UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONEIDA INDIAN NATION,

Plaintiff,

v.

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

Defendants.

Civil Case No. 5:17-cv-1035 (GTS/ATB)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS

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Defendants and Counterclaimants Melvin L. Phillips, Sr. and Melvin L. Phillips, Sr. / Orchard Party Trust (together, "Phillips"), by and through undersigned counsel, hereby submits this Memorandum of Law in Opposition to Plaintiff's to Dismiss Defendants' Counterclaims.

PRELIMINARY STATEMENT

Melvin L. Phillips, Sr., is and has been a member of the Orchard Party Oneida (the "Orchard Party"). He and his Orchard Party ancestors have enjoyed uninterrupted use and occupancy of the land subject to the counterclaims since time immemorial. They have maintained undisturbed possession from generation to generation according to Orchard Party tradition. To memorialize and secure title to the land for himself and Orchard Party descendants under New York law as well as under Orchard Party tradition, Melvin L. Phillips quitclaimed property he possesses to a trust established under New York law. The Phillips deed was recorded on September 9, 2015 in Oneida County, New York, at Instrument No. 2015-01-012939. Two years later, on September 19, 2017, OIN brought this suit to dispossess Phillips and the Orchard Party of land subject to the trust deed, and to quiet title to that land in OIN.

On January 12, 2018, Phillips filed an answer and counterclaims ("A&C", ECF No. 17) in this action, seeking a declaration that the property at issue belongs to Phillips and that OIN may not assert title over land that the federal government in Article 13 of the January 15, 1838, Treaty of Buffalo Creek (7 Stat. 550) (the "Buffalo Creek Treaty") and the State of New York in its June 25, 1842 treaty with the Orchard Party, recognized by those treaties as titled in and possessed by the Orchard Party.

Phillips' title is not dependent on federal recognition or State recognition of the Orchard Party as an Indian tribe. Nonetheless, OIN argues that because the Orchard Party Oneida are not a federally-recognized Indian tribe, Phillips should be dispossessed of the land whose title in the

Orchard Party has been recognized by the United States and New York State for 180 years.[1] Furthermore, OIN's quiet title action would dispossess Phillips from real property, a remedy that OIN is precluded from obtaining by *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) ("*Sherrill")* and more specifically *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005) ("*Cayuga*"). Finally, even to the extent that the pleadings are not dispositive, the allegations made in the counterclaims give rise to issues of fact which preclude dismissal based on the pleadings. Given this court's mandate to construe pleadings "so as to do justice", FED. R. CIV. P. 8(e), and the important factual issues raised by the pleadings, this Court should deny OIN's motion to dismiss the counterclaims and permit a full and fair adjudication of the merits of the claims in this action.

ARGUMENT

I. Counterclaimants Have Adequately Alleged Facts Supporting this Court's Jurisdiction and their Entitlement to the Relief Sought

Pursuant to Federal Rule of Civil Procedure 8(a), a pleading (such as, in this instance, an answer and counterclaim) stating a claim for relief must contain only a "short and plain statement of the claim showing that the pleader is entitled to relief." Federal courts have repeatedly and consistently disclaimed the need for "detailed factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007)). Furthermore, on a motion to dismiss, facts alleged in the complaint must be taken as true, and all favorable inferences drawn in favor of the plaintiff. *Id.* at 678. And while this deference is not ordinarily applied to pure legal conclusions, legal conclusions *can* support the framework of a complaint, as long as they are, as here, supported by factual allegations. *Id.* at 679. Otherwise, "[when] there are well-pleaded factual allegations, a court should assume their veracity and then determine whether

[1] Pursuant to this recognition, Phillips' land is not taxed by the State of New York.

they plausibly give rise to an entitlement to relief." *Id.* Here, the answer and counterclaims give detailed, specific information about the history and events giving rise not only to plausibility, but to the conclusion that Phillips is entitled to the relief he seeks.

