19-2737

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ONEIDA INDIAN NATION,

Plaintiff-Counter Defendant-Appellee,

—against—

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

Defendants-Counter Claimants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-COUNTER DEFENDANT-APPELLEE
ONEIDA INDIAN NATION

Michael R. Smith
David A. Reiser
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Washington, D.C. 20036
msmith@zuckerman.com
dreiser@zuckerman.com
(202) 778-1800

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND TREATIES

OTHER AUTHORITIES

INTRODUCTION

The 19.6-acre parcel at issue in this appeal is vacant land – a rural field across the road from Appellant Melvin Phillips' home.[1] It is federally-recognized Oneida reservation land that was never ceded to or obtained by the State. It is land that the State and the Oneidas agreed would be *reserved from* a cession of other land. The land was never sold to anyone thereafter, and no deed had ever been filed for the 19.6 acres before Phillips, an Oneida Indian Nation member, created a quitclaim deed in 2015 purporting to transfer the land to himself as trustee of a trust he created.

Under an historic 2013 settlement agreement among the Oneida Indian Nation, the State, and Madison and Oneida Counties, the 19.6 acres is "Nation Land" subject to Nation governance consistent with the agreement's terms. The Legislature has provided that the settlement supersedes any inconsistent state law or regulation. N.Y. Indian L. § 16. Phillips unsuccessfully objected to district court approval of the settlement. Only then did he create and file the deed and trust documents that precipitated the Nation's suit to quiet title.

Although Phillips' brief conveys the impression that this case involves his homestead, only the vacant 19.6 acres was the subject of the Nation's complaint and

[1]In this brief, "Phillips" refers to both Appellants, Phillips and his trust, unless context indicates otherwise. "Br." refers to Appellants' brief.

the judgment below. The Nation sought, and the judgment provides, no relief concerning the three other parcels Phillips quitclaimed to his trust, including the parcel he purchased by warranty deed and lists as his home address.

There is nothing to Phillips' contention on appeal that the district court "nullified 175 years of private ownership," Br. 1, in disregard of equitable considerations that bar tribal challenge to the legality of a cession of tribal land to a state if the challenge would threaten a long chain of state-recorded titles. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). The Nation did not challenge, and the district court did not invalidate, any cession of tribal land, and Phillips conceded that the 19.6 acres were not ceded to the State. Far from nullifying 175 years of private ownership, the district court unremarkably ruled that Phillips could not manufacture title by creating a quitclaim deed as to unceded Nation land.

Although on appeal Phillips claims individual ownership by inheritance of the 19.6 acres, that is not at all what he claimed in the district court. There, he asserted that the land is tribal land that has belonged to the "Orchard Party" of Oneidas and that as their spokesman he created a deed and trust to protect their interests. Phillips ultimately had to admit, however, that the Orchard Party is not an Indian tribe and that Orchard Party Oneidas are members of the Oneida Indian Nation.

Phillips points to an 1838 federal treaty and an 1842 state treaty to support his new claim of individual ownership. The 1838 federal Treaty of Buffalo Creek

contemplated that Oneidas who chose to remove from New York might "make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." The treaty did not authorize transfer of tribal land to individual Oneida members who chose to remain on unceded reservation land in New York.

Phillips admits that the Nation never ceded and the State never purchased the 19.6 acres. Br. 12; A-116-117. That admission forces Phillips to the internally contradictory argument that the "arrangements" for State "purchase" referenced in the 1838 federal treaty included "an outcome in which [the Oneidas] did not sell their land to" the State in the 1842 state treaty, Br. 28 – and then to the hedged argument that, in the 1842 state treaty, the State nonetheless "effectively" gave the land to Phillips' great, great-grandparents. Br. 12-13. The hedge "effectively" is an admission that the treaty did no such thing. The State did not transfer land it never purchased, a logical point confirmed by the text of the 1842 state treaty, which ceded certain Oneida "reservation" lands but not adjoining "reserved lands" that included the 19.6 acres. A-21 & 23. The treaty explicitly provided that the reserved lands were to be held "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" – i.e., tribally owned Oneida reservation land. A-23.

Phillips' new individual ownership claim amounts to a claim that tribal members acquire individual ownership of tribal lands by living on them. The law is to the contrary. Tribal lands are collectively owned by a tribe, and no tribal member acquires individual ownership through occupancy. The 19.6 acres thus remain tribal land pure and simple, as acknowledged in the 2013 Nation-State settlement.

STATEMENT OF JURISDICTION

The district court entered final judgment on July 31, 2019. A-182. Phillips filed a notice of appeal on August 29, 2019. A-183. The Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291.

The Oneida Indian Nation's complaint invoked the district court's subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 & 1362, asserting a tribal right to possession of land under the Indian Commerce Clause, federal treaties and statutes, and federal common law. A-10 (¶5); *County of Oneida v. Oneida Indian Nation* (*Oneida II*), 470 U.S. 226, 235-36 (1985) (Oneidas' "possessory right . . . is a *federal* right to the lands at issue" and "we hold that the Oneidas can maintain this action for violation of their possessory rights based on federal common law").

Phillips' counterclaim invoked only the district court's supplemental jurisdiction over state claims pursuant to 28 U.S.C. § 1367. A-114 (¶5). The district court dismissed Phillips' counterclaim for lack of jurisdiction because of tribal sovereign immunity. A-160-162 & A-150 n.5.

STATEMENT OF THE CASE

A. Legal Principles Governing Tribal Land

Under federal common law, Indian tribes hold their land as common property by "Indian title" or "aboriginal title."[2] Tribal land may also be held by "recognized title," meaning that the title is recognized by a federal statute or treaty.[3]

Tribal members do not hold individual rights to tribal lands that they occupy.[4] "A tribal member cannot convey title to tribal land and has no federal law right against the tribe to any particular part of tribal property, absent a specific law or treaty granting rights in severalty to members."[5]

The sovereign – initially Great Britain and later, in the former colonies, the states – had a right of preemption, an exclusive right to purchase tribal land. Once a state purchased tribal land, extinguishing tribal title, it could then issue patents or titles to non-Indian owners who would hold the land in fee and could freely sell it.[6]

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[2]Cohen's Handbook of Federal Indian Law, § 15.04[2] at 999 (2012 ed.).

[3]Cohen's Handbook, § 15.04[3] at 1004-1012.

[4]Cohen's Handbook, § 16.01[2] at 1069.

[5]Cohen's Handbook, § 16.01[2] at 1069.

[6]Cohen's Handbook, § 15.04[2] at 1001-3; *Oneida Indian Nation v. County of Oneida* (*Oneida I*), 414 U.S. 661, 667 & 670 (1974); *Oneida Indian Nation v. State of New York*, 691 F.2d 1070, 1075-76 (2d Cir. 1982); *Oneida Indian Nation v. State of New York*, 860 F.2d 1145, 1150 (2d Cir. 1988).

When the Constitution became effective, state purchases of land from tribes became subject to the exclusive power of the federal government, which statutorily mandated approval in the form of a federal treaty. 25 U.S.C. § 177 (current statute).[7] Purchases by a state without federal approval were invalid.[8] Even if a state violated federal law, "equitable considerations" recognized by the Supreme Court in *City of Sherrill* may bar a challenge to the state's purchase after a long period of time during which the state has issued fee titles that have been held, purchased and sold by generations of private landowners in reliance on good, state-issued title.[9]

B. The 19.6 Acres At Issue In This Appeal

The parties agree that the 19.6 acres at issue were part of the Oneidas' aboriginal lands recognized by the United States in the Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794), as the Oneidas' "property" and "reservation." A-11 (complaint); A-116 (answer); A-123-124 (counterclaim) (19.6 acres "part of the original Oneida reservation" acknowledged in the 1794 treaty); Br. 9. The Nation therefore had both Indian title and recognized title to the 19.6 acres.

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[7]Cohen's Handbook, § 15.06[1], at 1030-31; *Oneida I*, 414 U.S. at 667-670.

[8]*Oneida II*, 470 U.S. at 233-236.

[9]*City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005); *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010).

In a state treaty dated June 25, 1842, the State of New York purchased certain Oneida land by the agreement of the Orchard Party of Oneida Indians.[10] The purchased land was in an area of the Oneida reservation that had been surveyed by the State and divided into four lots, designated Lots 1, 2, 3 and 4. A-21 (treaty) & 37 (accompanying map). The State purchased three of those lots – "that part of their reservation known and distinguished as Lots Number One, Two and Four." A-21 (Article 1 of treaty). The State did not purchase the "reserved lands known and distinguished on the map . . . as Lot Number three." A-23 (Article 4 of treaty).

