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)

ORAL ARGUMENT REQUESTED

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

Eric N. Whitney
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836 8000
eric.whitney@arnoldporter.com

Attorneys for Melvin L. Phillips, Sr. and Melvin L. Phillips, Sr. / Orchard Party Trust

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

Defendants Melvin L. Phillips, Sr. and Melvin L. Phillips, Sr. / Orchard Party Trust (together, "Defendants"), by and through undersigned counsel, hereby submit this Memorandum of Law in Opposition to Plaintiff's Motion for Judgment on the Pleadings.

PRELIMINARY STATEMENT

Melvin L. Phillips, Sr., is an Oneida Indian and a descendant of Oneida Indians who comprised the Orchard Party of Oneida (the "Orchard Party"). He and his Orchard Party ancestors have enjoyed uninterrupted use and occupancy of the land subject to this action 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 ("Answer," ECF No. 17) with counterclaim 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. On March 2, 2018, Plaintiff filed a motion to dismiss Defendants' counterclaim for failure to state a claim ("Motion to Dismiss," ECF No. 24). On November 15, 2018, the Court granted Plaintiff's motion and dismissed the counterclaim. On November 26, 2018, Plaintiff's filed the instant Motion for Judgment on the

Pleadings ("Motion for Judgment," ECF No. 32), arguing that the Court's Order dismissing the counterclaim ("Order," ECF No. 30) necessitated that Plaintiff had already conclusively demonstrated its entitlement to relief.

ARGUMENT

Plaintiff's Motion for Judgment appears to be based on a mistaken belief that it can justify judgment on the pleadings—an extreme and disfavored remedy—through repetition of its previous arguments in favor of dismissing Defendants' counterclaim. But Plaintiff's Motion for Judgment must satisfy an even higher standard; Plaintiff is wrong to treat the Court's Order as adopting Plaintiff's view of the facts; and the sparse factual arguments made in Plaintiff's brief memorandum of law do not meaningfully attempt to prove facts that could justify judgment on the pleadings. Plaintiff's arguments regarding Defendants' counterclaim are not a basis for judgment on the claims of Plaintiff's Complaint.

I. Contrary to Plaintiff's Assertion, the Motion to Dismiss and the Motion for Judgment on the Pleadings Are Subject to Standards and Analysis that Differ in Critical Ways

A. Plaintiff's Motion to Dismiss Required Demonstrating Only that Defendants Had Not Carried the Affirmative Burden of Particularized Pleadings

In its November 15 Order, the Court laid out the legal standard that governed Plaintiff's previous motion—a "challenge to the 'sufficiency of the pleading' under Fed. R. Civ. P. 8(a)(2)."[1] As the Court explained in detail, Plaintiff's Motion for Dismissal dealt only with whether Defendants' counterclaim included sufficient detail, containing "a *short and plain*

[1] The Court noted that it is also possible to challenge "the legal cognizability of the claim." (Order at 11.) Plaintiff's original motion for dismissal did not assert that the claim was not cognizable, however, and the Court subsequently granted Plaintiff's motion only on the basis of the sufficiency of the counterclaim. (Order at 14.) The Court thus did not question the cognizability of Defendants' arguments, and that standard is not relevant to the instant motion.

statement of the claim *showing* that the pleader is entitled to relief." (Order at 12 (quoting Fed. R. Civ. P. 8(a)(2) (emphasis in original)).

The Court went on to detail the "fair notice" that claims must provide in order to satisfy this standard. The Court applied the standards laid out in the Supreme Court's *Iqbal* and *Twombly* decisions, explaining that allegations must have sufficient detail to "enabl[e] the adverse party to answer and prepare for trial"—a requirement that uniquely applies to the evaluation of *affirmative claims*. (Order at 12-13 (noting that *Twombly* specifically lowered the standard for dismissal of such claims, moving away from any requirement that claims only be dismissed for lack of "conceivability").) This Court has previously held that this standard applies to the claims in a complaint, to affirmative defenses, and to counterclaims, *Optigen, LLC v. Int'l Genetics, Inc.*, 777 F. Supp. 2d 390, 399 (N.D.N.Y. 2011)[2], but has not to Defendants' knowledge applied that standard to a defendant's denials in an answer. For Plaintiff's motion to be successful in spite of the denials and defenses in Defendants' Answer, Plaintiff must therefore demonstrate either that the Answer fails to meet the minimal requirements of notice pleading—including through reference and incorporation of documents such as the deed, attached to the Complaint as Exhibit E—or that the disputed factual issues raised by the Answer are either immaterial or too implausible to ever be supported by discovery. *See Edwards v. Jenkins*, 2013 WL 8366052, at *1 (E.D. Mich. Nov. 21, 2013) (holding that a plaintiff is entitled to judgment

[2] Defendants note that the law is unsettled regarding the relevant pleading standard for affirmative defenses. While this Court and various others have concluded that a heightened pleading standard is appropriate, a number of others have held that affirmative defenses should be held to only the lower standard of notice pleading. *See, e.g.*, *Bayer CropScience A.G. v. Dow AgroSciences LLC*, 2011 U.S. Dist. LEXIS 149636 (D. Del. Dec. 30, 2011) (listing nine reasons that the *Iqbal/Twombly* standard should not apply to affirmative defenses). The court in *Bayer* highlighted, in particular, that much of the rationale for the *Iqbal/Twombly* standard does not appear relevant in the context of affirmative defenses. Defendants believe that these arguments are persuasive, and would ask the Court to adopt the *Bayer* court's reasoning. In light of the Court's previous rulings on this issue, however, Defendants explain in this brief why its affirmative defenses are sufficient to defeat Plaintiff's motion even with the stricter pleading standard.

on the pleadings if the defendant's answer fails to satisfy Rule 8's pleading standard by "failing to deny the elements constituting a cause of action."); *Kertesz v. Gen. Video Corp.*, 2010 WL 11506390, at *2 (S.D.N.Y. Mar. 31, 2010) ("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.").

