[T]he United States cannot be lawfully sued without its consent in any case.”); *United States v. Clarke*, 33 U.S. (8. Pet.) 436, 443 (1834) (“As the United States are not suable of common right, the party who institutes a suit against them must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction.”). This feature of sovereign immunity does not warrant reconsideration of its jurisdictional status.

Nothing inherent in the nature of subject-matter jurisdiction precludes it from depending on a defendant’s choice. The Foreign Sovereign

Immunities Act expressly provides that a foreign state may waive its sovereign immunity and thereby allow a court to exercise subject-matter jurisdiction over the suit against it. *See* 28 U.S.C. § 1605(a)(1) (“A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... in which the foreign state has waived its immunity either explicitly or by implication.”); *see also id.* § 1330(a) (conditioning a court’s “original jurisdiction” over “any nonjury civil action against a foreign state” on “the foreign state ... not [being] entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement”); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 489 (1983) (confirming that § 1330(a) governs a court’s “exercise [of] subject matter jurisdiction”). Jurisdictional limitations do not generally depend on a party’s consent, but there is no principled reason why such rules cannot.<sup>7</sup>

The cases the court cites for a contrary argument stand for the unremarkable proposition that the absence of a claim of tribal immunity, like the presence of such a claim, does not in and of itself

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<sup>7</sup> In a similar way, Congress has conditioned a federal court’s exercise of removal jurisdiction on the unanimous consent of all defendants. *See* 28 U.S.C. § 1441(a) (allowing defendants to remove “any civil action brought in a State court of which the district courts of the United States have original jurisdiction ... to [a] district court of the United States”); *id.* § 1446(b)(2)(A) (“When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.”). Thus, whether a federal court may exercise removal jurisdiction depends on the consent of each defendant.

create subject-matter jurisdiction. *See Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989) (“The possible existence of a tribal immunity defense, then, did not convert Oklahoma tax claims into federal questions, and there was no independent basis for original federal jurisdiction to support removal.”). But that does not mean a tribe’s proper assertion of its immunity does not deprive a court of subject-matter jurisdiction. The defendant’s lack of immunity to suit is a necessary but not sufficient condition for the exercise of subject-matter jurisdiction. Because the court’s discussion of this point is dicta and is erroneous, I do not join it.

### III

The court’s opinion “assum[es]” that “equitable defenses beyond those described in *Sherrill* [a]re available.” *Ante* at 20. I would hold that the *Sherrill* equitable defense is the only equitable defense available against a tribal claim to land that was allegedly transferred or abandoned long ago. Phillips’s other equitable defenses are therefore barred as a matter of law.

In *City of Sherrill v. Oneida Indian Nation of N.Y.*, the Supreme Court devised a federal common-law equitable defense to a tribe’s claim of ownership to lands that it had allegedly sold without authorization two centuries earlier. 544 U.S. 197 (2005). The Court said this equitable defense considers whether there is a “longstanding, distinctly non-Indian character of the [disputed land] and its inhabitants,” whether there has been “regulatory authority constantly exercised by [the

state] and its counties and towns,” and whether there was a “long delay in seeking judicial relief against” the current holder or prior holders. *Id.* at 202.

This court has subsequently labeled this defense “the *Sherrill* equitable defense,” *Stockbridge-Munsee Cnty. v. New York*, 756 F.3d 163, 166 (2d Cir. 2014), and has held that in such cases we should “consider[] only factors equivalent to those addressed in *Sherrill*,” which itself “did not involve the application of a traditional laches defense so much as an equitable defense that drew upon laches and other equitable doctrines but that derived from general principles of ‘federal Indian law and federal equity practice,’” *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 128 (2d Cir. 2010) (quoting *Sherrill*, 544 U.S. at 213). Our analysis indicates that “the *Sherrill* equitable defense” is a *sui generis* defense that displaces traditional equitable defenses, *Stockbridge-Munsee*, 756 F.3d at 166, including those defenses based on state law, *see Oneida Indian Nation*, 617 F.3d at 128 (noting that the *Sherrill* equitable defense is not satisfied simply because “the elements of a traditional laches defense [are] met”).

Moreover, recognition of additional equitable defenses in the context of tribal claims to ancient lands would contravene the Nonintercourse Act, which provides that any conveyance of tribal land is of no “validity in law or equity” unless made pursuant to a “treaty or convention” with the United States. 25 U.S.C. § 177; *see also Oneida Indian Nation of N.Y. State v. Oneida County*, 414 U.S. 661, 670 (1974) (“The rudimentary propositions that Indian title is a matter of federal law

and can be extinguished only with federal consent apply in all of the States, including the original 13.”).

The court’s opinion correctly concludes that Phillips cannot satisfy the *Sherrill* equitable defense factors here. Rather than reach the merits of his other equitable defenses, I would hold that *Sherrill* bars those other defenses as a matter of law.

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The court errs in holding that tribal sovereign immunity bars Phillips’s counterclaim, in suggesting that tribal sovereign immunity does not affect a court’s subject-matter jurisdiction, and in considering affirmative defenses beyond the *Sherrill* equitable defense. But Phillips’s counterclaim fails on the merits, the court’s dicta about the nature of sovereign immunity are irrelevant to the disposition of this case, and Phillips cannot establish the *Sherrill* equitable defense. Accordingly, I concur in the court’s judgment.