The parties agree that the 19.6 acres are within the unceded and reserved Lot 3. Br. 12 ("1842 Treaty further arranged for New York not to purchase Lot 3"); A-116-117 (¶¶12 & 16 of Answer "admit[ting] that the State never obtained the 19.6 acres" and "admit[ting] that the 19.6 acres . . . are wholly within Lot 3 and were never conveyed as part of the June 25, 1842 treaty"); A-38 (United States Bureau of Land Management map of the State's purchases of Oneida lands which, for the June 25, 1842 purchase, leaves an unshaded area for the Lot 3 land that was not sold).

[10]This Court held that the Oneida Indian Nation could not advance a claim challenging the validity of such a transaction. *Oneida Indian Nation v. County of Oneida*, 617 F.3d at 136. The Nation's complaint did not challenge the validity of the 1842 state treaty, and its validity is not relevant to this appeal.

The June 25, 1842 state treaty attached two lists of Oneidas, those who agreed to leave New York to accept a reservation in Kansas and those who intended to stay. A-22-24 & 27-29. Lot 3 was "reserved for such of the Orchard Party as intending to remain in the State . . . 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-23 (Article 4 of treaty); A-117 (¶16 of Answer); A-125 (¶64 of Counterclaim).

Since the reservation of Lot 3 in the 1842 treaty, the State has never issued a patent, deed or other ownership document for the 19.6 acres, and Phillips does not contend otherwise. The only deed on file concerning the 19.6 acres is the quitclaim deed at issue here – created and filed by Phillips himself in 2015 after the State legislatively declared it to be Nation Land.

The 19.6 acres have never been subject to property taxes that would be paid by an individual on land privately held under a state-issued deed. Br. 14; A-125 (¶64 of Counterclaim). In the Oneida County tax records, the deedless land was listed at some later point as N.Y.S. Wild & Forest without any indication of the origin or reason for that designation. A-97.

C. The 2013 Nation-State Settlement Recognizing Lot 3 Land As Nation Land

In 2013, after decades of historical research and litigation concerning legal and political relationships, the Oneida Indian Nation, the State of New York, and Madison and Oneida Counties reached a settlement comprehensively resolving all disputes, including with respect to land, taxation and governance. A-39-58.

New York enacted legislation to approve the settlement. Laws of New York 2013, Ch. 174. Section 12 of the legislation provides that it was "enacted to implement the settlement agreement." Section 13 adds a new Section 11 to the Executive Law providing that "the settlement agreement shall be fully enforceable in all respects as to the rights, benefits, responsibilities and privileges of all parties thereto." Section 16 adds a new Section 16 to the Indian Law: "Notwithstanding any other provision of law, the provisions of the Oneida Settlement Agreement referenced in section eleven of the executive law shall be deemed to supersede any inconsistent laws and regulations."

The settlement acknowledges a "Marble Hill tract" as "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." A-40 (§II(G)).[11] The settlement also defines

[11]The State patented Lot 2 to a non-Indian but cancelled the patent and restored the land to the widow and heirs of an Oneida chief. A-88. This litigation does not concern land in Lot 2.

"Nation Land," a key settlement term governing allocation of most rights and duties to the parties under the settlement. A-41 (§II(L)). "Nation Land" includes land that "(i) is the 32-acre (more or less) *Boylan* tract[] [or] (ii) is the 104-acre (more or less) Marble Hill tract." A-41 (§II(L)). "Nation Land" also includes land held in trust by the federal government for the Nation and "Reacquired Land," subject to an acreage cap. A-41 (§II(L)). "Reacquired Land does not include the 32-acre (more or less) *Boylan* tract[] [or] the 104-acre (more or less) Marble Hill tract." A-41 (§II(P)).

The settlement required dismissal of pending litigation, including an Administrative Procedure Act action filed by the State and the Counties to challenge the Department of the Interior's 2008 decision to hold certain land in trust for the Nation. A-50-52 (§VI(A)); *State of New York v. Salazar*, No. 08-cv-644-LEK (N.D.N.Y)). The settlement required submission of the agreement to the court for approval. A-50-51 (§VI(A)(1)(a)); *see* A-56 (§VIII(C)). The parties, including the federal defendants, made those submissions to the Hon. Lawrence E. Kahn, who gave the requested approvals, incorporated the settlement agreement into the approval order, and retained enforcement jurisdiction. *State of New York v. Jewell*, 2014 WL 841764 (N.D.N.Y. March 4, 2014).

Phillips, through his current appellate counsel, made a submission to Judge Kahn in Phillips' related trust land litigation, objecting to approval of the settlement. Phillips asserted Orchard Party ownership of land in Lots 2 and 3 that is

acknowledged as Nation Land under the settlement, citing the June 25, 1842 state treaty. *Cent. N.Y. Fair Bus. Ass'n v. Jewell*, No. 6:08-CV-660, ECF 107 (N.D.N.Y. Feb. 18, 2014).[12] After Judge Kahn's approval of the settlement, Phillips did not seek to intervene in that case for purposes of taking an appeal.

D. Phillips' Quitclaim Deed And Trust

By his quitclaim deed recorded September 9, 2015, Melvin Phillips as grantor transferred four parcels to the trust that he created, with himself as trustee, titled "Melvin L. Phillips, Sr./Orchard Party Trust." A-59, 60-73 & 103-110. The deed labeled the parcels as Parcel I, Parcel II, Parcel III and Parcel IV. A-62-64. Parcel IV is the 19.6-acre parcel at issue here. A-63-64. On the map Phillips filed in county land records with the deed and trust documents, Parcel IV is marked as a 19.6-acre tract located in Lot 3 of the June 25, 1842 state treaty. A-97; *see* A-37 (treaty map).

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[12] "The Orchard Party/Marble Hill Band are seeking . . . the preservation of their land holdings and status." *Id*. at 1. "If approved by the court, the agreement will destroy the Orchard Party/Marble Hill Oneidas[']s separate and distinct existence and . . . land holdings. . . ." *Id*. at 1-2. The Nation was alleged to be "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.

Earlier in the same *Central N.Y. Fair Business* trust land litigation, No. 6:08-cv-660, Phillips swore to an affidavit claiming Orchard Party ownership of Lot 3, where the 19.6 acres are located. ECF 40-4, at ¶¶3 ("as tribal spokesman for the Marble Hill Band of Oneida Indians (also called the Orchard Hill Party) . . . I represent the Marble Hill Oneidas and control certain lands reserved for them) & 16 (Marble Hill/Orchard Party are separate tribe with separate "reservation land").

Parcels I, II and III were not put at issue in the Nation's complaint. A-127 (¶71) (Phillips' Answer & Counterclaim so noting). Parcel I is Phillips' home, acquired in 1974 by warranty deed from a non-Indian owner, and Parcels II and III are adjacent parcels that Phillips asserts are held by inheritance. A-65-73; 75-76; 90-91; 94-95, 101. The three parcels are located in what was described and mapped as Lot 2 in the June 25, 1842 state treaty – not within Lot 3 where the 19.6 acres are located. A-21-36 (treaty), 37 & 84 (1842 map of treaty lots); 97 (tax map annotated by Phillips to show where four trust parcels are within Lots 2 and 3).

Although the quitclaim deed asserts Phillips' ownership by fee or inheritance as to Parcels I, II and III, the deed does not make any such claim concerning Parcel IV (the 19.6 acres). The deed asserts that the 19.6 acres are "a portion of . . . the land that . . . the United States . . . acknowledged were reserved to be the property of the Oneida Nation" in the 1794 Treaty of Canandaigua and "for which arrangements were not made to be purchased by the State of New York" thereafter. A-72-73.[13] The deed also refers to the June 25, 1842 state treaty with the Orchard Party Oneidas and claims communal ownership of the 19.6 acres, stating that Phillips held the land for his own uses and "as steward of said premises pursuant to this

[13]That the quoted text concerns the 19.6 acres is clear from the preceding textual reference to "Parcel 16, consisting of 20 acres more or less" on a tax map. A-72. Parcel 16 on the referenced tax map is the 19.6 acres in Lot 3. A-97.

authority and responsibility as spokesperson for the Marble Hill Oneida."[14] A-72. Marble Hill Oneida is another way of referring to Orchard Party Oneida.