The Court's explanations of the legal standard and basis for Plaintiff's Motion to Dismiss are critical for placing the Court's Order in its proper context and understanding its impact on the ongoing litigation. The Court's ultimate decision to dismiss the counterclaim[3] indicated only that the counterclaim was deemed to lack sufficient "factual allegations" to make the counterclaim *as drafted* more than "speculative" under *Iqbal* and *Twombly*. The Court's decision, however, explicitly does not imply a determination that Defendants "can prove no set of facts in support" of their counterclaim, (Order at 13 (recognizing that *Twombly* "retired" that standard laid out in *Conley v. Gibson*)), or that either party's asserted facts have been proven or disproven.

B. The Standard Applied in Plaintiff's Motion for Dismissal of the Counterclaim Does Not Apply to the Majority of Defendants' Answer

Plaintiff asserts that its two motions are governed by "[t]he same legal rules," but it fails to provide a single citation or argument in support. On the contrary, a direct review of the relevant rules demonstrates that Plaintiff has not fully grappled with the standards and burdens that it must satisfy to prevail on the instant Motion for Judgment.

[3] As argued in Defendants' opposition to Plaintiff's Motion to Dismiss ("Opposition to MTD," ECF No. 27), Defendants continue to believe that the counterclaim was adequately pled, and that the facts will furthermore ultimately bear out Defendants' theory of the case. While Defendants reserve all rights to appeal the Order at the appropriate time, for the purpose of the instant motion, Defendants address the impact of the Order as issued by the Court.

As a very preliminary matter, the two motions invoke different text within the Federal Rules of Civil Procedure. Plaintiff's earlier Motion to Dismiss sought dismissal of Defendants' counterclaim under Rule 12(b)(6), arguing that Defendants had failed to state a claim with adequate factual support under the heightened pleading standards of *Iqbal* and *Twombly*. (Motion for Judgment at 5). As Defendants argued in opposition and the Court recognized in its Order, Plaintiff's reliance on the *Iqbal/Twombly* line of cases implicitly invoked Rule 8(a)(2), which establishes the requirement that an affirmative "claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." FRCP 8(a)(2). The parties and the Court are in agreement on this relevant standard for Plaintiff's previous motion.

Plaintiff, however, does not properly apply that standard to its Motion for Judgment. Whereas the prior motion challenged the counterclaim in which Defendants sought relief, now Plaintiff insists that it is entitled to judgment over the remainder of Defendants' Answer, including both denials and affirmative defenses. But absent the dismissed counterclaim, Defendants' responsive pleading contains no claims for relief, and thus is governed only by Rule 8(b), "Defenses; Admissions and Denials." Regarding defenses, the rule requires that a responsive pleading must state "in short and plain terms its defenses to each asserted claim against it,"[4] while the party's responses to specific allegations need only "admit or deny the allegations asserted against it by an opposing party." FRCP 8(b)(1). As this Court has previously explained, the Supreme Court holds that "by requiring the above-described 'showing,' the pleading standard under Fed. R. Civ. P. 8(a)(2)" requires the pleading party to provide the grounds upon which its claims rests. *See* (Order at 12); *Jenkins v. County of*

[4] While Rule 8(b) requires that affirmative defenses be stated shortly and plainly, it does not expressly include the requirement found in Rule 8(a) that the party must "show[] that the pleader is entitled to relief."

Washington, 126 F. Supp. 3d 255, 273 (N.D.N.Y. 2015). But this requirement of a "showing" was not incorporated in Rule 8(b), and thus does not impose a heightened pleading burden on Defendants' denials.

In suggesting that the same standard applies to both of Plaintiff's motions, Plaintiff would seemingly have the Court apply the requirements of Rule 8(a) to Defendants' Answer. But such a result would improperly incorporate the heightened pleading standards of *Iqbal* and *Twombly* in a context where they have no place. In responding to Plaintiff's various factual allegations, Defendants were required only to admit or deny Plaintiff's allegations and to plainly state their defenses. Defendants fully met that standard, with denials of Plaintiff's allegations throughout the Answer, and with affirmative defenses that are both plainly stated and supported by Defendants' preceding articulation of the facts.

Another key distinction between Plaintiff's Motion for Dismissal and its Motion for Judgment—which will be elaborated on further below—is that Defendants' counterclaim (now dismissed) argued that Defendants were affirmatively entitled to relief, while Defendants' denials and affirmative defenses were offered to dispute that *Plaintiff* would be entitled to relief. Plaintiff's Motion for Dismissal, then, argued that Defendants' had not pled the counterclaim in sufficient detail to demonstrate that Defendants could ultimately prevail on them. But in evaluating Defendants' denials, which dispute Plaintiff's allegations, it is Plaintiff who will bear the ultimate burden at trial. Even where an affirmative defense may bear similarities to a dismissed counterclaim, the two exist in different legal postures. Put another way, just because the Court has determined that certain factual allegations did not sufficiently demonstrate Defendants' entitlement to affirmative relief, due to differing standards and postures, those factual allegations may still legitimately challenge *Plaintiff's* entitlement.

