UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ONEIDA INDIAN NATION,

Plaintiff,

v.

MELVIN L. PHILLIPS, SR. et al.

Defendants.

Civil Action No.:
5:17-CV-1035 (GTS/ATB)

PLAINTIFF ONEIDA INDIAN NATION'S MEMORANDUM OF LAW
SUPPORTING MOTION TO DISMISS COUNTERCLAIM

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TABLE OF CONTENTS

The Nation filed this case because a Nation Member, Melvin Phillips, quitclaimed 19.6 acres of Nation land to a trust he created to take control of the land just after Judge Kahn approved a settlement declaring it to be "Nation Land." The question presented here is whether a tribal member can assert ownership of and transfer such unceded, treaty-protected tribal land. Under settled principles of federal law, the answer is no.

Phillips says he was authorized to quitclaim the 19.6 acres to the trust because he is a leader of a group of Oneidas that he refers to as the "Orchard Party Oneida," which he suggests had some form of Indian title that he conveyed to the trust. This Court, however, has consistently rejected Phillips' prior claims to separate tribal status for the "Orchard Party Oneida." The Court has determined that so-called "Orchard Party Oneida" are members of the Nation – noting especially that Phillips has filed affidavits and complaints in other cases claiming to be a member of the Nation and a part of the Nation's government.

The very creation of the trust gives the lie to any allegation that the "Orchard Party Oneida" held title in Oneida reservation land. If the "Orchard Party Oneida" had held such title, a state-law trust would not be needed; would be illegal under federal law; and would threaten the loss of any protections of Indian title. Moreover, the terms of Phillips' trust strip away any rights that an "Orchard Party Oneida" entity could be imagined to assert. Phillips, the sole trustee of the trust, has an exclusive current right to possess its land, which after death passes to his children and heirs, whether Oneida or not.

Phillips' motivation in all of this is clear. Over Phillip's objection, Judge Kahn approved the Nation's settlement with the State of New York, which acknowledged a tract of land including the 19.6 acres as "Nation Land." Instead of appealing, Phillips manufactured a quitclaim deed purporting to transfer interests in the land to a trust that he controlled and under

which he has current and essentially testamentary rights. In other words, he deeded the land to himself and his family. Phillips had no right to do that. The trust cannot defeat the Nation's rights that are recognized in the 2014 settlement order and under federal law. Its counterclaim should be dismissed.[1]

THE COUNTERCLAIM

A. Status of the Nation, the Orchard Party Oneida, and the Land in Dispute

The counterclaim admits that the Nation is a federally recognized Indian tribe and a direct descendant of the Oneida Indian Nation. Answer & Counterclaim ("A&C) ¶57.

The counterclaim refers many times to "the Orchard Party Oneida" but never alleges that it is an Indian tribe or any other entity, and never alleges that "the Orchard Party Oneida" authorized Phillips to transfer land to a trust or to file the counterclaim. The counterclaim does not allege that the trust holds land for "the Orchard Party Oneida." It alleges that the trust holds land for Phillips, his children, and some "members of the Orchard party," A&C ¶72, who are admitted to be members of the Nation, A&C ¶¶22-23 ("may be members of OIN and as such may receive certain services and benefits from OIN and may participate in OIN government").

The counterclaim admits unextinguished Indian title in the disputed 19.6 acres: "[t]he property at issue in this case was part of the original Oneida reservation" recognized by the United States in the Treaty of Canandaigua, A&C ¶60;[2] "[t]he property at issue in this case was part of the original Oneida reservation," A&C ¶60; and the property was reserved from a June 1842 state treaty and was "never conveyed," A&C ¶¶16-17 & 64.

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[1] Because the counterclaim refers to the "Orchard Party Oneida," sometimes also known as "Marble Hill Oneida," and to "members" of the "Orchard Party Oneida," we use those terms. That is not to suggest that there is an entity or tribe known as the "Orchard Party Oneida" or that there are "members."

[2] Article II federally recognized the Oneida reservation. "The United States acknowledge the lands reserved to the Oneida . . . and called their reservations to be their property. . . ." 7 Stat. 44 (Nov. 11, 1794).

B. 2014 Approval of Settlement and Phillips' 2015 Quitclaim Deed and Trust

The counterclaim alleges that (a) in 2014 Judge Kahn approved a settlement that "incorrectly" deemed the disputed land to be "Nation Land" and (b) in 2015 Phillips quitclaimed it to a trust "to conserve" it, acting "as the spokesman for the Orchard Party Oneida." A&C ¶69-72; *see* ¶54 (Phillips acted "to protect" "and reserve" land for "members of the Orchard Party Oneida"). The counterclaim incorporates the quitclaim and trust documents by reference. A&C ¶¶71-72; *see* ECF Doc. 1-5 at 2-15 & 44-52 (quitclaim and trust declaration).

Quitclaim. The counterclaim alleges that Phillips quitclaimed the lands to the trust. A&C ¶¶71-72. The deed is made individually by "MELVIN L. PHILLIPS, SR." and signed by him in his individual capacity, not on behalf of anyone. ECF Doc. 1-5 at 2 (quitclaim deed). The deed includes a property (Parcel I) described in an attachment to the deed as "currently owned by the grantor, Melvin L. Phillips" pursuant to a 1974 warranty deed conveyance of fee simple title from Martha Tall (a non-Indian). ECF Doc. 1-5 at 4 (attachment to quitclaim deed) & 43 (Phillips' warranty deed). Another attachment reiterates that the "grantor" is Phillips individually – "Melvin L. Phillips . . . a full-blooded Indian" – and recites that the deed covers land (Parcels II & III) that allegedly had passed to Phillips by a chain of inheritance. ECF Doc. 1-5 at 10-15; *see* 32-37 (wills). The same attachment refers to Parcel IV, the disputed 19.6 acres, as "*exclusively* owned, possessed and occupied by Melvin L. Phillips variously for . . . uses by him and his heirs and assigns and as steward of said premises pursuant to his authority and responsibility as spokesperson for the Marble Hill Oneida." *Id*. at 14 (emphasis added).