E. The Nation's Complaint And Phillips' Answer And Counterclaim

The Nation filed a complaint in the district court seeking a declaration that neither Phillips nor the Orchard Party Trust "owns or has any property interest in the 19.6 acres" and that the trust documents and deed "are invalid and void so far as they concern the 19.6 acres." A-19. The complaint also sought to enjoin Phillips and the trust not to claim the 19.6-acre parcel or cloud its title. *Id.*

Phillips filed an Answer and Counterclaim. The Counterclaim invoked only supplemental jurisdiction to determine state law claims. A-122 (¶54). It sought a declaration that the Nation does not have a property interest in the 19.6 acres and that the quitclaim deed and trust are valid with regard to the 19.6 acres. It also sought to enjoin the Nation not to claim the 19.6-acre parcel or to cloud its title. A-128-29.

Phillips' Answer and Counterclaim made no claim of individual ownership of the 19.6 acres. Phillips repeatedly asserted: (1) that the 19.6 acres belonged

[14]The deed asserted that Exhibit 3 showed Phillips' "formal recognition" "as spokesman" for the "Orchard Party/Marble Hill Oneida." A-66. Exhibit 3 has the letterhead of "Melvin L. Phillips – Representative" "Oneida Nation of Orchard Hill" and states that Orchard Hill Oneidas dwell on lands never ceded to any government.

collectively to the Orchard Party and (2) that Phillips acted as the Orchard Party's leader when he quitclaimed the 19.6 acres to the trust he created.

> "[A]s an Orchard Party Oneida descendant and spokesman, Mr. Phillips is . . . possessed of the lands of the Orchard Party Oneida held in that trust, including the land subject to this suit." A-113, 115 & 119 (¶¶1, 8 & 24-25).
>
> "[A]cting in his leadership capacity as the spokesman for the Orchard Party/Marble Hill . . . and as an Orchard Party Oneida descendent and member presently occupying Orchard Party Oneida land," Phillips "acted to conserve the Orchard Party Oneida lands for the . . . Orchard Party Oneida. . . ." A-113-114 & 127 (¶¶2-4 & 71).
>
> "[T]he 19.6 acres at issue in this case have been held, used and occupied collectively by generations of Orchard Party Oneida descendants. . . ." A-113-114 (¶¶2-4).
>
> The trust was "created by Melvin L. Phillips, Sr. to protect the historic lands of the Orchard Party Oneida and reserve them for current and future members of the Orchard Party Oneida." A-123 (¶56).
>
> "The unpurchased Lot 3 was reserved for the Orchard Party Oneida," and the terms of the 1842 state treaty provided for it "to be had, held, enjoyed and occupied by them collectively. . . ." A-125 (¶64). The State of New York recognizes "the Orchard Party Oneida's ownership of the lands." A-125 (¶64).
>
> "[T]his land was retained by the Orchard Party Oneida." A-127 (¶70).
>
> "Melvin L. Phillips, Sr., as spokesman for the Orchard Party Oneida, conveyed the 19.6 acres to a trust." A-128 (¶75).
>
> Filing the deed and trust documents was "a lawful action to maintain possession and control of the 19.6 acres and other Orchard Party Oneida lands identified in the deed for the benefit of the Orchard Party Oneida." A-128 (¶76).

Phillips acknowledged Judge Kahn's approval of the Nation-State settlement agreement but alleged that the agreement "incorrectly describe[s] land reserved in the 1842 state treaty as Nation Land." A-127 (¶70). Phillips admitted that the "property at issue in this case was part of the original Oneida reservation" recognized by the United States, that the State never obtained the land by cession or otherwise, and that some Orchard Party Oneidas are members of the Oneida Indian Nation and participate in its government. A-117-119 & 124-125 (¶¶16, 17, 22, 23, 60, 64).

F. The Parties' Arguments On The Nation's Motions To Dismiss Phillips' Counterclaim And For Judgment On The Pleadings And The District Court's Rulings

The Complaint and the Answer & Counterclaim showed that the parties claimed the same 19.6 acres. They also showed that the parties agreed about much of the land's history. They agreed that the 19.6 acres were within the lands recognized by the United States in the Treaty of Canandaigua, that the 19.6 acres were never ceded to or obtained by the State, and that the 1842 state treaty reserved the 19.6 acres from cession and stated that the Oneidas there would continue to occupy 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." The parties' dispute concerned whether the reserved *tribal land rights* belonged to the Orchard Party Oneida or to the Oneida Indian Nation.

1. Nation's Motion To Dismiss Counterclaim

The Nation's motion to dismiss the counterclaim stressed that Phillips did not claim that Orchard Party Oneidas are a separate Indian tribe that could have received a transfer of the Nation's tribal land rights, and stressed also that previously courts and the federal government had found and Phillips had admitted that Orchard Party Oneidas are not separate from the Nation. ECF 24-2 at 9-15. The Nation showed that the Treaty of Buffalo Creek, 7 Stat. 55 (Jan. 15, 1838), dealt with the Nation as a whole and did not create multiple Oneida tribes in New York, ECF 24-2 at 7-8, that the 1842 state treaty did not change the Nation's rights in the Lot 3 land that includes the 19.6 acres and was reserved to be held collectively as before, ECF 24-2 at 15-18, and that tribal members do not acquire rights in tribal land by living on it, ECF 24-2 at 9. The Nation also showed that the Nation-State settlement approved by Judge Kahn and the doctrine of tribal sovereign immunity barred Phillips' counterclaim. ECF 24-2 at 18-23.

In opposition, Phillips' based his claim on the 1838 federal Treaty of Buffalo Creek and the 1842 state treaty. Phillips argued that the 19.6 acres were "recognized by those treaties as titled in and possessed by the Orchard Party." ECF 27 at 1 & 5-6. Phillips asserted he should not be "dispossessed of the land whose title in the Orchard Party has been recognized by the United States and New York State." ECF 27 at 1-2. "[T]he Orchard Party members were vested with possession and title to

the land by the federal and state treaties." ECF 27 at 5. The treaties "resulted in all of the land subject to Phillips' counterclaim remaining in possession of Orchard Party members to this day." ECF 27 at 5. Phillips emphasized his "role as designated Orchard Party leader." ECF 27 at 4. He argued that the Nation-State settlement Judge Kahn approved "Does Not Alter the Orchard Party's Claim to its Land." ECF 27 at 6. Phillips also argued that tribal sovereign immunity did not apply to "the Orchard Party land at issue." ECF 27 at 11.

2. Nation's Motion For Judgment On The Pleadings

The Nation's motion sought judgment declaring Phillips' deed and trust invalid, relying on the same black letter law and the same concessions by Phillips that had been highlighted in the Nation's motion to dismiss Phillips' counterclaim. In opposition, Phillips doubled-down on the argument that, under the 1838 federal Treaty of Buffalo Creek and the 1842 state treaty, the 19.6 acres were "recognized by those treaties as titled in and possessed by the Orchard Party." ECF 37 at 1. "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." ECF 37 at 20. Phillips nevertheless admitted that "there is no claim today that the Orchard Party is a separate tribe from Plaintiff Oneida Indian Nation." ECF 37 at 19. Phillips reiterated that "there was no suggestion that Defendants claimed separate tribal status." ECF 37 at 19.

3. The District Court's Rulings On Motions

The district court rejected Phillips's argument that the 19.6-acre parcel belonged to the Orchard Party as an Indian tribe. A-161 (ruling on motion to dismiss Counterclaim); A-174 (ruling on motion for judgment on pleadings).

a. Motion To Dismiss The Counterclaim

In dismissing, the district court explained that Phillips "admit[ted] that the land was Plaintiff's" and failed to allege a cession of that land. A-161. The court explained that, in the 1838 Treaty of Buffalo Creek and otherwise, the United States "treated the Oneidas as a unified nation" in New York, undermining any "argument that the Court should consider Orchard Party Oneida as a separate tribe from Plaintiff, with independent tribal rights to the 19.6 acres." A-161 & n.8. The court also ruled that the Nation's sovereign immunity barred Phillips' Counterclaim. A-161-162. The court described and accepted the Nation's other arguments for dismissal, A-160, including that Phillips is bound by Judge Kahn's unappealed decision to approve the 2013 settlement agreement, A-154 & 149-150.

b. Motion For Judgment On The Pleadings

In granting judgment, the district court determined there could be no material factual dispute given Phillips' admission that the 19.6 acres were within the Oneida reservation recognized by the Treaty of Canandaigua and that the parties' rights could be determined based upon construction of statutes and treaties. A-173-174.