A. The Counterclaim Sufficiently Asserts Federal Jurisdiction

OIN's assertion that the counterclaims do not plead federal jurisdiction is factually incorrect. As noted at A&C ¶ 54, subject matter jurisdiction is vested in this court by virtue of 28 U.S.C. § 1367, which states that "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy". 28 U.S.C. § 1367(a). Both the complaint and the counterclaims seek to adjudicate title to the same plot of land; the counterclaim also seeks to quiet title in related land. Complaint ¶ 5; A&C ¶ 73. Plaintiff's argument that the claim and counterclaims are somehow unrelated, and that the court's exercise of subject matter jurisdiction is inappropriate, is counter to the plain language of the law. Both the complaint and the counterclaims derive from a "common nucleus of operative fact," and thus the exercise of this court's supplemental jurisdiction is entirely justified. *See United Mine Workers of Am. v. Gibbs*, 363 U.S. 715, 725 (1966).

In addition, the complaint itself asserts claims pursuant to federal law. Complaint ¶ 5 ("28 U.S.C. §§ 1331 & 1362 establish subject matter jurisdiction."). Plaintiff affirmatively asserts that its complaint is subject to federal jurisdiction because it involves "the Constitution (Indian Commerce Clause and Supremacy Clause), a statute (Nonintercourse Act), the treaties (Treaty of Canandaigua), and the common law of the United States". *Id.* For Plaintiff to then assert that Defendants' counterclaims, which not only involve the same subject matter but also the same federal laws as well as another federal treaty, the Buffalo Creek Treaty, that rebuts Plaintiff's claims, are somehow not susceptible to this Court's jurisdiction is nonsensical. If the

counterclaims are outside the jurisdiction of this Court, then so too are Plaintiff's claims. In fact, the counterclaims correctly assert that any claims technically outside the scope of federal law arise out of the same set of acts as Plaintiff's claims and are thus properly within this Court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

B. The Counterclaims Do Not Require the Orchard Party to be a Federally- or State-Recognized Indian Tribe

OIN's assertion that the counterclaim does not plead that the Orchard Party is an Indian tribe is irrelevant. The Orchard Party need not be a *federally-recognized* Indian tribe for Phillips' counterclaim to lie against OIN. In an affidavit to this court in *Oneida Indian Nation v. United States*, Civ. No. 74-CV-187 (N.D.N.Y.), an action involving another Oneida entity that lacked federal recognition, the Deputy Commissioner of Indian Affairs stated: "The absence of federal recognition, however, does not imply that it is not a successor-in-interest to any interests protected, secured, or reserved to the historic Oneida Nation . . .." (Affidavit of M. Sharon Blackwell, dated June 14, 2001, N.D.N.Y. Case No. 74-CV0187, ECF No. 294 at p. 56). The rights to and possession of land of the Orchard Party recognized by the United States in the Buffalo Creek Treaty, passed down from generation to generation by Orchard Party members to Phillips in unbroken succession, and now vested in the Melvin L. Phillips/Orchard Party Trust are protected interests under federal law and the decisions in *Sherrill* and *Cayuga*. The June 25, 1842, Treaty between New York and the Orchard Party also protected the land at issue for "such of the Orchard Party as intending to remain in the State". A&C ¶ 65.

The Phillips deed and counterclaims detail Melvin L. Phillips' Orchard Party lineage and various determinations made by state and federal courts and governments during the 19th, 20th, and 21st centuries regarding ownership and possession of the land at issue in this action and Melvin L. Phillips' role as designated Orchard Party leader. The current status of that ownership raises

questions of law for this court. The Phillips deed and counterclaims, however, sufficiently present and plead facts supporting a determination that: (1) the Orchard Party members were vested with possession and title to the land by the federal and state treaties; (2) Phillips is a direct descendant of the Orchard Party; and (3) the deed at issue in this action is valid and enforceable.