Trust. No "Orchard Party Oneida" entity is alleged to have an interest in trust property. The counterclaim admits that the trust beneficiaries are Phillips, his heirs, and those particular members, if any, "of the Orchard party who actually live on" the lands. A&C ¶72. Those

"members" have a contingent interest arising, if ever, upon the trust's termination. The trust declaration (Intro & ¶¶1& 3) describes the land conveyed to the trust by Phillips as "owned" and "occupied" by him. ECF Doc. 1-5 at 44-52. During Phillips' life, he is the only person with rights in trust property, having "the absolute and unfettered right to live upon[,] occupy, possess and use the lands." *Id*. ¶4(a). When he dies, the trust benefits his lineal descendants/heirs, who have the land in perpetuity so long as one or more "live upon, possess and occupy the lands." *Id*. at ¶4(c)(2). An Orchard Party Oneida "member" can have an interest in the property only if the trust terminates. It "shall automatically terminate" if, after Phillips dies, no descendant/heir lives on the lands. *Id*. Then "the title to the lands herein shall pass collectively [only] to the then surviving members of the Orchard Party then living upon, occupying and using said lands." *Id*.

The trust declaration makes Phillips trustee, followed after Phillips' death by a son and then an heir. ¶7. The trust does not give "the Orchard Party Oneida" or any "member" power to remove the trustee. If "government action" threatens the scheme laid out in the trust, Phillips and one of his descendants may terminate the trust and then Phillips may "distribute the corpus as he in his sole and absolute discretion deems proper." *Id*. at ¶4(b).

C. The Trust's Claim

Although Phillips and the trust are described in the counterclaim's "Parties" section, A&C ¶¶55-56, the counterclaim is filed only by Phillips' trust. In the "Prayer," only the trust seeks a judgment, which would declare the trust valid as to the 19.6 acres in dispute.

The "Jurisdiction" section of the counterclaim invokes only the Court's supplemental jurisdiction under 28 U.S.C. § 1367 to decide state law claims. A&C ¶54. The counterclaim does not invoke general federal question jurisdiction under 28 U.S.C. § 1331 – or specific federal question jurisdiction under 28 U.S.C. § 1362, which addresses the claims of Indian tribes.

APPLICABLE LEGAL STANDARDS

On a Rule 12(b)(6) motion, factual assertions usually are taken as true, but that principle "is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *Iqbal*'s point is important here because the counterclaim is long on legal conclusions about the Marble Hill/Orchard Party and its rights, but lacking in factual allegations about tribal status or any act of the federal government by which the Marble Hill/Orchard Party could have acquired rights in the 19.6 acres following the Treaty of Canandaigua.

In addition to a requirement that facts, not just legal conclusions, be pleaded, the facts that are pleaded must *plausibly* support a claim of entitlement to relief.

> 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. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Iqbal, 556 U.S. at 677-78; *see McManus v. Tetra Tech Constr., Inc.*, 260 F.3d 197, 203 (N.D.N.Y. 2017) (restating *Iqbal-Twombly* principles). The common sense that the plausibility requirement brings to bear is important here because the counterclaim does not allege that the "Orchard Party Oneida" is an Indian tribe, Phillips previously has informed this Court that he is a member of the Nation and its government, and federal agencies and judges have rejected the idea that the "Orchard Party Oneida" are an Indian tribe separate from the Nation.

Finally, a court may consider documents incorporated into a counterclaim by virtue of reference in it, documents integral to it, public documents subject to notice, and matters of which judicial notice may be taken. *ATSI Comm's, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007); *Newman & Schwartz v. Asplundh Tree Expert Co., Inc.*, 102 F.3d 660, 662 (2d Cir. 1996).

ARGUMENT

A. THE COUNTERLCAIM DOES NOT STATE A CLAIM UNDER FEDERAL LAW BECAUSE IT FAILS TO PLAUSIBLY IDENTIFY ANY SOURCE OF FEDERAL PROTECTION OF "ORCHARD PARTY ONEIDA" RIGHTS IN THE DISPUTED 19.6 ACRES.

The counterclaim (¶54) alleges supplemental jurisdiction to determine state claims, not federal question jurisdiction. State law, however, plays no role in the protection of Indian land held by Indian title, like the land at issue here. The Supreme Court has described "tribal rights" in Indian (or aboriginal) title as "an unquestionable, and heretofore unquestioned, right to the land they occupy, until that right shall be extinguished by a voluntary cession to our government." Cohen's Handbook of Federal Indian Law ("Cohen's Handbook") § 15.04[2] at 1002 (2012 ed.) (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 32 (1831)). The possessory claim alleged by the Nation in this case, mimicked in the counterclaim, concerns the tribal right enforceable under federal common law first recognized as to the Oneida reservation. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) ("*Oneida I*").

In *Oneida I*, the Court explained: "It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign – first the discovering European nation and later the original States and the United States – a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the *exclusive province of the federal law*." *Id.* at 667 (italics added). After recognizing that federal law preempts state law regarding Indian title, the Court held that the Oneida tribal claims arose under federal common law for purposes of jurisdiction pursuant to 28 U.S.C. § 1331, explicitly distinguishing such tribal claims from claims by

individual Indians to land that had been removed from tribal ownership by a federal statute and allotted to tribal members. *Id.* at 675. "Here, the right to possession itself is claimed to arise under federal law in the first instance. Allegedly, aboriginal title of an Indian tribe guaranteed by treaty and protected by statute has never been extinguished." *Id.*; *see* Cohen's Handbook § 15.06 (2012 ed.) (explaining federal preemption regarding Indian land).