The court concluded as a matter of law that the 1838 federal Treaty of Buffalo Creek did not transfer Oneida reservation land to the Orchard Party. A-174-176. The court explained that the treaty did not approve any particular transfer of land, that the United States recognized "the Oneidas as a single unified Nation," and that the Orchard Party is not "a separate tribe from Plaintiff." A-174-176. As the district court noted, "Defendants now agree that the Orchard Party is not a separate faction." A-179 (citing Phillips' opposition, ECF 37 at 19).[15]

[15]Phillips had to concede the point. The Answer and Counterclaim admitted "that certain beneficiaries of the Orchard Party Trust may be members of [the Nation]." A-119 (¶23). The district court knew that Phillips had sworn he was "an enrolled member of the Oneida Indian Nation" when he filed an affidavit in Oneida leadership litigation. A-14 (¶24) (Nation's complaint in this case); *see Shenandoah v. U.S. Dep't of Interior*, 1997 WL 214947 at *1 (N.D.N.Y. Apr. 14, 1997) (district court noting that Phillips and other Marble Hill plaintiffs sued as members of Oneida Indian Nation), *aff'd*, 159 F.3d 708 (2d Cir. 1998); *Oneida Indian Nation v. County of Oneida*, No. 74-cv-00187, ECF 311 at ¶¶50 & 53, (N.D.N.Y. Nov. 7, 2001) (Marble Hill/Orchard party proposed complaint in intervention asserting violation of land rights of "Oneida Nation, including the Marble Hill Oneidas").

The court below also was aware that federal courts and the executive branch had rejected the claim that the Orchard Party is a separate tribe. A-13-16 (¶¶23-28(a)-(c)) (Nation's complaint in this case describing rejections); ECF 24-2 at 10-15 (Nation memorandum in this case explaining rejections); *see Oneida Indian Nation v. New York*, 194 F. Supp.2d 104, 115 (N.D.N.Y. 2002) (Marble Hill Oneidas not indispensable in land claim litigation because part of Oneida Indian Nation); *Oneida Indian Nation v. State of New York*, No. 5:74-cv-00187, ECF 388 at 2-3 (N.D.N.Y. May 22, 2002) (order denying intervention in Oneida land claim because Marble Hill/Orchard party is part of Oneida Indian Nation), *aff'd sub nom., Marble Hill Oneida Indians v. Oneida Indian Nation*, 62 Fed. App'x. 389 (2d Cir. 2003) (intervention denial not abuse of discretion).

Regarding affirmative defenses, the court found many abandoned during briefing and rejected others as a matter of law, including based on the legal principle that tribal members do not come to own tribal land by living on it. A-179-180.

c. The Judgment

The district court entered judgment declaring that neither Phillips nor his trust owns the 19.6 acres and that the quitclaim deed and trust are void as to the 19.6 acres, and enjoining them from claiming to own the 19.6 acres. A-182.

SUMMARY OF ARGUMENT

Phillips did not raise below, and thereby forfeited, his argument that his ancestors acquired individual ownership of the 19.6 acres through the 1838 federal treaty and 1842 state treaty. In fact, he made the contradictory claim that the land belonged to the Orchard Party of Oneidas, which he purported to lead as tribal spokesman. Even if Phillips can now make a new claim of individual ownership, the plain language of both treaties defeats the claim. The 1838 federal treaty refers to Oneidas who chose to leave New York for Kansas making "satisfactory arrangements" to sell land to the State. It says nothing about converting Oneida tribal land in New York to separate parcels belonging individually to Oneidas who chose to remain in New York. The 1842 state treaty explicitly reserved unceded land such as the 19.6 acres as tribal property to be held "collectively" by the same right title and interest as before the treaty was made. In *United States v. Boylan*, 265 F. 165 (2d Cir. 1920), this Court gave that same construction to the very similar treaty made by the State with Oneidas just a month earlier in 1842.

Phillips' appellate invocation of *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), "equitable considerations" to protect supposed state-conferred individual ownership fails because he forfeited the argument by not presenting it in the district court. Reliance on equitable considerations also fails because the prerequisite for invoking them is a challenge to the validity of a cession of tribal land

to a state, with an attendant threat to a long chain of state-issued titles. Phillips' claim to title comes, not from a long chain of state-recorded titles following a cession to the State, but from a quitclaim deed he created and filed in 2015 as a supposed spokesman of the Orchard Party of Oneidas. He manufactured the quitclaim deed to collaterally attack the Nation-State settlement agreement under which the 19.6 acres is acknowledged to be Nation Land. New York has made the terms of the settlement agreement a part of the State's law, N.Y. Indian L. § 16, eliminating any possible state law basis for Phillips' claim to own unceded tribal lands.

The district court correctly ruled that none of the affirmative defenses in Phillips' answer is viable as a matter of law to cause a transfer of tribal ownership of unceded tribal land, permitting entry of judgment on the pleadings.

It is not necessary to reach the question whether the district court correctly dismissed Phillips' counterclaim on the alternative ground of tribal sovereign immunity. The judgment in favor of the Nation on its complaint contesting Phillips' claim to the 19.6 acres necessarily disposes of Phillips' counterclaim for that land. In any event, if the immovable property exception were applicable to tribal sovereign immunity, it would not apply to land like the 19.6 acres at issue in this case. It is within the Nation's *own* territory and is so recognized by the State.

ARGUMENT

I. PHILLIPS' NEW ARGUMENT ON APPEAL THAT HE OWNS THE 19.6 ACRES AS AN INDIVIDUAL, NOT AS A REPRESENTATIVE OF THE ORCHARD PARTY ONEIDAS, IS BOTH FORFEITED AND WITHOUT MERIT.

In the district court, Phillips asserted possession of the 19.6-acre parcel in his purported capacity as a tribal leader of the Orchard Party Oneidas who, not the Oneida Indian Nation, possessed the land as tribal land. Phillips eventually was forced to concede, and the district court correctly ruled, that the Orchard Party Oneidas are part of the Oneida Indian Nation and not a separate tribe that could have succeeded to the Nation's tribal rights in the 19.6 acres. Even though that ruling supports the judgment entered below, Phillips does not challenge the ruling on appeal. By itself, that is enough to support affirmance of the judgment.

On appeal, Phillips has changed both counsel and direction, switching from his district court claim of Orchard Party ownership of the 19.6 acres to a claim of individual ownership, hoping to avoid the concession below that the Orchard Party is not a separate Oneida tribe. Br. 9 (ownership passed from "the Oneidas as a tribal entity" and "became individually vested in Phillips and his ancestors"); 13 (Phillips' ancestors "effectively" became "individual landowners of tracts that were to be kept within the family by tradition"); 15 (land "titled in Phillips"); 31 (treaty "provided for . . . special individual property rights"); 46 ("state treaty placed ownership in individual Indians who are direct lineal ancestors to Phillips").

Phillips' new argument concerning individual ownership is contradicted by his consistent allegation of collective Orchard Party ownership in his quitclaim deed and trust, his Answer and Counterclaim, and his briefing below. Phillips cannot litigate a new and inconsistent claim on appeal.[16] Even if he could, Phillips' new theory of individual ownership fails because it depends on an impossible reading of the 1838 federal Treaty of Buffalo Creek and the June 25, 1842 state treaty as transferring Oneida Nation tribal ownership of unceded lands to individual Oneidas.

A. Phillips' Claim Of Individual Ownership Is Fatally Contradicted By His Objection To The Nation-State Settlement, His Quitclaim Deed, And His Pleadings And Arguments Below, As All Assert That The 19.6 Acres Belong To An Orchard Party Tribal Entity.

In 2013, New York State and Oneida and Madison Counties agreed to a settlement of trust land and other litigation providing, after extensive historical research during decades of the Oneida land claim and *Sherrill* litigation. "[S]tate tax-exempt land retained by the Oneida Nation as Lots 2 and 3 in the June 25, 1842 Orchard Party treaty" is "Nation Land" that remains part of the Oneida reservation

[16] "[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) (citation omitted). *See, e.g., Sczepanski v. Saul*, 946 F.3d 152, 161 (2d Cir. 2020); *BIOCAD JSC v. Hoffman-LaRoche*, 942 F.3d 88, 95 (2d Cir. 2019); *Mago Int'l v. LHB AG*, 833 F.3d 270, 274 (2d Cir. 2016).

and is subject to tribal governance.[17] Phillips objected to district court approval of the settlement by filing a letter from his current appellate counsel to Judge Kahn, arguing the Orchard Party's tribal interest in the relevant land. *Phillips v. Jewell*, No. 6:08-CV-660, ECF 107 (N.D.N.Y. filed Feb. 17, 2014). The letter argued that approval would "destroy the Orchard Party/Marble Hill Oneidas[']s separate and distinct existence." *Id*. at 2. The letter argued that the Nation was "attempting to legitimize their status by stealing the land of a separate, distinct and bonafide tribal entity." *Id.* at 4.