II. The Quitclaim Transferring Assets to the Melvin L. Phillips/Orchard Party Trust is Valid

A. Federal or State Recognition is Irrelevant to the Question of Phillips Being a Successor in Interest to Orchard Party Land Title Vested by Federal Treaty

Contrary to OIN's contention, this is a case about title to and possessory interest in real property, not tribal status under federal law. Phillips need not establish that the Orchard Party is a federally recognized tribe in order to have a possessory interest in and title to the lands that are protected from dispossession under *Sherrill* and *Cayuga*. Notably then, it is significant that OIN's complaint in this action ignores the Buffalo Creek Treaty, in which the United States explicitly identified separate and distinct interests in land that members of the Orchard Party and Christian Parties of Oneida Indians had, respectively, in Oneida and Madison Counties. Article 13 of the Buffalo Creek Treaty specifically identifies the Orchard Party and authorizes it "to make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." The Orchard Party made such arrangements in the Treaty of June 25, 1842 with the State of New York. That treaty resulted in all of the land subject to Phillips' counterclaim remaining in possession of Orchard Party members to this day. Both title and possession have been recognized and protected across generations of Orchard Party members. In no way has either title or possession been affected by the fact that the Orchard Party is not today recognized by the state or federal governments. For their part, the Oneidas of the First and Second Christian Parties--whose descendants today are federally recognized as the OIN--made a separate Treaty with the State of New York on May 23, 1842, pursuant to the Buffalo Creek Treaty under which

they alienated their land in Madison County to New York.[2] In any event, the Buffalo Creek Treaty rebuts OIN's contention at page 17 of their brief that the Orchard Party's June 25, 1842, state treaty is "irrelevant." Even to the extent that a state treaty by itself "cannot alter tribal possessory rights", as claimed by OIN, a federal treaty did affirmatively authorize tribes to make satisfactory arrangements with a state for its lands, in the form of the Buffalo Creek Treaty. *See* 25 U.S.C. § 177 (permitting transactions where made "by treaty or convention entered into pursuant to the Constitution").

B. The *Jewell* Settlement Does Not Alter the Orchard Party's Claim to its Land

OIN's brief discusses at length the settlement in *New York v. Jewell,* N.D.N.Y Case No. 08-cv-644, *approved at* 2014 WL 841764 (N.D.N.Y. Mar. 4, 2014) ("*Jewell*"), and claims that the Settlement Agreement entered into in that action by the Oneida Nation, the State of New York, the County of Madison and the County of Oneida dated May 16, 2013, ECF No. 319-2 (the "*Jewell* Settlement"), somehow affected title to the real property identified in the *Jewell* Settlement, including the land subject to the counterclaims. Phillips' counterclaims are consistent with the terms of the *Jewell* Settlement; OIN's claim is not. The *Jewell* Settlement is not a land conveyance document. It *does not vest title* in OIN to any land, let alone the land which is the subject of the counterclaims. The *Jewell* Settlement defines "Nation Land" as "land *possessed* by the Nation within the exterior boundaries of the Reservation [defined as land in Madison and Oneida Counties reserved in the Treaty of Canandaigua]" *and* that […] is (ii) the 104-acre (more or less) Marble Hill tract . . .." *Jewell* Settlement, Definition II.L (emphasis added). That statement in the *Jewell* Settlement does not establish OIN sovereignty over, or title to, the land which is the subject of the counterclaims, and explicitly distinguishes the land at issue in this action from land "possessed" by

[2] The effect of the Buffalo Creek Treaty on OIN title has never been adjudicated, as discussed by Justice Stevens and acknowledged by Justice Ginsberg in *Sherrill* at footnote 9.