Lastly, there are arguments and defenses in Defendants' Answer, which would have to be addressed in order to justify judgment on the pleadings, that are not directly addressed in either the Court's Order or Plaintiff's Motion for Judgment. As one example, Plaintiff has attempted to address in its Motion for Dismissal and Motion for Judgment certain standards regarding potential claims of Orchard Party tribal sovereignty that Defendants do not make, but has not addressed arguments Defendants do make sounding in real property law regarding successors-in-interest, possession, and abandonment. Plaintiff cannot rely on the victory of its Motion for Dismissal to circumvent its burden of proof regarding arguments and defenses that were not the subject of that motion. The unaddressed substance of Defendants' arguments will be dealt with in more detail below.

Plaintiff's Motion for Judgment ignores all of this nuance in the requirements of pleadings. Plaintiff has not attempted to explain the lower pleading standard that would be applicable to Defendants' denials throughout the Answer, and thus includes no argument alleging deficiencies in Defendants' denials. Plaintiff further fails to even mention "affirmative defenses" in its motion, and thus even under the heighted *Iqbal/Twombly* standard, Plaintiff has not alleged any specific deficiency in Defendants' affirmative defenses that would justify striking or dismissing them. Instead, Plaintiff has effectively requested judgment on the pleadings based on just its own interpretations of the facts, without addressing any of Defendants' substantive responses that dispute Plaintiff's account.

C. Judgment on the Pleadings Requires Plaintiff to Clear a Higher Burden of Proof, and Should Be Strongly Disfavored at this Early Stage

Motions for judgment on the pleadings face a high bar and a number of obstacles. Here, where Plaintiff seeks judgment over Defendants' Answer, Plaintiff in particular must overcome a greater burden than applied to its motion challenging Defendants' counterclaim. Plaintiff briefly

recognizes in its brief that it must "establish that there remains no material issue of fact to be resolved," but that wording does not capture the additional hurdles that Plaintiff must overcome to demonstrate an entitlement to relief at this very early stage of the litigation. *See Juster Assoc. v. Rutland*, 901 F.2d 266, 269 (2d Cir. 1990) (movant is "entitled to judgment on the pleadings only if it has established that 'no material issue of fact remains to be resolved and that [it] is entitled to judgment as a matter of law." (quoting Wright & Miller, Federal Practice and Procedure § 1368, at 690 (1969))).

Because motions for judgment on the pleadings grant such a severe remedy at such an early stage of the case—before discovery has even allowed the parties to test each other's claims—they are "disfavored and rarely granted." *See L.C. Eldridge Sales Co. v. Azen Mfg. PTE, Ltd.*, 2012 U.S. Dist. LEXIS 196631 (E.D. Tex. Dec. 10, 2012). The Second Circuit has recognized that judgment on the pleadings "is designed to provide a means of disposing of cases when the material facts are not in dispute." *Rivera v. Schweiker*, 717 F.2d 719, 722 n.1 (2d Cir. 1983). To evaluate whether the motion should be granted, the non-moving party "enjoys the benefit of all inferences that plausibly can be drawn from well-pleaded allegations." *Ciralsky v. C.I.A.*, 689 F. Supp. 2d 141, 159 (D.D.C. 2010). Judgment on the pleadings is not an appropriate remedy, however, when the parties have fundamental, unresolved disagreements on material facts.

1. Defendants' Denials and Defenses Effectively Preclude Judgment

Motions for judgment are frequently brought by defendants, in contexts where the complaint has not adequately established the elements of a claim, or where defendants' answer clearly undermines the complaint's assertions of fact. Plaintiffs may also request judgment on the pleadings over the defendants' answer, but in that context, "plaintiff is not entitled to judgment on the pleadings if the defendant's answer raises issues of fact or affirmative

defenses." *See Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147, 1159 (9th Cir. 2015). Plaintiff thus faces an especially uphill battle to justify a Motion for Judgment at this stage.

As articulated above, Defendants are neither the movant nor party seeking relief[5], and they are not required to affirmatively demonstrate their right to relief in order to defeat Plaintiff's motion. *See Bud Forrest Entm't, Inc. v. Turnaround Artists, Inc.*, 2018 U.S. Dist. LEXIS 5427, at *9 (S.D.N.Y. Jan. 10, 2018) ("When stated in an affirmative defense, defendants do not bear the burden of proof, as they would on a motion to dismiss; rather it is the plaintiff who must meet the 12(f)[6] standard."). Instead, "Defendants need only raise questions of material fact or present affirmative defenses." *Hamilton v. Yates*, 2014 WL 4660814, at *2 (E.D. Cal. Sept. 17, 2014).