Phillips did not seek to intervene in the State and Counties' trust land litigation in order to challenge the settlement approval on appeal. The district court ruled that Phillips' failure to appeal barred his counterclaim for the 19.6 acres. A-160 (accepting Nation's arguments) & A-149-150 (explaining argument regarding failure to appeal). Phillips brief on appeal does not seek and thereby waives any right to appellate review of the district court's ruling. While it was made with respect to dismissal of Phillips' counterclaim, it fully supports the district court's judgment.

[17]A-40 (defining "Marble Hill tract"); A-41 (defining "Nation Land" to include the Marble Hill tract); A-49-52 (provisions permitting the Nation to govern Nation Land and exempting it from taxation).

Phillips' quitclaim deed, created in the wake of the Nation-State settlement, claimed that he possessed the land "as steward . . . pursuant to his authority and responsibility as spokesperson for the Marble Hill Oneida." A-72.

Phillips' Answer and Counterclaim alleged that he filed the quitclaim deed and trust "as spokesman for the Orchard Party Oneida" in an effort to "maintain possession and control of the 19.6 acres and other Orchard Party Oneida lands . . . for the benefit of the Orchard Party Oneida." A-128 (¶¶73 &76). He claimed authority to file the deed "as an Orchard Party descendant and member presently occupying Orchard Party Oneida land, act[ing] to conserve the Orchard Party lands for the use and enjoyment of current and future members of the Orchard Party Oneida." A-127 (¶71); *see* A-123 (¶56: trust created "to protect the historic lands of the Orchard Party Oneida"). The 19.6 acres "has always been in the possession of the Orchard Party Oneida" and "has always been in possession of members of the Orchard Party Oneida." A-116 (¶¶12 & 13). "[T]he 19.6 acres at issue in this case have been held, used and occupied collectively by generations of Orchard Party Oneida descendants. . . ." A-113 (¶¶2-4). The 19.6-acre parcel was "never conveyed" in the 1842 state treaty but (quoting the treaty) was "reserved for such of the Orchard Party as intending to remain in the State . . . 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-117 (¶16). The State of New York recognizes "the Orchard Party Oneida's ownership of the lands under the" 1842 treaty. A-125 (¶64). "[T]his land was retained by the Orchard Party Oneida." A-125 (¶64).

Phillips' objection to the settlement, his quitclaim deed, and his pleadings all fatally contradict his new argument on appeal that the 1842 state treaty, although reserving the 19.6 acres and other Lot 3 land from cession to the State, nevertheless somehow transformed it from tribal land to land held individually by members of Phillips' family, "to be kept within the family by tradition." Br. 13; *see* Br. 28 (lands reserved in 1842 state treaty were "no longer tribal lands"). The only deed reflecting individual title to the 19.6 acres is the quitclaim deed that Phillips himself created. *Cf*. Br. 15 (land is "titled in Phillips").

B. The 1838 Federal Treaty Of Buffalo Creek And The 1842 State Treaty Do Not Support Phillips' New Claim Of Individual Ownership.

There is no merit to the argument that Phillips' forbears acquired individual ownership of separate parcels of the Lot 3 reserved land by virtue of the 1838 federal Treaty of Buffalo Creek and the June 25, 1842 state treaty.

1. 1838 Federal Treaty Of Buffalo Creek

Phillips now claims that Article 13 of the 1838 Treaty of Buffalo Creek extinguished all Oneida tribal ownership in New York, including to unceded land

like the 19.6 acres that Oneidas continued to occupy. This Court has rejected that position twice, in its decision in *United States v. Boylan*, 265 F. 165 (2d Cir. 1920), and more recently in a portion of its 2003 *City of Sherrill* decision that the Supreme Court left standing. In *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 443-44 (2d Cir. 2011), and *Oneida Indian Nation v. Madison County*, 605 F.3d 149, 157 n.6 (2d Cir. 2010), this Court reaffirmed its prior holding in *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 161-165 (2d Cir. 2003), that the Treaty of Buffalo Creek did not affect the Nation's property and reservation rights. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 215 n.9 (2005) (declining to review Second Circuit's holding regarding the Treaty of Buffalo Creek).

Article 13 refers to Oneidas who remove from New York making "satisfactory arrangements" to sell land to the State. The treaty says nothing about changing the ownership of land occupied by Oneidas who decided not to remove from "their lands at Oneida." A-134 ("agree to remove to . . . the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida"). The treaty also says nothing about authorizing Phillips' "direct ancestors" "to make satisfactory arrangements personally with the State of New York to secure individual title," as Phillips strains to argue. Br. 7.

This Court has explained that Article 13's provision for sale to the State was "conditioned on speculative future arrangements," a condition never met as to some

Oneida land. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d at 150. Federal treaty commissioner Ransom Gillet promised the Oneidas, when seeking consent to the Senate-amended treaty, that they could remain on the land and not sell it to the State, which is inconsistent with any idea the treaty transformed tribal land into separate parcels of individual property (or the property of a new tribe). *Id.*[18]

The way the treaty recorded Oneida consent shows that the Oneida Nation as a single entity made the treaty and that it did not create individual land ownership. The treaty records the signatures of all "Party" leaders – Orchard, First Christian, and Second Christian – as "the undersigned chiefs of the Oneida tribe of New York Indians" accepting the treaty as amended by the Senate after it was "explained . . . to our said tribe . . . at the Oneida Council House." A-142. The treaty records acceptance by the "Oneidas residing in the State of New York for themselves and their parties," giving a unified census of one Oneida tribe in New York. A-136. *See* note 15, above (detailing judicial and executive branch decisions that Orchard Party (aka Marble Hill) Oneidas are part of Oneida Indian Nation and not a separate tribe, and admissions by Phillips to the same effect).

[18]Article 3 of the treaty provided that Oneidas who did not remove from New York would give up rights to tribal land promised to them in Kansas, not that their tribal rights in their remaining New York land would be extinguished. *City of Sherrill*, 337 F.3d at 161-63.

2. The 1842 State Treaty

Phillips casts the 1842 state treaty as implementing the authority to make "satisfactory arrangements with" the State "for the purchase of their lands at Oneida" under Article 13 of the Treaty of Buffalo Creek. Br. 28. But Article 13 concerned cessions by those who chose to remove from New York, not those who chose to remain on unceded reservation land like the 19.6 acres. A-134.

Phillips' concession that the 1842 state treaty reserved the 19.6 acres and other Lot 3 land from cession, Br. at 12 & A-116-117, has caused him to paradoxically maintain that "'[s]atisfactory arrangements'" to sell under the 1838 federal treaty included an "outcome in which they did not sell their land to New York but remained individually possessed of it." Br. 28. Not only is that construction contradicted by the text of both treaties, it is contradicted by Phillips' quitclaim deed. A-73 (19.6 acres is part of "the land . . . for which arrangements were not made to be purchased by the State," which recognizes that the arrangements contemplated by the 1838 federal treaty were sales to the State).

The fact is that the 1842 treaty text Phillips' cites as creating individual ownership of Oneida reservation land establishes exactly the opposite point. The treaty is explicit that Lot 3 lands are "reserved lands" and that the Oneidas remaining there will "collectively" hold the same "right, title and interest" in the land they had

"before the execution of this treaty," which was a collective tribal right of possession of reservation land recognized in the Treaty of Canandaigua – not new individual ownership. A-23 (Article 4). References in treaties to land being held in common or collectively mean held by the tribe, not "the tenancy in common of the common law." Cohen's Handbook of Federal Indian Law, § 16.01[2] at 1069. Phillips' arguments that the treaty "arranged for New York not to purchase Lot 3" and that Phillips ancestors "*effectively* bec[ame] individual landowners of tracts" are admissions that neither the 1838 federal treaty nor the 1842 state treaty referred to a transfer of tribal land to individual tribal members. Br. 12-13 (emphasis added).

That the June 25, 1842 treaty left the reserved, unceded Lot 3 lands to be held "collectively" as before the treaty (i.e., as tribal land) is all that is required to reject Phillips' argument that the treaty divided the reserved land into individually owned tracts – tracts never identified in the treaty and never thereafter reflected in any deed.