The counterclaim (¶73) vaguely alleges that the trust's rights in the disputed 19.6 acres are protected "by federal treaty . . . and by the Constitution" but does not identify any specific federal-law basis for a claim of ownership or entitlement to possession.

Statutes. There is no allegation that a federal statute protects the trust's rights (or those of an Orchard Party) despite the fact that the federal Nonintercourse Act is the obvious source of federal protection of tribal land rights. 25 U.S.C. § 177; *County of Oneida v. Oneida Indian Nation ("Oneida II")*, 470 U.S. 226 (1985); *see James v. Watt*, 716 F.2d 71, 72 (1st Cir. 1983) (Act protects only tribes); 83 Fed. Reg. 4235 (Jan. 30, 2018) (list of recognized tribes).

Treaties. It is a black letter principle that federal Indian treaties are made with Indian tribes. Cohen's Handbook § 1.03[1] at 23 (2012 ed.). The counterclaim mentions two federal treaties, but both were made with the Oneida Nation. The counterclaim admits (¶60) the first, the Treaty of Canandaigua, acknowledged that the "property at issue in this case was part of the original Oneida reservation." *See* 7 Stat. 44 (Nov. 11, 1794) (treaty); *Oneida II*, 470 U.S. at 231 n.1 (quoting Article II, recognizing Nation's lands as Nation's "property" and "reservation").

The counterclaim (¶61) also mentions a second federal treaty, the Treaty of Buffalo Creek (1838), noting that some signatories to the treaty were from the Orchard Party. There is no allegation that the treaty recognized separate Orchard Party rights in the 19.6 acres, and a simple reading of the treaty shows that it did not. 7 Stat. 550 (Jan. 15, 1838). The treaty reflects

that federal negotiator Ransom Gillett returned to the Nation to obtain Oneida assent to the treaty as ratified by the Senate, obtaining on August 8, 1838 the assent of "the undersigned chiefs of the Oneida tribe of New York Indians." The treaty thus lists the chiefs of the First Christian Party, the Second Christian Party and the Orchard Party as signing the treaty for that single tribe – the Oneida tribe of New York Indians. Judge Kahn has held that the Treaty of Buffalo Creek was not made with "factions" of Oneidas but "treated the Oneidas as one Nation." *Oneida Indian Nation v. State of New York*, 194 F. Supp.2d 104, 119 (N.D.N.Y. 2002).

Constitution. The counterclaim does not identify a relevant constitutional provision. The only constitutional protection that conceivably could be relevant would be the Supremacy Clause protection that applies to a tribe's aboriginal possession of land at the time the Constitution became effective and federal law regarding tribal rights preempted state law. But the counterclaim cannot and does not allege that the "Orchard Party Oneida" is an Indian tribe, and its allegation at ¶¶55 & 58 of possession of the disputed 19.6 acres "since time immemorial" clearly concern aboriginal possession as members of the Nation. It is not disputed that the Oneida Nation (and no other tribe) was in possession of Oneida lands when the Constitution became effective and also when the 1794 Treaty of Canandaigua recognized Oneida lands as the Nation's "property" and "reservation." *Oneida II*, 470 U.S. at 230-31 & n.1. That remains true. *See Nebraska v. Parker*, 136 S. Ct. 1072, 1078 (2016) (only Congress can diminish a tribe's reservation, and its intent to do so must be clear); *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 443-44 (2d Cir. 2011) (Oneida reservation not diminished or disestablished).

B. THE COUNTERCLAIM DOES NOT STATE A CLAIM BECAUSE THE "ORCHARD PARTY ONEIDA" IS NOT A SEPARATE INDIAN TRIBE.

Even if the counterclaim identified a federal-law basis for its claim, it would fail because it does not assert the rights of an Indian tribe. The federally protected possessory right recognized in *Oneida I* is a tribal right. "A tribe with original Indian title may bring a federal common law action to enforce ownership rights." Cohen's Handbook, § 15.04[2] at 1004. As Judge Kahn explained in the land claim litigation, "[t]he [common law possessory] rights alleged by Plaintiffs in this action do not involve the rights of the individual groups or sects of Oneida Indians that Defendants [State and Counties] allege completed the disputed land transactions with the State of New York. The rights alleged by Plaintiffs are rights protected by the Nonintercourse Act for the Oneida Indian Nation and its successors as a whole." *Oneida Indian Nation of New York v. New York*, 194 F. Supp.2d 104, 118–19 (N.D.N.Y. 2002).

> Tribal property is a form of ownership in common. It is not analogous to tenancy in common, however, or other collective forms of ownership known to Anglo-American private property law, because *an individual tribal member has no alienable or inheritable interest in the communal holding*. No tribal member has any vested property right that would permit claims to partition the tribal estate or to share pro rata in the proceeds of any sale. Absent federal legislation vesting individual rights of ownership in tribal members, *no tribal member can claim a federal right against the tribe to any specific part of the tribal property*.

Cohen's Handbook, § 15.02 at 996 (italics added). Thus, only the tribe holding the land under federal protection can assert a claim to possession based on Indian title, which, as explained in *Oneida I*, is controlled by federal law. Tribal members do not acquire rights in tribal land by living on it, and tribes do not lose rights in land where members live.