Critically, the assertion of affirmative defenses is often held to preclude judgment on the pleadings in a plaintiff's favor. *See Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d. 228, 230-31 (9th Cir. 1989) ("[I]f the defendant raises an affirmative defense in his answer it will usually bar judgment on the pleadings."). Courts have also given particular weight and deference to the affirmative defense that Plaintiff has failed to state a claim, which is "invulnerable as against the [12(f)] motion." *See Aros v. United Rentals, Inc.*, 2011 U.S. Dist. LEXIS 125870, *12 (D.C. Conn. Oct. 31, 2011) (holding it to be "well settled" that Defendants need not "identify the factual deficiency alleged"

[5] Defendants could have brought its own motion for judgment on the basis of the deed attached to Plaintiff's Complaint, which provides title to Defendants on its face and which was accepted and executed by the government of Oneida County. *See Stein v. Doukas*, 98 A.D.3d 1026, 1027, 1029 (N.Y. App. Div. 2012) (in defense against claim that a deed had been "wrongfully manufactured," "a certificate of acknowledgement attached to an instrument such as a deed raises a presumption of due execution"), Defendants have chosen not to bring such a motion at this time, however, in light of the early stage of the case.

[6] This case related to a motion to strike under Rule 12(f). Additionally, courts treat motions for judgment on the pleadings under Rule 12(c) as functionally equivalent to a motion for dismissal under Rule 12(b)(6), with the same legal standards. *Jenkins v. County of Washington*, 126 F. Supp. 3d 255, 272 (N.D.N.Y. 2015). Throughout this memorandum of law, Defendants will refer to Plaintiff's motion as invoking Rule 12(c) and as a motion for judgment, but citations may refer variously to the equivalent framing of the motion and applicable rules.

in order for the defense to be sufficient and sufficiently pled). Defendants' Answer asserts a number of affirmative defenses that would bar Plaintiff's recovery, including that Plaintiff has failed to state a claim upon which relief can be granted. (Answer at ¶¶ 40-53.)

In fact, even just the denial of critical facts in Defendants' Answer, by itself, can be fatal to Plaintiff's motion at this stage. *See Bond v. Sterling, Inc.*, 997 F. Supp. 306, 312 (N.D.N.Y. 1998) (denying motion for judgment on the pleadings based on general denials, which "raise material fact issues"). To succeed on the Motion for Judgment, Plaintiff bears the burden to demonstrate its case and to show the absence of any dispute of material facts—and where Defendants have denied certain facts, the Court must accept those denials just as it would other statements of facts by the non-movant.

2. Judgment on the Pleadings is Particularly Inappropriate Based on the Current, Preliminary Understanding of the Relevant Facts

As an important extension of Plaintiff's high burden to show that there are no material disputes of fact—and the requirement to accept Defendants' factual assertions as true—the question at issue for Plaintiff's Motion for Judgment is whether Plaintiff has *conclusively* proven its entitlement to relief. While the Court dismissed Defendants' counterclaim for a failure to plead factual support in sufficient detail, even such lack of support at this stage would not be sufficient to permit judgment on the pleadings. If there is even a chance that Defendants will be able to offer facts supporting their defenses and undermining Plaintiff's claims at trial, then the Motion for Judgment must be denied. This has several specific applications and consequences.

First, Defendants were not required to include in the Answer every fact that might support their defenses or undermine Plaintiff's affirmative claims. The facts of this litigation are not limited to only those specific facts explicitly articulated in the Complaint and Answer. On the contrary, it is expected that each party's theory of the case, and the facts on which those

theories rely, will continue to evolve over time. Judgment on the pleadings at this stage would inappropriately lock Defendants into a single set of facts and theory of the case at an extremely early stage of litigation, depriving Defendants of a full and fair hearing on the merits of its case.[7] *See, e.g.*, *Biro v. Conde Nast*, 963 F. Supp. 2d 255, 265 (S.D.N.Y. 2013) (explaining that "hasty or imprudent use of this summary procedure . . . violates the policy in favor of ensuring to each litigant a full and fair hearing on the merits of his or her claim or defense.").

Second, if discovery may shed light on the relevant factual disputes, it would be inappropriate to "summarily extinguish litigation at the threshold and foreclose the opportunity for discovery and factual presentation." *Maniaci v. Georgetown Univ.*, 510 F. Supp. 2d 50, 58 (D.D.C. 2007). Defendants need only show that there are "allegations in the [answer] which, if proved, would provide a basis for recovery" to survive the Motion for Judgment on the Pleadings. *Id.* Defendants are not required to have already obtained any potential documents that would support their responses and defenses before even having filed their Answer. The purpose of discovery is to allow the parties time to test each other's theories and obtain relevant documents, which can significantly change the contours of the case.

Third, the question raised by Plaintiff's Motion for Judgment is not about whose pleading is more persuasive, but about whether Plaintiff (and only Plaintiff) can make a decisive showing of the true inevitability that they will be able to obtain relief. Defendants have not filed a similar motion for judgment, and only need to show that there are questions about which party will ultimately have the more persuasive arguments in the future at trial. Even if the Court were to

[7] Even where courts do grant motions for judgment on the pleadings, they traditionally allow the non-moving party an opportunity to amend the pleadings to address any deficiencies that the court identified. This alternative remedy helps alleviate some of the potential risks associated with judgment on the pleadings, as it prevents a technical failure in the pleading—or early decisions made regarding the party's arguments—from determining the case's ultimate outcome. Should the Court determine that Plaintiff has carried the high burden for judgment on the pleadings, Defendants would request an opportunity to address the Court's concerns through an amended Answer.

believe "on the face of the pleading that [Defendants' chances] are very remote and unlikely . . . that is not the test." *Scott v. City of New York*, 2004 WL 2980135, at *1 (S.D.N.Y. Dec. 27, 2004); *Antrobus v. Dep't of Corr.*, 2009 WL 773277, at *2 (S.D.N.Y. Mar. 24, 2009) ("A [pleading] should not be dismissed simply because a [party] is unlikely to prevail on the merits.").