A parallel May 23, 1842 state treaty with Oneidas known as the First and Second Christian Parties has been held to preserve tribal rights in reserved land, and there is no material difference between that treaty and the one made a month later involving Orchard Party Oneidas. *United States v. Boylan*, 256 F. 468, 469-470 (N.D.N.Y. 1919), *aff'd*, 265 F. 165, 167-168 (2d Cir. 1920) (both decisions extensively set forth the text of the treaty). The Christian Parties treaty provided for the sale of some Oneida land, with other land unceded and "reserved" for the

Oneidas who did not leave the New York reservation for Wisconsin. 256 F. at 469-70, 265 F. at 167-168. The treaty text provided that the "reserved lands shall be deemed the *common property* of" the remaining Oneidas," who, the district court concluded, "did not abandon their lands or their status as members of the Oneida Tribe of Indians." 256 F. at 469-470 & 477 (emphasis added). Accordingly, the district court restored the Oneidas to the thirty-two acres from which a state court had evicted them in a foreclosure action in violation of federal and state protections of tribal lands. On appeal, this Court affirmed and held:

> No specific lot or parcel was attempted to be allotted or set off by the treaty to any individual Indian as his or her separate share.
>
> . . .
>
> There is nothing in the treaty which indicates a partition of lands embraced in lots 17 and 19 [the reserved lands] as between the 23 individual Indians, nor did the treaty mention or contemplate any future partition between individuals.

265 F. at 168-169; *see City of Sherrill*, 337 F.3d at 163 (noting "common property" in 1842 Christian Parties treaty and holding Oneida reservation not disestablished).

There is no daylight between the May 23, 1842 Christian Parties treaty provision that the lands reserved from cession were the "common property" of the Oneidas who did not remove and the June 25, 1842 Orchard Party treaty provision that the reserved lands would be held "collectively." If anything, the Orchard Party treaty's additional emphasis that collective ownership would be as "before the

execution of this treaty" makes continued *tribal* ownership even clearer, especially so given Phillips' admission that the 19.6 acres was part of the Oneida reservation recognized by the United States in the 1794 Treaty of Canandaigua. *Cf. Boylan*, 256 F. at 470 (district court characterization that land reserved as "common property" under Christian Parties treaty was to be held "the same as before").[19]

Phillips's brief repeatedly states that his family has lived on land reserved in the 1842 Orchard Party. Their presence on tribal land cannot generate individual ownership. Tribal land is held in common; members do not acquire individual ownership by their presence on the land. Cohen's Handbook of Federal Indian Law, § 16.01[2]; *accord Wilson v. Omaha Tribe*, 442 U.S. 653, 665 (1979) ("'Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.'") (citations omitted); Powers of Indian Tribes, 55 Dec. of Dep't of Interior 14, 51 (1934) ("The proposition

[19]Philips points to an 1843 New York statute authorizing tribal members to hold lands in severalty and to alienate them, although he does not explain the relevance of the statute to his claim of individual ownership. Br. 14 n.8. This Court actually reviewed the 1843 statute in *Sherrill* and concluded that the statute's reference to "lands and property in the Oneida reservation" showed that the reservation had not been disestablished, 337 F.3d at 162-163 & n.21, which is inconsistent with any idea that tribal land came to be individually owned. Also, as the courts determined in *Boylan* with respect to the thirty-two acres, the 1843 statute is irrelevant to the status of lands reserved in 1842 that never came to be deeded to an Oneida member or sold under the terms of the 1843 statute, which was later repealed. 256 F. at 476-477; 265 F. at 169-171.

that occupancy of tribal land does create any vested rights in the occupant as against the tribe is supported by a long line of court decisions.").[20]

As the *Boylan* decisions held, the fact that individual Oneida members lived on tribal land reserved in the 1842 Christian Parties treaty did not convert it into individually owned land. *See City of Sherrill*, 337 F.3d at 163. So, it is irrelevant whether Phillips' forbears or other Oneidas occupied Lot 3 land, including the 19.6 acre parcel. Moreover, even if Phillips' interpretation of the 1842 state treaty were imagined to be plausible, his claim to state treaty rights fails because the Nation-State settlement takes precedence. N.Y. Indian L. § 16.

C. Isolated Statements Expressing An Understanding That The Thirty-Two-Acre Parcel Restored To Oneida Possession In *Boylan* Is The Only Unceded Oneida Land Are Not Relevant To The Status of the 19.6 Acres That Phillips Admits Were Unceded.

Phillips' brief strings together some statements that the Nation was thought to have only thirty-two acres of unceded tribal land. Br. 15-17. Those statements did not address the 19.6 acres and do not change the undisputed fact that the Nation never ceded the 19.6 acres. Nor can such statements confer ownership on Phillips.

Phillips acknowledges that the State has always recognized the distinct status of the 19.6 acres because it never subjected them to private property taxes. Br. 14.

[20]https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/doi_decisions_055.pdf.

Further, in the Oneida land claim litigation, the United States Bureau of Land Management created a map showing each of the Nation's cessions to the State. In an area shaded to show the June 25, 1842 cession (area 27), a blank space within the shaded area reflects the unceded Lot 3 land. A-38. Finally, the 2013 Nation-State settlement reflects a decision by the State, after development of the historical record in the many years of Oneida land claim litigation, that "Nation Land" includes land both "the 32-acre (more or less) *Boylan* tract" and "the 104-acre (more or less) Marble Hill tract," A-41 (§II(L)), and that neither is "Reacquired Land," A-41 (§ II(P)). Those terms acknowledge the equivalent pedigree of the 19.6 acres and the 32 acres as unceded land under the two equivalent 1842 state treaties.

There is no doubt the Nation was understood for many years to have retained only the thirty-two acres of unceded land at issue in *Boylan*. That was the land the United States had sued to restore to Oneidas evicted in a state foreclosure action, creating a dispute that made the land's cession history important. Oneidas were not evicted from the 19.6 acres and surrounding lands, and there was no comparable dispute to provoke a judicial determination of its history or to draw attention to its status as unceded tribal land. *Boylan* confirmed tribal rights, which is why the Oneida Nation Representative once referred to the thirty-two acres as the Nation's acknowledged territory. No such statement, including by a court that was not

addressing the status of Lot 3 or the 19.6 acres, has any bearing on the status of the 19.6 acre-parcel once it has been established (and conceded) to be unceded land.

Phillips emphasizes the Supreme Court's statement in *City of Sherrill* that the thirty-two *Boylan* acres are the only remaining Oneida lands not lost to the State. Br. 15. No question about the 19.6 acres had been presented to or addressed by any court because no dispute about them arose before Phillips filed his quitclaim and trust. The Supreme Court's comment about the thirty-two acres was to provide a contrast to the ceded but reacquired lands that were actually at issue in *City of Sherrill*, not to adjudicate the status of land not involved in the case.[21]

[21]Phillips cites *Shenandoah v. U.S. Dep't of Interior*, 1997 WL 214947 at *8 n.6 (N.D.N.Y. Apr. 14, 1997), *aff'd*, 159 F.3d 708 (2d Cir. 1998), as having adjudicated the status of the 19.6 acres in reference to one of the plaintiffs, Thelma Buss. The decision involved no such adjudication. Moreover, Phillips asserts that Buss lives on Lot 2, not Lot 3, where the 19.6 acres are located. Br. 16.

Phillips also cites an old decision concluding that the Oneidas were not a tribe. *United States v. Elm*, 25 F. Cas. 1006 (N.D.N.Y. 1877), Br. 11 & 28. In *Boylan*, the dissent cited *Elm*, but this Court concluded that tribal relations continued. 265 F. at 174-176. This Court also recognized continuous Oneida tribal existence and rejected *Elm* in *City of Sherrill*, 337 F.3d at 165-167 & n.25. The Department of the Interior rejected *Elm* when it determined, in connection with the trust litigation in which Phillips participated, that the Oneida Indian Nation remained a tribe under federal jurisdiction and thus was eligible for trust land. *State of New York v. Kempthorne*, ECF 334-1 at 26, No. 08-cv-644 (N.D.N.Y.). Phillips contested that decision on summary judgment in his trust land case. *Central N.Y. Fair Bus. Ass'n v. Kempthorne*, No. 08-cv-660, ECF 119 at 18-21 (N.D.N.Y.). The district court ruled against Phillips. *Central N.Y. Fair Bus. Ass'n v. Jewell*, 2015 WL 1400384 at *6-*11 (N.D.N.Y. March 26, 2015). Phillips appealed but did not raise the issue. *Central N.Y. Fair Bus. Ass'n v. Jewell*, 673 Fed. App'x. 63 (2d Cir. 2016).