Here, the quitclaim deed releases to the trust only the interests, if any, of "MELVIN L. PHILLIPS, SR." Document 1-5 at 2 (quitclaim deed attached to complaint). Document 1-5 at 45-52 (trust declaration attached to complaint). The trust is a state law entity, governed by an

instrument that in paragraph 4 gives Phillips a life estate in the land and the power to dissolve the trust and to distribute its corpus any way he wants. It is sufficient to dismiss the counterclaim that the trust is not an Indian tribe; that the quitclaim does not purport to release a tribal interest; and that the trust itself has no provision giving the "Marble Hill Oneida" (who are not alleged to an Indian tribe) control or a beneficial interest. Even if the quitclaim deed were imagined to have conveyed a federally protected tribal interest, it would be invalid as a matter of federal law for lack of the federal approvals required by the Nonintercourse Act, 25 U.S.C. § 177.

Finally, what if the trust were to amend the counterclaim to include the missing allegation of tribal status as to the Orchard Party/Marble Hill Oneida? Putting aside the reality that no such entity filed the counterclaim, an allegation of tribal status would be implausible under *Iqbal-Twombly* standards. Phillips has contradicted any such allegation, the Departments of Justice and Interior have denied it, and this Court has rejected it. Indeed, the answer preceding the counterclaim admits in ¶22 that "certain" of the Orchard Park Oneida are members of the Nation.

1. Any Claim of Separate Tribal Status for Marble Hill/Orchard Party Oneidas Would Not Be Plausible, and Phillips and His Trust Would Be Judicially Estopped from Making It, Because Phillips and Others Previously Claimed Membership in the Nation and in Its Government.

In a case before Judge Pooler, "Melvin Phillips, individually and as the TRADITIONAL LEADERS of the Oneida Nation," sued to challenge federal recognition of the Nation's government and its alleged violations of their rights *as Nation members*. "Plaintiffs are members of the Oneida Nation of New York, an Indian tribe officially recognized by the United States Government. . . ." Complaint ¶10, ECF Document 1, No. 5:96-cv-00258 (Feb. 13, 1996). Phillips and the others alleged that the Nation's government "inhibit[ed] their right to self-government," meaning to participate in the Nation's government. *Id*. at ¶12. Phillips alleged also that the same land at issue here is Nation land: "Plaintiff MELVIN PHILLIPS is a *member*

of the Oneida Nation, descended from the Orchard Party, and resides on *unceded Oneida lands at RD2, Marble Road in Oneida, New York*. Mr. Phillips is a Turtle Clan representative" in the Nation's government. *Id*. at ¶15 (italics added); *see* ¶14. Phillips and the others even "alleged that they themselves represent the Oneida Nation and therefore have the authority to make a valid waiver" of its sovereign immunity. *Shenandoah v. DOI*, 1997 WL 214947 *6 (N.D.N.Y. 1997); *see* Amended Compl., ECF Document 332 ¶17 (alleging Phillips and the others "are all holders of leadership titles for the Oneida Nation and, in such capacities, represent the Nation").

On appeal from dismissal, the Second Circuit affirmed. The Second Circuit declined to reach Judge Pooler's ruling that the Nation was indispensable and could not be joined because of its tribal immunity. The Second Circuit relied on the allegation by Phillips and the others that they were, in fact, the Nation's government, accepting it at the pleadings stage in order to move past the indispensable party/immunity issue and to reach the exhaustion issue – leaving the door open to post-exhaustion litigation that would have been precluded by Judge Pooler's dismissal order. *Shenandoah v. DOI*, 159 F.3d 708, 714-15 (2d Cir. 1998).[3]

In the recent Oneida trust land litigation, Phillips filed a complaint treating the Orchard Party/Marble Hill Oneidas as Nation members by referring without distinction to "the Oneidas residing on the 32 acre parcel in Madison County and State land at Marble Hill." ECF Document 1 at ¶132, *Cent. N.Y. Fair Bus. Ass'n v. Jewell*, No. 6:08-cv-660 (June 21, 2008). Even the answer in this case, while slippery about it, admits that "certain" beneficiaries of Phillips' trust "may be members of the OIN [the Nation]. A&C ¶22-23.

[3] The counterclaim (¶ 66) quotes the District Court's statement in *Shenandoah* that plaintiff Thelma Buss did "not reside on Oneida Nation territory." 1997 WL 214947, *8 n.6 (N.D.N.Y. April 14, 1997). That statement is not relevant to the disputed 19.6 acres. The court was relying on the complaint and was not addressing ownership. The Answer and Counterclaim in this case acknowledges (¶66) that Buss lived on the Lot 2 that was *ceded* in a June 25, 1842 state treaty, not the *unceded* Lot 3, where the disputed 19.6 acres is located.

Under *Twombly*/*Iqbal*, courts find factual allegations implausible when a plaintiff contradicts himself. "The court need not . . . accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "With contradictory factual allegations, the Court cannot find a claim with 'facial plausibility' under the standards set forth in *Iqbal*." *Saravia v. Select Portfolio Servicing, Inc.*, 2014 WL 2865798 at *7 (D. Md. 2014) (contradictions in complaint). "The court may also consider the prior allegations as part of its 'context-specific' inquiry based on its judicial experience and common sense to assess whether the Third Amended Complaint plausibly suggests an entitlement to relief, as required under *Iqbal*." *Cole v. Sunnyvale*, 2010 WL 532428 at *4 (N.D. Cal. 2010) (amended complaint contradicted complaint); *accord Green v. Niles*, 2012 WL 987473 (S.D.N.Y. 2012) (contradiction in amended complaint); *Colliton v. Cravath, Swaine & Moore LLP*, 2008 WL 4386764 at *19 (S.D.N.Y. 2008) (same).