There is some irony that, while the Court must evaluate the sufficiency of the parties' pleadings that it has studied, it must evaluate the parties' burdens at trial without limiting itself to only the facts and arguments already before it. The disposition of Plaintiff's Motion for Judgment requires, simultaneously, setting aside any long-term expectations regarding the case and open-mindedly considering how the parties' factual and legal arguments may evolve in the long-term. *See Wager v. Pro*, 575 F.2d 882, 884 (D.C. Cir. 1976) (motion must be denied where issues of fact exist, "even if the trial court is convinced that the party opposing the motion is unlikely to prevail at trial"); *Scott*, 2004 WL 2980135, at *1 (the "narrow" issue in evaluating Plaintiff's motion "is not whether a plaintiff will ultimately prevail but whether the [defendant] is entitled to offer evidence"); *Ciralsky*, 689 F. Supp. 2d at 159 ("Whether [the claims] may turn out to be unfounded is irrelevant at this stage; what matters is only that [the party] has pled those claims sufficiently. Indeed, a trial court should not grant [a motion] simply because it is dubious of the [party]'s ability to [dis]prove the allegations of the complaint at trial.").

II. The Counterclaim Order Reflects the Court's Determination on Sufficiency of Defendants' Dismissed Pleading, Not Findings of Fact or Law of the Case

The disconnects described above between the standards applied to Plaintiff's original Motion to Dismiss and the standards, burdens, and obstacles of the instant Motion for Judgment are not mere technicalities, but serious flaws in the new motion's premise. Plaintiff has not addressed the pleading standard that governs Defendants' factual denials; has not alleged how

specific affirmative defenses would fail even under the heightened pleading standard; and has ignored the various obstacles and burdens that make judgment on the pleadings a disfavored remedy. Rather, Plaintiff has simply relied on the Court's granting of its Motion to Dismiss, seemingly suggesting that the Court's Order dismissing the counterclaim logically requires dismissal of the Answer as well.

In its Order, the Court found that Defendants' counterclaim had not provided factual support to affirmatively demonstrate the validity of Mr. Phillips' execution of the trust declaration and quitclaim deed. In the context of Defendants' counterclaim, for which Defendants bore the burden to support the affirmative claim, the Court determined that Defendants had not underpinned the counterclaim with sufficient affirmative factual support to "give[] the defendant *fair notice* of what the plaintiff's claim is and the grounds upon which it rests," which in turn would have made it more difficult for Plaintiff "to answer and prepare for trial." (Order at 12.) While Defendants in this respect disagree with the Court, and maintain that Plaintiff had more than sufficient notice of the basis for Defendants' counterclaims, there should be no question that the lengthy deed documents attached to Plaintiff's own Complaint as Exhibit E lays out in detail the basis for Defendants' position regarding ownership of the land.

Plaintiff, furthermore, repeatedly treats the Court's Order as making conclusive, final findings of fact in Plaintiff's favor. (Motion for Judgment at 1 (characterizing the Court's holdings regarding pleading standards as affirmatively "explaining" facts); Motion for Judgment at 3 (characterizing the Court's dismissal as "accept[ing] that the 19.6-acre tract is a part of the Nation's reservation").) This distorts the substance of the Court's Order in an attempt to find a basis for the instant motion. The Court undeniably sided with Plaintiff regarding the sufficiency of Defendants' counterclaim—granting the motion to dismiss for the "alternative reasons stated

in Plaintiff's memoranda of law"—but Plaintiff stretches its victory too far in treating the Order as an adoption of Plaintiff's underlying facts.

Plaintiff offers one brief explanation for why it treats dismissal of the counterclaim as determinative of the fate of the rest of Defendants' Answer, but this falls into the same trap as the rest of Plaintiff's motion. Plaintiff raises a comment from Defendants that the relief sought by the Complaint and the counterclaim "'essentially mirrors the relief' sought by the other" and presented "the exact same issues." (*See* Motion for Judgment at 1). While Plaintiff has accurately quoted Defendants' previous briefing, Plaintiff's attempt to spin these quotes into a justification for its motion fails. It is entirely true that the relief sought by the Complaint and the counterclaim were mirror images of one another—each sought quiet title to the 19.6[8] acres of land at issue. And it should be unsurprising that the Complaint and the counterclaim therefore involved the "exact same issues" for that reason—ultimate resolution of the factual and legal questions in this case at trial will determine whether one party or the other is entitled to the land. But the complementarity of the relief requested by each party does not change the relevant legal standard for judgment on the pleadings—Plaintiff must still demonstrate that there are no issues of material fact in dispute. Plaintiff has failed to do so.