II. *CITY OF SHERRILL* EQUITABLE CONSIDERATIONS DO NOT AFFECT TRIBAL RIGHTS IN UNCEDED TRIBAL LAND.

Phillips argues that *City of Sherrill* equitable considerations bar the judgment below that forbids him and his trust to claim the 19.6 acres. Br. 32-36. The rationale for this argument is that the judgment deprives him of ownership individually guaranteed to him and his forebears in the 1842 state treaty. Br. 32 & 36. But the district court correctly ruled that the 1842 state treaty did not transfer Oneida tribal ownership. Consequently, Phillips' argument that "equitable considerations" protect individual ownership rights granted by the 1842 state treaty cannot be right.

The Supreme Court invoked "equitable considerations" in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), to preclude enforcement of tribal sovereignty on land that the Oneidas reacquired some 200 years after it had been ceded to the State, which had issued a long chain of private titles and had governed the land. The Nation argued that the State originally obtained a cession of tribal land in violation of federal law, that tribal rights were not extinguished due to the illegality, and that on reacquisition the Nation should be able to exercise tribal sovereignty over the land. The Supreme Court rejected the argument on the rationale that, otherwise, there would inequitable interference with 200 years of reliance on the effectiveness of the cession of tribal land only now challenged as unlawful.

This Court has applied *Sherrill*'s equitable considerations in tribal land claim actions for damages arising from a state's illegal acquisitions of tribal land, including Oneida land. *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010). The *Oneida* decision concluded that *Sherrill* equitable considerations apply when a claim is disruptive of settled expectations regarding a long chain of private land titles. *Id*. at 136. This Court explained:

> [A] claim, which necessarily calls into question the validity of the original transfer of the subject lands and at least potentially, by extension, subsequent ownership of those lands by non-Indian parties, effectively "asks this Court to overturn years of settled land ownership." Claims having this characteristic, as *Cayuga* recognized, necessarily threaten to undermine broadly held and justified expectations as to the ownership of a vast swath of lands-expectations that have arisen not only through the passage of time but also the attendant development of the properties.

617 F.3d at 136 (citation omitted).

Sherrill's equitable considerations do not apply here. The question raised by the Nation's claim is not the legality of the 1842 state treaty upon which Phillips relies, but what it provides. The treaty reserves Lot 3, including the 19.6 acres, from cession to the State, and Phillips points to no other source of state-conferred title. The Nation does not call into question "the validity of the original transfer of the subject lands" to the State. The parties here agree that there was no cession to the State. Nor is there a challenge to, "at least potentially by extension, subsequent ownership of those lands by non-Indian parties." Enforcement of tribal rights

reserved in a treaty is the opposite of claiming, as in *City of Sherrill* and the land claim cases, that tribal rights survived an illegal cession. The parties agree that no deed existed for the 19.6 acres before Phillips' 2015 quitclaim deed. And Phillips created that deed in response to the 2013 Nation-State settlement that is now a part of state law, N.Y. Indian L. § 16, which means that there is no possible conflict between tribal ownership and New York's property law and governance regimes.

Finally, *City of Sherrill* equitable considerations "evoke the doctrines of laches, acquiescence, and impossibility." 544 U.S. at 221. The district court held that Phillips had waived the affirmative defense of laches and impossibility by failing to brief them with respect to the Nation's motion for judgment on the pleadings. A-177. Phillips' brief on appeal does not challenge the district court's waiver ruling. Moreover, because Phillips asserted Orchard Party tribal rights and not individual ownership that might be protected against a tribal claim, neither Phillips' opposition to the motion nor his surreply actually set forth an argument regarding an equitable considerations defense, and only a single footnote in connection with a different argument mentioned *City of Sherrill* equitable considerations. ECF 37 at 20 n.11. Consequently, Phillips' defense regarding *City of Sherrill* equitable considerations is not properly presented in this appeal. *See* Br. 33 (assailing Nation's "long delay" in seeking judicial relief and invoking laches, acquiescence and impossibility as a basis for applying a *City of Sherrill* defense).

III. THE DISTRICT COURT CORRECTLY RULED THAT PHILLIPS' AFFIRMATIVE DEFENSES FAIL AS A MATTER OF LAW.

Phillips has not identified any facts, much less any *plausible* factual scenario, that would entitle him to assert any of his affirmative defenses.

A. The Governments Phillips Identifies Are Not Indispensable Parties.

"A party cannot be indispensable unless it is a 'necessary' party under Rule 19(a)." *Jonesfilm v. Lions Gate Int'l*, 299 F.3d 134, 139 (2d Cir. 2002). The federal, state and local governments identified by Phillips, Br. 37-38, are not necessary parties under Fed. R. Civ. P. 19(a) and thus are not indispensable.

This case concerns land that was part of the Oneida Reservation acknowledged by the United States in the 1794 Treaty of Canandaigua and that was never ceded to or titled to anyone by the State of New York. The district court correctly concluded that Phillips' admission that the 19.6 acres had not been ceded to or obtained by the State eliminated any state or local government interest in litigation concerning Phillips' quitclaim deed and trust. The State of New York and Oneida and Madison Counties agreed in the 2013 settlement that the 19.6-acre parcel is Nation Land. The federal government was not a party to the settlement agreement, but it was a party to the litigation that was resolved by the settlement agreement and did not object to its judicial approval.

Phillips has not explained how either of the immune parties he argues cannot be joined, the United States and the State of New York, could possibly claim an interest requiring them to be joined in this litigation between the Oneida Nation and Phillips concerning the 19.6 acre parcel in Lot 3. The kind of interest triggering balancing under Rule 19 must be a legally-cognizable interest that could be impaired by a judgment rendered in the party's absence or that could lead to conflicting obligations. Phillips does not claim that either the State or the United States has such an interest. Phillips could hardly make such a claim when the Oneida test case, filed to establish the Oneidas' possessory right to land occupied by Madison and Oneida Counties, proceeded to judgment (affirmed by this Court and the Supreme Court) without the necessity of joining the State or the United States.[22] Phillips cites no case in which a tribe's suit to quiet title in unceded tribal reservation lands was dismissed on the ground that the United States or a state was an indispensable party, and we know of none.

The Town of Vernon and Oneida County could be joined, but Phillips does not explain what interest they could have in the litigation, and he did not name them

[22]Neither the United States nor the State was a party to the Oneida land claim litigation before the United States intervened in 1999 and joined the State as a defendant. Yet the Supreme Court affirmed a judgment in favor of the Oneidas and against the Counties in 1985, notwithstanding the Court's determination that the Counties could not join the State for purposes of seeking indemnification based on State-conferred land titles. *Oneida II*, 470 U.S. at 250-53.

in his Counterclaim, suggesting that they have no interest. Phillips refers vaguely to their "jurisdiction" over the land, but the Nation's jurisdiction as to the 19.6 acres is recognized as a matter of state law under the 2013 settlement agreement. And the judgment in this case only provides that Phillips does not own and cannot claim the 19.6 acres and that his quitclaim and trust are invalid so far as the 19.6 acres are concerned. A-182. That does not affect any Town or County interest.

B. The 1838 Treaty of Buffalo Creek Did Not Release Oneida Tribal Rights To Unceded Land And Has No Bearing On The Defenses Of Release Or Accord And Satisfaction.

The affirmative defense of accord and satisfaction refers to an agreement to accept a payment (or other performance) as satisfaction of a disputed debt or claim. "An accord and satisfaction, as its name implies, has two components. An accord is an agreement that a stipulated performance will be accepted, in the future, in lieu of an existing claim. Execution of the agreement is a satisfaction." *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 383 (1993); *Ryder v. J.P. Morgan Chase Bank*, 767 F. App'x. 29, 32 (2d Cir. 2019); *Zwiebach v. CitiMortgage, Inc.*, 2017 WL 4078132 at *5 (D. Conn. Sept. 14, 2017). That defense has no application to the Treaty of Buffalo Creek or any other fact in this case.

The affirmative defense of release, like accord and satisfaction, requires the existence of an anterior dispute or claim and a contractual agreement to release the

claim. Phillips does not identify any anterior dispute or claim concerning the 19.6 acres that was settled or released. Br. 39-40.

The district court was correct that any agreement, including a release or an accord and satisfaction, that has the effect of transferring ownership of tribal land must be approved by a federal treaty. A-178-179; *see* 25 U.S.C. § 177. The 1838 Treaty of Buffalo Creek was the only federal treaty Phillips identified as possibly relevant to his claims of ownership. He argues, Br. 40, that the 1838 Treaty of Buffalo Creek was the "basis for arrangements" between the Orchard Party and New York State, but even if that were correct (which it is not), it would not make the 1838 Treaty an accord and satisfaction or a release. These affirmative defenses have no application to this case.