Similarly, the doctrine of judicial estoppel would bar any effort by Phillips or his trust to inject the tribal status allegation that is missing in the counterclaim. The judicial estoppel doctrine preserves the integrity of the judicial process, disabling a plaintiff from playing loosely with the truth by taking inconsistent litigation positions. *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001); *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 (2d Cir. 1999). Although the doctrine is flexibly applied and ultimately controlled by "considerations of equity," "several factors typically inform the decision." *New Hampshire*, 532 U.S. at 750-51 & 755. *First*, clearly inconsistent litigation positions; *second*, whether a court adopted the inconsistent prior litigation position; *third* (usually but not always), whether the inconsistent party derived an unfair advantage or imposed an unfair detriment on the opposing party. *Id.*; *BPP Ill., LLC v. RBS*, 859 F.3d 188, 192-94 (2d Cir. 2017); *Mitchell*, 190 F.3d at 6.

In *New Hampshire*, the Supreme Court barred a state from changing its position taken earlier in the litigation concerning the meaning of a boundary term, where the Court had accepted the State's earlier position in approving a settlement that benefited the state. 532 U.S. at 751-52. Similarly, in *Mitchell*, the Second Circuit barred an employee from claiming in an ADA Act suit that he had sufficient ability to work and required an accommodation when he previously had sued for disability benefits on the allegation that was totally disabled, resulting in a disability "determination in his favor." 190 F.3d at 3-4 & 6-8.

Here, any allegation of separate tribal status for the Orchard Party Oneida would be inconsistent with Phillips' representations in the civil rights case, where he alleged membership in and also that he was part of the Nation's government. The Second Circuit, moreover, assumed that the Nation might be present in the case through Phillips, avoiding a sovereign immunity dismissal that would have precluded further litigation by him and instead reaching an exhaustion issue that resulted, in effect, in dismissal without prejudice to further litigation after exhaustion.

2. The Federal Government Has Rejected the Existence of a Marble Hill or Orchard Party Tribe.

Both the Departments of the Interior and Justice have concluded that there is no Marble Hill/Orchard Party tribe. Through Justice, the United States successfully opposed Marble Hill/Orchard Party intervention into Oneida land claim litigation, asserting: "the members of the Marble Hill are all members of the New York Oneida Nation. . . ." ECF Document 343 at 2, *Oneida Indian Nation v. State of New York*, No. 5:74-cv-00187 (N.D.N.Y. Feb. 15, 2002). Similarly, in support of its motion to dismiss Phillips' challenge to Interior's decision to hold Oneida land in trust, the United States asserted: "the Marble Hill Oneidas are not a federally-recognized tribe. . . ." ECF Document 52 at 6, *State of New York v. Jewell*, No. 6:08-cv-00660 (N.D.N.Y. 2009). In the same case, the United States filed an administrative record with a

finding by Interior that the Marble Hill/Orchard Party group is not a separate tribe and that the Nation "is a single tribe" that include Marble Hill members. ECF Document 109-1, Amendment to the May 20, 2008 Record of Decision at 25-26 n.171 (filed Feb. 9, 2014).

3. Judges Port, McCurn and Kahn Have Decided that Marble Hill/Orchard Party Oneidas Are a Part of the Nation, Not a Separate Tribal Entity.

Judges in this district have consistently rejected the assertion that Orchard Party/Marble Hill Oneida are a separate tribe. In the Oneida land claim litigation, a group of Oneidas sought to intervene, including Nation members from the Marble Hill community. Judge Port denied intervention, holding that Marble Hill Oneidas were represented by the Nation, to which they belonged. *Oneida Indian Nation v. County of Oneida*, No. 5:70-cv-00035 (N.D.N.Y. June 17, 1979) (Order at 4). The Second Circuit affirmed. *Oneida Indian Nation of New York v. County of Oneida*, 62 Fed. Appx. 389, 620 F.2d 285 (2d Cir.1980) (table).

Next, the defendants in a related Oneida land claim case argued that the Marble Hill Oneidas were indispensable. Judge Kahn ruled: "The Marble Hill Oneidas are official members of the Oneida Indian Nation of New York" and "are fully represented by the tribe of which they are a member." *Oneida Indian Nation v. New York*, 194 F. Supp.2d 104, 115 (N.D.N.Y. 2002).

In the same case, Oneidas (including Phillips) moved to intervene. Alleging that they are an Indian band distinct from the Nation, they claimed to be the Marble Hill or Orchard Party and pointed to the same facts alleged in the counterclaim in this case. ECF Documents 314 (Nov. 7, 2001 motion), 353 (Phillips' March 8, 2002 affidavit) & 354 (March 8, 2002 reply), *Oneida Indian Nation v. State of New York*, No. 5:74-cv-00187. Phillips' affidavit stated that "[t]he Marble Hill [Orchard Party] Oneidas are an independent tribal community" wishing "to preserve our separate identity and our homes and to recover for our aboriginal land." ECF Document 353,

at ¶¶4 & 16. The United States opposed intervention on the ground that those Oneidas are Nation members and thus were represented by the Nation. ECF Document 343 (Feb. 15, 2002).

Judge Kahn denied intervention, having a substantial record, including previous statements by Phillips and others that declared: "I am an enrolled member of the Oneida Indian Nation of New York." ECF Document 388 at 3 (May 22, 2002) (opinion); *see* Document 332 at 38 (Phillips' statement). "While the Marble Hill Oneida claim to be a tribal community separate from the New York Oneida, it is clear from affidavits that they are in fact part of the New York Oneida Indian Nation." *Id.* at 2. "[T]he Marble Hill Oneida's claim to a tribal status independent of the New York Oneida is simply not reliable." *Id.* at 3. The Second Circuit affirmed. *Marble Hill Oneida Indians v. Oneida Indian Nation*, 2003 U.S. App. Lexis 6841 (April 8, 2003); *see Oneida Indian Nation v. Clark*, 593 F. Supp. 257, 259 (N.D.N.Y. 1984) (McCurn, J.) (Marble Hill Oneidas claiming to be part of Nation's government).