As already discussed at length above, the Court's dismissal of Defendants' counterclaim stems from a finding that Defendants had not provided sufficient factual grounding to support their own potential entitlement to relief. The dismissal did not, however, suggest that Plaintiff *had* affirmatively proved any facts, nor did it imply that Defendants will never be able to offer facts supporting their view of the case—merely that Defendants had not laid sufficient support in

[8] While Defendants' counterclaim was specifically directed to the 19.6 acres at issue in Plaintiff's Complaint, Defendants note that the deed attached to Plaintiff's Complaint as Exhibit E is not limited to only that parcel. Based on evidence that comes to light in discovery, Defendants reserve their rights in this case to seek quiet title to the 19.6 acres, as well as any other parcels reflected in the deed.

the counterclaim. Even if Defendants had not provided sufficient facts for their counterclaim in the pleadings—a conclusion with which Defendants disagree—that would not mean Plaintiff has proven its own entitlement. At this early stage, long before trial, before discovery has begun, it need not be one or the other. In effect, the Court dismissed Defendants' counterclaim for a technical failure of pleading, rather than impossibility, leaving any number of disputed issues of fact to be resolved at trial—including the validity and interpretation of the deed documents relied on by Defendants and attached to Plaintiff's own Complaint, which unquestionably raises issues of material fact regarding the long-term usage and occupation of the land. If anything, this is a relatively mundane situation in litigation, and this litigation should now proceed on the normal path to trial, where Plaintiff can attempt to carry the burden to prove its claims.

As overlap between an answer and the defendant's counterclaim is certainly not rare, Plaintiff is not the first litigant attempting to conflate the dismissal of counterclaims with broader dismissals of a defendant's answer. Plaintiffs may even challenge counterclaims and affirmative defenses in a single motion, allowing courts to cement and emphasize the different standards that apply to each. But even where a defendant's counterclaim and affirmative defenses significantly overlap, dismissal of the counterclaim does not require or imply that the defendant's answer either fails to meet its own pleading standard or lacks merit on the substance of the claims. Given the different standards and postures of the two motions, Plaintiff is effectively insisting that if Defendants' counterclaim did not include facts sufficient to defeat Plaintiff's claim, then no such facts exist or can ever exist in the future. As a matter of logic, Plaintiff's linking of the two motions does not hold together.

In cases such as *Summers Mfg. Co. v. Tri County Ag, LLC*, plaintiffs have emphasized in motions to dismiss that the counterclaim and affirmative defenses "suffer[] from the same

deficiencies," essentially "parrot" each other, and "must be dismissed for the same reason." *Summers Mfg. Co. v. Tri County Ag, LLC*, 300 F. Supp. 3d 1025 (S.D. Iowa 2017) (dismissing counterclaims but not affirmative defenses, after concluding affirmative defenses required only notice pleading); *see also Sony/ATV Music Pub. LLC v. D.J. Miller Music Distributors, Inc.*, 2011 WL 4729807, at *8 (M.D. Tenn. Oct. 7, 2011) (dismissing defendants' counterclaim but denying plaintiffs' request to dismiss defendants' affirmative defenses). While the *Summers* court had reached a different conclusion regarding the applicable pleading standard for affirmative defenses, the reasoning of *Summers* and *Sony* can still be persuasive regarding the difference between dismissing Defendants' counterclaim and dismissing their denials.

III. Contrary to Plaintiff's Assertions, Numerous Disputes of Fact Preclude Judgment on the Pleadings

A. Plaintiff Fails to Translate the Factual Positions from its Motion to Dismiss into the Context of a Motion for Judgment

Plaintiff attempts to rely almost exclusively on the Court's Dismissal Order, but these arguments run aground for a number of reasons, both general and specific. Because Plaintiff has almost entirely relied on previous pleadings, and has not framed its factual arguments according to the appropriate pleading standards and the high bar for a motion for judgment, Plaintiff has failed to even make allegations that would justify judgment on the pleadings—let alone prove those allegations. For the same reason, however, it is difficult for Defendants to offer a meaningful rebuttal regarding Plaintiff's underlying factual claims.[9] Nevertheless, Defendants

[9] As Plaintiff's sparse opening brief lacked discussion of and allegations regarding the relevant standards and burdens—which in turn made it difficult for Defendants in their response to address the relevant issues—Plaintiff should not be permitted in its reply brief to offer new arguments that, for the first time, attempt to apply the relevant legal standards to its factual positions and address other deficiencies in the briefing that are articulated in this brief. *See Jaquish v. Comm'r of Soc. Sec.*, 2017 WL 3917019, at 2 n.2 (N.D.N.Y. Sept. 6, 2017) ("It is well-established that 'arguments may not be made for the first time in a reply brief,'" and "new arguments first raised in reply papers in support of a motion will not be considered."); *Zirogiannis v. Seterus, Inc.*, 221 F. Supp. 3d 292, 298 (E.D.N.Y. 2016) (while "reply papers may properly

have isolated the small number of affirmative factual arguments contained in Plaintiff's memorandum of law, and address them below. In particular, Plaintiff's brief relies on two holdings that Plaintiff erroneously attributes to the Court as bases for judgment: that the 19.6-acre tract was never conveyed to the Orchard Party Oneida, and that the Orchard Party Oneida are not a separate Indian tribe. (Motion for Judgment at 1.)

B. Disputed Issues of Material Fact Exist Regarding Whether the Land Was Ceded, and Plaintiff Has Not Properly Disputed the Allegations in the Answer

Plaintiff asserts that the Court "accepted that the 19.6-acre tract is a part of the Nation's reservation and rejected Defendants' claim to the 19.6 acres," (Motion for Judgment at 3), but this misstates the grounds for dismissal in a number of important ways, as the Court's actual holding does not support that point or Plaintiff's motion.