OIN. It defines a category of land that OIN may proffer--without objection by New York and Oneida and Madison counties--to the Secretary of the Interior in a trust land application under the Indian Reorganization Act, 25 U.S.C. § 465. *Sherrill* holds that an approved trust application, which can only involve land to which OIN has both title and possession, is the sole means by which the land under the *Jewell* Settlement can become Nation Land subject to OIN sovereignty to the exclusion of New York laws and regulations (except as provided in the *Jewell* Settlement). Here, OIN has neither title nor possession, and has not made any application to the Secretary of the Interior for this land to be taken into trust. Under *Sherrill* and *Cayuga*, OIN is specifically barred from dispossessing any occupant of any land under the *Jewell* Settlement, including any of the Marble Hill tract. Thus possession by OIN is a critical prerequisite in Definition II.L. However, OIN does not possess the 104-acre Marble Hill tract, which is owned in part by Phillips, other Marble Hill descendants, and non-Indians. Under *Sherrill*, OIN cannot dispossess anyone, including Phillips, from any portion of the Marble Hill Tract.

In addition, the *Jewell* Settlement is a contract among its parties. It does not affect the rights of non-parties--though it does protect the possessory interests of non-parties, such as Phillips--to challenge the Settlement. The *Jewell* Settlement cannot be used to bar third parties from pursuing their relevant claims. *Jewell*, 2014 WL 841764 at *10 ("a settlement agreement, even when incorporated into a court order such that it becomes a consent decree, remains a contract between the parties"); *id.* ("[C]onsent agreements are ordinarily intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented") (quoting 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4443 (1981) (*citing Ariz. v. Cal.*, 530 U.S. 392, 414, *supplemented*, 531 U.S. 1 (2000)).

C. The Counterclaims Do not Implicate the Nonintercourse Act

The Nonintercourse Act, 25 U.S.C. § 177, which essentially prohibits the alienation of lands from any Indian nation or tribe of Indians without congressional sanction, is not implicated in this case. No Orchard Party land is being alienated. Rather Phillips' deed arranges for the intergenerational transfer of the possessory interest in that land to members of the Orchard Party to whom it belongs on terms and in the manner used by the Orchard Party since at least 1838. The integrity of possession and title to the Orchard Party land involved in the Phillips deed are intact. The Phillips deed does not alienate the land from any present or future Orchard Party descendant.

Even if the court should find that the terms of the deed somehow implicate the Nonintercourse Act, the Phillips deed complies with that act because of the authority granted to the Orchard Party by the congressionally-approved Buffalo Creek Treaty. Pursuant to that congressional authority, the Orchard Party, including Phillips, have unfailingly made "satisfactory arrangements" to maintain the land in possession and ownership of the Orchard Party's descendants, and were made with the concurrence of the State of New York as demonstrated by, for example, the June 25, 1842 treaty and the fact that Phillips' land is exempted from property taxation.

III. Tribal Sovereign Immunity does not Insulate OIN from Defendants' Counterclaims in this Case

Finally, OIN argues that despite its having brought an action to quiet title to immovable property outside its jurisdiction and territory, it is immune from a counterclaim by the party in possession of that same property.

The cases cited by OIN are inapposite. *Quinault Indian Nation v. Pearson for Estate of Comenout*, 848 F.3d 1093 (9th Cir. 2017), involved an action where a defendant sought to assert counterclaims against a tribe *after the tribe had dismissed its own action*. Here, OIN continues to

maintain its own action, which essentially mirrors the relief sought by the Orchard Party. In addition, the counterclaims in that case were found by the court to have gone beyond the allegations of the Indian tribe's suit; the suit by the tribe asserted RICO and fraud claims, while the counterclaims included the seeking of business permits, a declaration that defendant did not violate the law, and lost profits, among others. *Id.* at 1098. Finally, and most important, *Quinault* took pains to distinguish its fact pattern from that of *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241 (8th Cir. 1995), where "the Eighth Circuit allowed counterclaims to quiet title," because "the tribe there did more than file a lawsuit: it invoked the district court's equitable power to determine the status of land." This is exactly what OIN has done in this action -- the first paragraph of the Complaint in this action states, "Plaintiff Oneida Indian Nation (the 'Nation') sues to quiet title of 19.6 acres" of alleged OIN land. This is precisely why these counterclaims should be permitted to proceed.