C. THE COUNTERCLAIM DOES NOT PLAUSIBLY ALLEGE THAT NEW YORK STATE LAW GIVES THE TRUST RIGHTS IN THE DISPUTED 19.6 ACRES.

The counterclaim alleges (¶ 73) that the trust has a right to possess the disputed 19.6 acres protected by "state treaty, statutory and common law." But it identifies (¶64) only a June 25, 1842 state treaty that is attached to the Nation's complaint, ECF Document 101. The State made the treaty with the Orchard Party of Oneida Indians in order to purchase Oneida lands.

The treaty is irrelevant because a state treaty cannot alter tribal possessory rights protected by preemptive federal law. The counterclaim does not allege federal approval of the treaty, and so it had no "validity in law or equity." 25 U.S.C. § 177; *Oneida II*, 470 U.S. at 231-34 (states lack authority to make treaties regarding Indian land, a subject within "exclusive province of federal law" under the Constitution and committed by Nonintercourse Act to exclusive federal control); *Oneida I*, 414 U.S. at 670-71 ("rudimentary proposition that Indian

title . . . can be extinguished only with federal consent"). When unsuccessfully seeking 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 never thereafter federally ratified. ECF Document 311 at ¶¶25-26, No. 5:74-cv-187 (Nov. 7, 2001). The trust cannot now plausibly assert, and is estopped to assert, the validity of the state treaty.

Putting invalidity aside, the counterclaim admits that the disputed 19.6 acres is within land that "was reserved" from cession and thus "unpurchased" by the State in the 1842 treaty. A&C ¶64. Further, the preceding answer admits: "The Orchard Party admits the 19.6 acres that are the subject of this action are wholly within Lot 3 and were never conveyed as part of the June 25, 1842 treaty." A&C ¶16. It necessarily follows that the State never even attempted to obtain Indian title and could not therefore have subsequently transferred rights in the reserved land to anyone. Indian title necessarily stayed exactly where it had been, with the Nation.

Although the counterclaim (¶64) implies that the treaty shifted property rights to the "Orchard Party Oneida," that is impossible because, as the counterclaim admits, there was no cession to the State of the reserved land. That admission ends the matter. In addition to the treaty text reserving the land from cession, the treaty contains other text affirmatively showing an intention to change nothing – to leave the "Orchard Party Oneida" with their rights as Nation members living on Oneida land, and no more. The unceded land was:

> "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 party so remaining *before the execution of this treaty*."

A&C ¶64 (counterclaim quoting treaty) (italics added). Thus, putting aside the rule that a state treaty cannot affect tribal title, the 1842 treaty did not purport to do so with respect to Lot 3 or

the disputed 19.6 acres within it. *Cf. Oneida II*, 470 U.S. 247-48 (valid federal treaty does not affect tribe's land rights absent plain and unambiguous text indicating intent to do so).

The counterclaim does not and cannot allege that the Nation lost Indian title to Lot 3 prior to the 1842 state treaty. The "Orchard Party/Marble Hill" complaint in intervention filed by Phillips and others in the Oneida land claim litigation alleged that the 1842 state treaty was "signed by members of the Oneida Nation," including specifically the "Orchard Parties of the Oneida Nation," and was one of 26 treaties that "interfered with the Oneida Nation's enjoyment of its rights to the Oneida lands under federal law" "in derogation of the Oneida Nation's federal rights to the Oneida lands" – and that "the Oneida Nation, *including* the Marble Hill Oneidas, has a continuing right to title to and possession of the subject lands." ECF Document 311 at 24-25, 34-35 &45, No. 5:74-cv-187 (Nov. 7, 2001) (italics added).

If state law mattered, it would be dispositively against the counterclaim. N.Y. Indian L. § 2 lists all Indian tribes recognized by the State, without mention of "Orchard Party Oneida," who therefore cannot claim state law rights. Further, as explained more fully below, the State and Madison and Oneida Counties settled with the Nation, agreeing in part that the land at issue here is "Nation Land." At the request of those parties and of the United States, Judge Kahn approved the settlement, and New York amended its laws to enforce the settlement. N.Y. Indian L. § 16 now provides that the settlement terms "supersede any inconsistent laws and regulations." Consequently, the meaning of the 1842 state treaty does not matter because N.Y. Ind. L. § 2 and the settlement control the status of the disputed 19.6 acres.

D. THE COUNTERCLAIM IS BARRED BY THE ORDER APPROVING THE ONEIDA SETTLEMENT AGREEMENT, TO WHICH PHILLIPS UNSUCCESSFULLY OBJECTED AND FROM WHICH HE DID NOT APPEAL.

The Court can also dismiss for failure to state a claim because the counterclaim is an improper collateral attack on a final judgment entered by Judge Kahn in recent Oneida trust land litigation. It is res judicata as to Phillips, the alleged Orchard Party Oneida, and the trust.

The counterclaim admits that, in trust land litigation, Judge Kahn approved a settlement agreement among the State of New York, Madison and Oneida Counties and the Nation on March 4, 2014 and that the land at issue here is recognized to be "Nation Land" under the settlement. A&C ¶¶69-70.[4] Judge Kahn's approval order[5] incorporated all of the settlement's terms, making them a part of the Court's order. "The Court therefore . . . incorporates the terms of the Settlement Agreement and the Waiver into the order of dismissal, and retains jurisdiction to enforce the Settlement Agreement." *Id*. at 24. "The terms of the Settlement Agreement are **INCORPORATED** into this Order, and the Court **RETAINS JURISDICTION** to enforce the settlement agreement." *Id*. (emphasis). Such an order embodies a determination that the terms are valid. *Perez v. Westchester County Dep't of Corr*., 587 F.3d 143, 153 (2d Cir. 2009) (court approval of settlement requires determination that settlement is 'fair and lawful" and thus puts "judicial imprimatur" on settlement and makes "settlement valid"). The United States, the State, and Madison and Oneida Counties all requested settlement approval and incorporation of settlement terms into the approval order. ECF Document 319 (including Exhibit 1) in *State of*

[4] The settlement is Exhibit 2 to ECF Document 319, filed Dec. 12, 2013 on behalf of all parties in *State of New York v. Jewell*, No. 6:08-cv-644. Section II(L) defines "Nation Land" to include "the Marble Hill Tract," defined by Section II(G) as: "'**Marble Hill Tract**' means the 104 acres (more or less) of state tax-exempt land retained by the Oneida Nation as Lots 2 and 3 in the June 25, 1842 Orchard Party treaty." Exhibit I to the agreement also depicts the current map of the Nation's reservation, which includes the land at issue here.