Plaintiff wrongly represents that the Court held "Defendants" had failed to allege that Plaintiff had ever ceded rights to the land. (Motion for Judgment at 4.) But in reality, the Court stated this only regarding "the factual allegations contained in the counterclaim," and not Defendants broadly. (Order at 17.) The Court's holding quoted by Plaintiff makes absolutely no suggestion that Defendants or the Answer more broadly had failed to make such an allegation. And Defendants in the Answer, as a point of fact, did deny Plaintiff's allegation that asserted "[t]he Nation never conveyed the land," except to the extent that Defendants believe Plaintiff had never possessed the land in the first place. (*Compare* Complaint, ECF No. 1, at ¶ 12; Answer at ¶ 12.) If the Court's ultimate conclusion is that Plaintiff did possess the land, then this paragraph represents a general denial by Defendants that the land was never conveyed.

---

address new material issues raised in the opposition papers," "[a]rguments may not be made for the first time in a reply brief").

Furthermore, in its affirmative defenses, Defendants allege that Plaintiff "has abandoned any rights it may have" to the land. (Answer at ¶ 51.) If Plaintiff has abandoned its rights in the land, this presents an alternate means by which ownership of the land could have passed from Plaintiff to the Orchard Party Oneida. That allegation stands as a denial in the Answer—and not part of the counterclaim that was previously examined by the Court—creating a disputed issue of material fact regarding potential conveyance of the land at issue.

Even outside of the current pleadings, the parties and the Court could certainly learn more about the history of the 19.6 acres through discovery, which has not yet begun in the case. Defendants anticipate seeking discovery regarding issues such as the original ownership of the land at the time of the Treaty of Canandaigua; any contemplated or effectuated transfers of the land; and the lack of any usage or possession of the land by Plaintiff, along with other indicators of abandonment. As CPLR § 212(a) requires that actions to recover real property "cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action," discovery regarding Plaintiff's lack of usage and possession would, by itself, require dismissal of its current claims—demonstrating the importance of not granting judgment on the pleadings at this early stage of the case. Defendants will also submit additional evidence of Defendants' own possession of the land, which Plaintiff will presumably seek and obtain in discovery well before trial. The potential for a greater understanding of these factual issues following discovery is another key reason that Plaintiff's Motion for Judgment is inappropriate at this time and should be denied.

In order to succeed on this Motion for Judgment, Plaintiff must demonstrate that there is no material dispute between the parties. On the issue of whether Plaintiff ever ceded or abandoned rights to the land, however, Plaintiff has not even acknowledged, let alone rebutted,

Defendants' relevant denials and defenses. Plaintiff cannot possibly have carried its burden on this motion without even presenting any facts or arguments addressing the disputes of material fact raised in Defendants' Answer.

C. Plaintiff's Focus on the Issue of Distinct Tribal Identity Misunderstands the Actual Nature of Defendants' Arguments, Which Have Not Been Resolved

Plaintiff asserts that the Court "rejected Defendants' arguments" regarding the Orchard Party Oneida existing as a separate tribe from Plaintiff's Oneida Indian Nation. (Motion for Judgment at 4.) Plaintiff once again takes liberties with both Defendants' pleadings and the Court's holding in order to suggest that the Order represents ultimate findings of fact on Defendants' factual arguments regarding historical ownership of the land at issue.

Contrary to the framing advanced repeatedly by Plaintiff, there is no claim today that the Orchard Party is a separate tribe from Plaintiff's Oneida Indian Nation. Plaintiff initially raised the issue of a "breakaway" in its Complaint, attributing that argument to Defendants in order to immediately oppose it. (Complaint at ¶¶ 4, 25-28.) In Defendants' Answer, however, there was no suggestion that Defendants claimed separate tribal status. (*See, e.g.*, Answer at ¶ 25 (stating that "Melvin L. Phillips is a full-blooded Oneida Indian.") Though Defendants have not asserted separate tribal status as a basis for relief, as an issue of fact, or in opposition to Plaintiff's previous motion, Plaintiff repeatedly act as though that it has caught Defendants in some sort of damning contradiction. (*See* Motion for Dismissal at 9-15 (dedicating an entire section to proving "the lie to any allegation" of tribal status, despite it having never been alleged); Motion for Judgment at 4 (claiming the Court "rejected" an argument Defendants had not made).

Respectfully, Plaintiff may have even managed to lead the Court astray regarding the allegations and arguments that Defendants have put forward. (*See* Order at 17 (finding that

certain facts "undermine[10] Defendants' argument that the Court should consider Orchard Party Oneida as a separate tribe from Plaintiff").) In actuality, Defendants have not made this argument, focusing instead on the rights that Defendants possess *regardless of* federal tribal recognition. (*See* Opposition to MTD at 4 (noting that allegations of tribal status are irrelevant to Defendants' arguments).) Defendants challenge Plaintiff's claim as successor-in-interest to the interests protected under Oneida Nation treaties[11]—an argument contemplated by a former Deputy Commissioner of Indian Affairs. (*See* Answer at ¶ 16; Opposition to MTD at 4.) Defendants assert their rights to possession of the land, based on recognition of the Orchard Party in the Buffalo Creek Treaty and the subsequent unbroken chain of succession in members of the Orchard Party. (*See* Answer at ¶¶ 1-2; Opposition to MTD at 4; Complaint Ex. E (trust deed).) Defendants assert their rights under real property law, and their defenses therefore do

[10] While Defendants have not argued for separate tribal identity, they must note that Plaintiff has over-stated the holding of the Court's Order on this issue. While Plaintiff claims that the Court "rejected" an argument, the Court's Order only suggested that certain facts would "undermine" that argument. While this particular misstatement is not determinative of any issue, as it deals with an argument Defendants are not advancing in this case, it is consistent with other overstatements and misuse of the Court's Order by Plaintiff in its arguments, which have been outlined elsewhere in this brief.