C. The Complaint States A Claim That Phillips' Deed And Trust Documents Are Invalid And That He Has No Ownership Right To The 19.6 Acre Parcel.

Phillips offers no reason why the Nation's complaint fails to state a claim, Br. 40-41, and the district court's ruling that it does state a claim, A-179, should be affirmed. Indeed, Phillips' brief simply copies the text from the surreply he filed below, literally responding to the Nation's reply below, and nowhere challenging the correctness of the district court's ruling. Br. 40-41; ECF 42 at 5-6.

The complaint states a quiet title cause of action under federal law to preserve tribal rights recognized in *Oneida I*, 414 U.S. at 666-67, 675 & 677-78, and *Oneida*

II, 470 U.S. at 235-36, to be protected by federal common law, federal treaty and federal statute. The complaint alleges that Phillips' filing of his quitclaim deed purporting to transfer 19.6 acres of tribal property to his trust was an attempt to obtain possession and control of tribal land in violation of federal law, warranting an action under federal common law to quiet title in the Nation.[23]

The Nation's complaint plausibly alleges that the Nation is a federally recognized tribe (¶7); that it had aboriginal and federal treaty rights to the 19.6 acre parcel (¶¶9-11, 34); and that the State of New York never acquired the 19.6 acre parcel or extinguished the Nation's Indian title. (¶¶12-13, 35). Those allegations establish both the Nation's property right and its cause of action to protect it under federal law. The complaint alleges that Phillips "has never possessed a beneficial or legal interest" in the property. (¶37). The district court correctly accepted all of those propositions to be correct as a matter of law when it dismissed Phillips' counterclaim, establishing their sufficiency to support a judgment in favor of the Nation, not merely to state a claim for relief.

[23]Phillips claims the Nation cannot bring a state law quiet title action. Br. 43-44. Even if his claim that the Nation lacks constructive possession of unceded land were true (and it is not), it would have no bearing on whether the Nation can obtain a declaration of its federal possessory right under federal common law. The Nation bases its quiet title action on its unextinguished Indian title and treaty-recognized title, recently reaffirmed by the Nation-State settlement agreement.

D. Phillips Has Not Identified Any Basis For A Defense Of Acquiescence Or Estoppel When Both Parties Agreed In The District Court That There Was No Transfer To Which The Oneida Indian Nation Could Have Acquiesced.

As explained above, members of an Indian tribe do not acquire the kind of individual property rights Phillips claims by occupying tribal land. A tribe's acquiescence in occupancy by its members does not convey tribal land to them. Nor does a tribe's acceptance of occupancy by tribal members estop the tribe from asserting its tribal property rights. Phillips maintains, Br. 42, that "this is a case regarding the conveyance of real property rights by the historic Oneida tribe" in the 1838 Treaty of Buffalo Creek, but even if that were correct (which it is not) it would have nothing to do with state law defenses of acquiescence or estoppel. Phillips makes no attempt to show that there is any applicable legal basis for these defenses.

E. There Can Be No Abandonment Defense In Light Of Phillips' Allegation That The 19.6 Acres Have Been Continuously Occupied By Tribal Members.

Phillips' abandonment defense, Br. 42-45, fails as a matter of law. Phillips' own allegation of continuous occupancy by members of the Orchard Party negates abandonment because even Phillips admits that Orchard Party Oneidas are not a separate tribe from the Oneida Indian Nation. Land continuously occupied by a group of tribal members has been populated by the tribe, not abandoned. Tribal members do not acquire tribal land by living on it, *see* nn. 4-5, above; otherwise, tribal land would disappear. In any event, an Indian tribe that has treaty-based

recognized title as well as common law Indian title does not lose title merely by ceasing to occupy a particular tract of land. *See Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 270 (2d Cir. 2005) (noting district court application of this rule). Phillips' real argument seems to be that the parcel was conveyed to Phillips' ancestors, which is incorrect and not the same as abandonment.

F. There Are No Material Facts In Dispute.

The facts that Phillips identifies in his brief are not material to whether he has an individual property right, passed down from his forbears, to the 19.6 acre parcel. Even if Phillips is not estopped now from claiming individual rights when he claimed in his deed and his Answer and Counterclaim and briefing below that he was asserting tribal rights as a tribal "spokesman," the "historical record as to how Phillips' family's 175-year long land tenure," Br. 45, is not a basis for finding a transfer of tribal land to individual members of the tribe. And, even if the question whether the 1842 state treaty "was implementing the 1838 Treaty" of Buffalo Creek were a question of fact as Phillips claims, Phillips's family cannot have acquired individual rights to tribal land in the 1842 treaty because the treaty explicitly leaves the reserved land to the Oneidas collectively and explicitly provides that rights in the reserved land were the same as existed before execution of the treaty.

IV. IF THE COURT DECIDES TO REACH THE QUESTION WHETHER TRIBAL SOVEREIGN IMMUNITY BARRED PHILLIPS' COUNTERCLAIM, THE IMMOVABLE PROPERTY EXCEPTION PROFFERED BY PHILLIPS DOES NOT APPLY TO UNCEDED RESERVATION LAND RECOGNIZED BY THE STATE AS SUBJECT TO NATION GOVERNANCE.

Phillips challenges the dismissal of his counterclaim on the alternative basis that the Nation has tribal sovereign immunity. Br. 47-49. The Court need not reach that question because the declaratory and injunctive relief granted with regard to the Nation's own complaint necessarily resolves the merits of the counterclaim as well. However, if the Court does reach the sovereign immunity question, it should affirm.

Phillips argues that the Court should adopt the "immovable property" exception to sovereign immunity described in *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018). In that case, the tribe purchased on the open market land that had once been, but was no longer, part of its reservation. The tribe concluded that non-Indians who occupied an adjoining tract had misplaced a fence and were occupying about an acre of land that should have been part of the parcel reacquired by the tribe. The non-Indian neighbors filed a quiet title action after the tribe announced it intended to remove the fence and put up a new one. In the Supreme Court, for the first time, the neighbors invoked the immovable property exception to argue that their action against the tribe should not have been dismissed. The Court described the exception but declined to decide in the first instance its applicability to tribal sovereign immunity.

> At common law, they say, sovereigns enjoyed no immunity from actions involving immovable property located in the territory of another sovereign. As our cases have put it, "[a] prince, by acquiring private property in a foreign country, ... may be considered as so far laying down the prince, and assuming the character of a private individual." *Schooner Exchange v. McFaddon*, 7 Cranch 116, 145, 3 L. Ed. 287 (1812).

138 S. Ct. at 1653-54.

The immovable property exception, even if it otherwise applied to the immunity of tribes and not just foreign sovereigns (as in *McFaddon*), would not apply to never-ceded land within a tribe's reservation that is held by unextinguished Indian title and recognized treaty title because the land would be part of the tribe's own territory.[24] Nor would it apply to land that the State itself, as a matter of state law implementing the Nation-State settlement, agrees is Nation Land subject to Nation, not State, governance.

[24]The rationale for the traditional immovable property exception, as described in this Court's opinion in *Permanent Mission of India*, does not apply to land owned by a tribe before the existence of New York State or the United States. *City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365, 373–74 (2d Cir. 2006), *aff'd and remanded*, 551 U.S. 193 (2007) ("Foreign governments own, use, and possess land subject to the unique regulations of the forum jurisdiction; their property rights derive from, and are protected by, that regime.... [D]efendants purchased the land subject to New York's property law, including real-estate taxes and liens to enforce them.") (quoting and adopting district court opinion). A tribe with Indian title originating in aboriginal possession does not acquire the land subject to state law. Tribal title preceded the existence of the state.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

/s/ Michael R. Smith

Michael R. Smith
David A. Reiser
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Washington, DC 20036
msmith@zuckerman.com
dreiser@zuckerman.com
(202) 778-1800

Attorneys for Plaintiff-Counter Defendant-Appellee Oneida Indian Nation

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. 32(a)(7) because it contains 12,489 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Word 2010.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font.

/s/ Michael R. Smith
Michael R. Smith

CERTIFICATE OF SERVICE

I hereby certify that, on March 30, 2020, an electronic copy of the foregoing Brief for Plaintiff-Appellant Oneida Indian Nation was filed with the Clerk of Court using the ECF system and thereby served upon all counsel appearing in this case.

/s/ Michael R. Smith
Michael R. Smith