[5] Judge Kahn's approval order is ECF Document 341, *State of New York v. Jewell*, No. 6:08-cv-644. The order also can be found at 2014 U.S. Dist. Lexis 27042 (March 4, 2014).

New York v. Jewell, No. 6:08-cv-644 (letter request for approval); *see* ECF Documents 341 at 23 (approval order/"[a]ll parties" agreed to incorporation of settlement terms into order).

Recognizing that the approved settlement dooms the counterclaim absent some avenue of escape, the counterclaim alleges two. First, that the settlement agreement is "incorrect[]." A&C ¶¶69-70. That allegation amounts to an allegation that Judge Kahn's approval order is incorrect. The order incorporates the settlement, and Section VII(E) provides that the Northern District of New York retains "jurisdiction, exclusive of any other court, to enforce this agreement according to its terms, [and] to adjudicate any challenges . . . by third parties to the enforceability of this Agreement." *See* note 4, *supra*. Thus, third parties must file challenges in *State of New York v. Jewell*, No. 6:08-cv-644, in which the approval order was entered. Neither the trust nor any other third party is entitled to collaterally attack the order.

It is also too late for the trust to attack Judge Kahn's order. While the request of all parties for approval was pending in *State of New York v. Jewell*, No. 6:08-cv-644, Phillips filed a 10-page objection to that request on February 18, 2014. Phillips filed that objection, ECF Document 107, in the related challenge Oneida trust land challenge he had filed, *Central New York Fair Business Ass'n v. Jewell*, No. 6:08-cv-660, indicating on the Re line in the letter that it concerned both his own case, No. 6:08-cv-660, and "related case[]: CV-644" in which the settlement approval request was pending. The counterclaim streamlines the 10-page objection, but the counterclaim's allegations regarding the Orchard Party Oneida and the disputed land are lifted from the objection. The counterclaim contains nothing new about those subjects.

Judge Kahn approved the settlement over Phillips' objection. Phillips' arguments were, familiar to Judge Kahn, who, as explained above, had rejected them previously and had concluded that Phillips and the "Orchard Party/Marble Hill" Oneida are part of the Nation.

Likewise, as also explained above, the Departments of Justice and the Interior had come to the same conclusion. In fact, Interior which has expertise in this area, made a specific finding on a substantial record rejecting "Orchard Party/Marble Hill" claims of existence apart from the Nation. ECF Document 109-1, Amendment to May 20, 2008 Record of Decision at 25-26 n.171, filed Feb. 9, 2014 in *Cent. N.Y. Fair Bus. Ass'n v. Jewell*, No. 6:08-cv-660 (also filed in *State of New York v. Jewell*, 6:08-cv-644, in disk format as ECF Document 337 on Feb. 7, 2014).[6]

Phillips chose not to appeal and is bound by the order. He was not entitled to use quitclaim and trust papers to "preserve," "protect," and "conserve" land from the effect of that order (or the underlying federal treaty protection of Nation lands). *See* A&C ¶¶54 & 69-72; *cf. James v. Bellotti*, 733 F.2d 989, 994 (1st Cir. 1984) (tribal members who moved to intervene to object to tribe's settlement but dropped appeal from denial of motion "may well have foreclosed their opportunity to contest the settlement").[7]

The counterclaim also alleges that the Orchard Party "was not a party to the agreement." A&C ¶¶69-70. That is true but irrelevant. As explained above, the settlement and Judge Kahn's approval order require that third party challenges to the agreement and order be filed in the case in which the approval order was entered. Moreover, when Phillips objected to the approval order, he objected on behalf of the Orchard Party for whom, as in this case, he claimed to speak – making both of them parties to litigation regarding settlement approval by the Court. Phillips' objection began by stating that he is "the recognized leader of the Orchard Party/Marble Hill Oneidas" and that the settlement will destroy the relationship between them and the State of New

[6] Answering Phillips' complaint challenging Oneida trust land, the United States denied that the June 25, 1842 state treaty "had any legal effect whatsoever." ECF Document 54 at ¶22, *Cent. N.Y. Fair Bus. Ass'n v. Jewell*, No. 6:08-cv-660 (Feb. 6, 2009) (U.S. answer); ECF Document 1 at ¶22 (June 21, 2008) (Phillips' complaint).

[7] Phillips appealed from dismissal of his Oneida trust land case, No. 6:08-cv-660, but presented no issue concerning settlement. *Cent. N.Y. Fair Bus. Ass'n v. Jewell*, 673 F. App'x. 63 (2d Cir. 2016).

York under the same June 25, 1842 state treaty referenced here in the counterclaim. ECF Document 1 at 1, No. 6:08-cv-660. Thereafter, the objection put the alleged land rights of Orchard Party Oneida front and center, asserting the same claim made in the counterclaim.[8] Neither Phillips nor the trust can pretend that Phillips, the alleged "leader" of the Orchard Party Oneida, did not litigate and lose their challenge to Judge Kahn's approval of a settlement recognizing the land in issue here as "Nation Land."