[11] Notably, the Defendants and their direct ancestors are descendants of the Orchard Party/Marble Hill (aka Orchard Hill) Oneida, who have continuously resided in New York on the land at issue from prior to the time of the Treaty of Buffalo Creek through today. Defendants will produce evidence to that effect and, correspondingly, evidence to establish the Plaintiff's lack of sovereignty over, or possession of, the land subject to the Defendants' deed. *See* Affidavit of M. Sharon Blackwell, Deputy Commissioner of Indian Affairs, June 14, 2001, filed in *Oneida Nation v. New York*, 194 F. Supp. 2d 104 (N.D.N.Y. 2002) ("The Secretary of the Interior recognizes the Oneida Nation of New York as the Indian tribe that remained on the New York Oneida Reservation [in Madison County], as surveyed by Nathan Burchard, following the Treaty of May 23, 1842, between the State of New York and the First and Second Christian Parties of the Oneida Indians." (emphasis added)). The 1842 treaty was authorized by the January 15, 1838 Treaty of Buffalo Creek, 7 Stat. 550 Article 13. In that same Article 13, the Orchard Party was authorized to make "satisfactory arrangements with the Governor of State of New York for the purchase of their lands . . ." in Oneida County. The Orchard Party did so in its May 23, 1842 Treaty, and in a subsequent treaty on June 25, 1842. The Plaintiff has neither sovereignty over nor possession of the lands under the Orchard Party treaties, which include those lands under the Defendants' deed. Courts have held that equitable defenses are available to similarly-situated defendants against similar land claims seeking coercive action, "even when such a claim is legally viable and within the statute of limitations," *see Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266, 273 (2d Cir. 2005), and against plaintiffs seeking to similarly reestablish lost sovereignty over land, *see City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005).

not require tribal sovereignty. (*See* Opposition to MTD at 5 ("[T]his is a case about title to and possessory interest in real property, not tribal status under federal law.").)

Defendants also anticipate that discovery will shed further light on the status and rights of the Orchard Party Oneida. Topics on which Defendants will likely seek discovery include the status of the Oneida tribe and any subdivisions at the time of the Treaty of Canandaigua; the negotiation and signature, including the relevant parties, of the Treaty of Buffalo Creek and the 1842 Treaty with New York; and the historical treatment of the Orchard Party Oneida[12]. This discovery will shed light on evidence relevant to Defendants' arguments under the law of real property to establish Defendants' interest in the real property at issue here. The potential for a greater understanding of these factual issues following discovery is another key reason that Plaintiff's Motion for Judgment is inappropriate at this time and should be denied. While the Court held that Defendants' counterclaim had not provided the necessary factual support to justify the affirmative relief it sought, the instant motion asks whether Defendants will be permitted to offer evidence that disputes Plaintiff's entitlement to relief. Discovery on these topics is very likely to reveal such facts.

In order to succeed on this Motion for Judgment, Plaintiff must demonstrate that there is no material dispute between the parties. On the issue of the historical status of real property rights of the Defendants, however, Plaintiff has focused on arguments it has conjured rather than

[12] As examples of the relevant information that would arise in discovery, the Court would learn that on the same day as the Orchard Party made its May 23, 1842 Treaty with New York in Oneida County, pursuant to the authority under the Buffalo Creek Treaty, the Christian party of Oneida made a similar Treaty for the sale of their lands in Madison County to New York. These facts demonstrate that the federal government identified and recognized possessory interests of different Oneida Indian groups in different lands. Those Orchard Party lands occupied by Defendants and identified in the Defendants' trust deed were established by testamentary and other intergenerational transfers by Orchard party Oneida who always possessed and occupied that land. Defendants would also demonstrate that the federal government regularly delivered allotments of cloth owed to the Oneida under the 1838 Buffalo Creek Treaty separately to the Christian Party and the Orchard Party, rather than to a single Oneida entity. Historical evidence in this vein would demonstrate that agreements made under the Buffalo Creek Treaty created obligations not just to the Oneida as a whole, but to groups and individual Oneida Indians.

those actually advanced by Defendants, failing to grapple with the real property arguments Defendants rely on to demonstrate their long-standing rights in the land at issue. As Plaintiff's argument in support of its Motion to Dismiss relies only on an incorrect characterization of Defendants' arguments, Plaintiff cannot possibly have carried its burden on this motion to demonstrate that those arguments lack factual support.

CONCLUSION

For the reasons stated above, the Court should deny Plaintiff's Motion for Judgment on the Pleadings, or in the alternative, the Court should permit Defendants an opportunity to amend the Answer to correct any deficiencies that the Court has identified.

January 14, 2019
Respectfully submitted:

__/s/ *Eric N. Whitney*_____

Eric N. Whitney
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710
Telephone: (212) 836-8000
Eric.whitney@arnoldporter.com

Counsel for Melvin L. Phillips, Sr. and Melvin L. Phillips, Sr. / Orchard Party Trust