The other case cited by OIN, *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 79 F.3d 1000 (10th Cir. 2015), involved dueling claims of sovereign immunity and criminal prosecution authority on tribal lands. The *Ute* court held that a "Disclaimer, Referral, and Mutual Assistant Agreement" between the tribal, state, and local governments did not constitute an express waiver of sovereign immunity. It did not address the question of whether a tribe may voluntarily bring suit and proceed to hide behind the principle of sovereign immunity to protect itself from countersuit on the exact same issues. As *Rupp* clearly points out, and as a matter of basic equity, a tribe should not be permitted to do so.

In addition, the court should note that the issue of tribal sovereign immunity in real property litigation is pending in the United States Supreme Court in *Upper Skagit Indian Tribe v. Lundgren*, No. 17-387 (argued March 21, 2018). There, a tribal sovereign, the Upper Skagit Tribe,

purchased land beyond its jurisdiction and sovereignty and then invoked sovereign immunity when an adjacent landowner sought to quiet title in State court against the Tribe's alleged encroachment on the adjacent land. There are certain factual differences between that case and this one, but the immovable property exception to sovereign immunity in that case informs the appropriate disposition of OIN's sovereign immunity claim in this case. Here, OIN does not own, and is not in possession of, the land under the Phillips deed for which it has sued to quiet title and for which Phillips has counterclaimed to quiet title. Despite its factual differences, *Upper Skagit* introduces the application of the "immovable-property rule" exception, a limitation on sovereign immunity in the common law in the context of foreign sovereign immunity and the sovereign immunity of the States, to cases involving allegations of tribal sovereign immunity. The court should apply the immovable property exception to sovereign immunity here to overcome OIN's purported sovereign immunity defense to Phillips' quiet title counterclaim.

The Brief of the Respondents in *Upper Skagit* persuasively sets out the rationale for limiting the scope of sovereign immunity with respect to immovable property. It is accessible at this link: https://www.supremecourt.gov/DocketPDF/17/17-387/36071/20180221123548256_Merits%20Brief.pdf. Below is an excerpt:

> This Court first recognized the unavailability of sovereign immunity in immovable-property cases in *Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812). In that case, the Court relied on van Bynkershoek in observing that "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting the property to the territorial juris-diction; he may be considered as so far laying down the prince, and assuming the character of a private individual." *Id.* at 145. That observation was consistent with a uniform body of international-law commentary before and since.
>
> […]
>
> Congress also has recognized that sovereign immunity does not extend to cases involving real property held by one sovereign in the territory of another. In the Foreign Sovereign Immunities

> Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891, Congress expressly provided that immunity does not extend to cases "in which * * * rights in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4). As this Court has explained, that provision did not represent a change in the law but rather was intended "to codify . . . the pre-existing real property exception to sovereign immunity recognized by international practice." *Permanent Mission of India* v. *City of New York*, 551 U.S. 193, 200 (2007) (quoting *Asociacion de Reclamantes*, 735 F.2d at 1521); see H.R. Rep. No. 1487, 94th Cong., 2d Sess. 20 (1976); Restatement (Second) of Foreign Relations Law of the United States § 68(b) (1965).

The arguments made in *Upper Skagit* support the determination that the counterclaims in this case, which similarly involves immovable property (specifically, the Orchard Party land at issue in the Phillips deed), do not implicate sovereign immunity.

CONCLUSION

For the reasons stated herein, Defendants respectfully requests that the Court deny Plaintiff's Motion to Dismiss Defendant's Counterclaims. In the alternative, Defendants respectfully request that the Court grant them leave to file an Amended Answer and Counterclaims.

Respectfully submitted,

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