There is the additional point that the trust is Phillips' alter ego. They share an identity of interest. Phillips set up the trust to "conserve" and control land after losing his objection to approval of the settlement. A&C ¶¶69-72. Further, as explained above, Phillips quitclaimed property to the trust, acting individually as Grantor; the does not state that the Orchard Party Oneida quitclaimed any interest. The first page of the trust underscores that Phillips was the grantor of property and only then indicates that Phillips "in his capacity as spokesman" accepts the role of trustee of the trust that will hold the property. The trust establishes Phillips as sole trustee for life, and only Phillips is entitled to use trust property while he is alive. If a court threatens the trust, Phillips in his sole discretion can do with the trust property what he wants. The "Orchard Party," whatever it is imagined to be, has no interest of any kind under the trust, now or ever. Unnamed "members" have at most a contingent future interest.

The ordinary rules of finality have particular importance here.

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[8] "The Orchard Party/Marble Hill Band are seeking peaceable existence . . . and only the preservation of their land holdings as status promised by the" state and federal governments. ECF Document 1 at 1, No. 6:08-cv-660. "If approved by the court, the agreement will destroy the Orchard Party/Marble Hill Oneidas[']s separate and distinct existence and . . . bonafide historical land holdings. . . ." *Id*. at 1-2. Complaining that "Marble Hill land [is] specifically included in the Agreement," the objection asserted: "The Marble Hill Band seeks only to preserve Lots 2 and 3 pursuant to the June Treaty of 1842 and later codified and preserved under New York State statutes." *Id*. at 3. Through the settlement, the objection argued, the Nation "stealing the land of a separate, distinct and bonafide tribal entity. . . ." *Id*. at 4. "The Orchard Party/Marble Hill Oneida's continuous title to Lots 2 and 3 in the Marble Hill Tract shows that they have paramount title and exclusive rights to possession." *Id*. at 5. "[T]he Orchard Party/Marble Hill Band . . . are direct descendants of the Orchard Party. They are not seeking anything more than the freedom and protection from the state to use Lots 2 and 3. . . ." *Id*. at 7.

First, Section VIII(I) of the settlement agreement addresses "Non-Severability" and provides: "If any material term . . . is held . . . to be invalid, void, or unenforceable . . . then this agreement shall be null and void in its entirety with each party returned to the position it held before the effective date." Exhibit 2 to ECF Document 319 (Dec. 12, 2013) in *State of New York v. Jewell*, No. 6:08-cv-644. The idea of undoing the settlement of so many disputes that affected the Nation and its neighbors for so long should be nearly unthinkable. Doing so would also be nearly impossible, as all parties to the settlement have performed under the settlement, including the payment and receipt of many millions of dollars at the times specified in the settlement.

Second, all parties in the settled trust case (including the United States and the State of New York) asked Judge Kahn to approve the settlement. ECF Documents 319 (Dec. 12, 2013) (letter request) & 341 at 23 (March 4, 2014) (approval order), *State of New York v. Jewell*, No. 6:08-cv-644. To the extent that the trust asserts a federal or state law basis for the counterclaim, that would be directly contradicted by the federal and state request for approval of a settlement recognizing the land in issue here as "Nation Land."

Third, since approval of the settlement, the State has enacted legislation that defeats any claim grounded in state law, even if federal law did not preempt state law. The State enacted N.Y. Indian L. § 2, which lists all Indian tribes in New York – but no Orchard Party or Marble Hill entity. The State also enacted N.Y. Indian L. § 16: "Notwithstanding any other provision of law, the provisions of the Oneida Settlement Agreement referenced . . . shall be deemed to supersede any inconsistent laws and regulations." State law, therefore, rejects any suggestion in the counterclaim that the State recognizes the Orchard Party Oneida or that the State recognizes the right of any such entity or group to the land. Indeed, the relief sought in the counterclaim would amount to a partial invalidation of Sections 2 and 16 of the New York Indian Law.

E. THE NATION'S SOVEREIGN IMMUNITY REQUIRES DISMISSAL OF PHILLIPS' COUNTERCLAIM.

The Court lacks subject matter jurisdiction over a lawsuit against an Indian tribe unless the tribe has waived immunity or Congress has abrogated it. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014); *see* Fed. R. Civ. P. 12(b)(1). Tribal immunity applies whether a claim is presented in a complaint or in a counterclaim. *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 508–09 (1991) (although tribe sought injunction, tribal immunity barred State's counterclaim seeking injunction against tribe). These immunity principles bar a defendant's counterclaim for declaratory relief even when it mirrors (and would negative) a tribe's claim for declaratory relief against the defendant. *Quinault Indian Nation v. Pearson*, 868 F.3d 1093, 1098-1100 (9th Cir. 2017) (dismissing counterclaim for mirror-image declaration and other relief); *Ute Indian Tribe v. Utah*, 790 F.3d 1000, 1009 (10th Cir. 2015) (Gorsuch, J.) (dismissing state's counterclaims for injunctive and declaratory relief in suit brought by tribe to assert tribal interest in land and to enjoin certain state prosecutions of crimes on the land). As *Quinault* explained, an exception applies to counterclaims that do not seek affirmative relief against the tribe, *e.g.*, *Berrey v. Asarco, Inc.* 439 F.3d 636, 643 (10th Cir. 2006) (recoupment of money), but the exception obviously does not apply in this case. The counterclaim seeks affirmative relief against the Nation – including a declaration that the Nation does not own the disputed land and an injunction barring the Nation from asserting rights in the land. The Nation is immune from that and all relief sought in the counterclaim in this case.

CONCLUSION

Phillips' counterclaim should be dismissed.

Respectfully submitted,

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