19-2737-cv

United States Court of Appeals

for the

Second Circuit

ONEIDA INDIAN NATION,

Plaintiff-Counter Defendant-Appellee,

– v. –

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

Defendants-Counter Claimants-Appellants.

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

BRIEF FOR DEFENDANTS-COUNTER CLAIMANTS-APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

INTRODUCTION

The District Court's grant of judgment on the pleadings for quiet title nullified 175 years of private ownership in real property, dispossessed the defendant-appellant-landowner, and quieted title in the plaintiff-appellee, notwithstanding a recorded deed documenting the landowner's right, title and interest in that land under the laws of the United States and the State of New York.[1]

The fact that Plaintiff-Appellee OIN is an American Indian tribe and Defendant-Appellant Phillips is a member of the tribe, cannot justify the District Court's termination of long-held private property rights in what are non-tribal lands. In doing so, the District Court misread the historical record, misconstrued state and federal treaties, ignored controlling precedent regarding the existence and location of OIN's tribal lands in New York and failed to recognize the applicability of the laches affirmative defense announced in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005). This Court has applied the *Sherrill* laches defense to prohibit the OIN and other New York Indian tribes from unilaterally dispossessing

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[1] Plaintiff-Appellee Oneida Indian Nation (OIN) misrepresents the impact of its quiet title claim in asserting that "[t]he Nation does not seek to evict anyone." ECF No. 38 at 14. The relief requested and obtained by OIN in the District Court strips Defendant-Appellant Melvin L. Phillips (Phillips) of all right, title and interest in the land he owns. (A180 to A181.) Phillips' continued occupation of the land is at the sufferance of OIN, with no right to remain on it.

landowners of privately-owned lands within the Oneidas' historic reservation.

The District Court also failed to construe the pleadings in the light most favorable to the non-movant as required in a motion for judgment on the pleadings. The District Court's noncompliance with Rule 12(c) resulted in its giving no weight to (a) evidence of a recorded deed with detailed recitations of facts pertaining to the private treatment of the lands in question for generations, and (b) the factual allegations set forth in a series of affirmative defenses alleging these non-tribal lands were created in 1842 under federal and state treaties and had been continuously owned, used and occupied by successive generations of the same family for 175 years. Additionally, the district court failed to recognize that OIN's acquiescence for 175 years bars its present claim to quiet title in itself.

Had the District Court applied the correct legal standards, the Tribe's motion for judgment on the pleadings would have failed, as would the Tribe's motion to dismiss the counterclaim. The parties' competing claims to quiet title as set forth in the complaint, answer and counterclaim, should not have been resolved on the pleadings and without oral argument. Rather, title to the land at issue should be determined after discovery and a hearing (or trial) on the claims and defenses, as such cases typically are.

The judgment below should be reversed.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 because it arose under the laws of the United States, namely, the Treaty with The New York Indians made at Buffalo Creek, 7. Stat. 550, January 15, 1838 (Buffalo Creek Treaty) and the Indian Trade and Intercourse Act, 25. U.S.C. § 177.

This Court has jurisdiction over this appeal from a final decision of a U.S. District Court under 28 U.S.C. §§ 1291 and 1294.

The United States District Court for the Northern District of New York entered a Decision and Order dated November 15, 2018 (A145), dismissing the counterclaim of Appellants Melvin L. Phillips, Sr., by Melvin L. Phillips, Sr., himself and as trustee for the Melvin L. Phillips, Sr./Orchard Party Trust (collectively "Phillips"), and a Decision and Order dated July 31, 2019 (A163), granting the motion of Appellee Oneida Indian Nation (OIN) for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), and permanently enjoining Phillips from owning, claiming title to, possessing, using or occupying land to which Phillips has been personally and specifically entitled since the Buffalo Creek Treaty, a period of more than 175 years.

Phillips timely filed a Notice of Appeal on August 29, 2019. (A83.)

STATEMENT OF THE ISSUES

1) Whether the District Court erred in granting Appellee OIN's (a) Rule 12(c) motion for judgment on the pleadings and (b) Rule 12(b)(6) motion to dismiss the counterclaim, and thereby determined as a matter of law that title to a certain 19.6 acre-parcel is quieted in OIN notwithstanding: (a) a recorded deed filed by Phillips in conformity with New York law and (b) detailed allegations in Phillips' answer and counterclaim that the lands in question have been treated as non-tribal lands in the continuous ownership, possession and use of Phillips and his predecessors since 1842 pursuant to federal and state laws and treaties?

2) Whether the District Court's decisions below conflict with the Supreme Court's decision in *Sherrill*, 544 U.S. 197, as construed by this Court in a number of decisions, including *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir.2005) ("*Pataki*"), *cert. denied*, 547 U.S. 1128 (2006), *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114 (2010), *cert. denied* 565 U.S. 970 (2011) ("*Oneida*"), and *Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1492 (2015) ("*Stockbridge*"), all of which: (a) nullified or otherwise made unenforceable OIN's claims of sovereignty over and possessory interest in real property within the boundaries of the original 300,000 acre Oneida reservation recognized by the United States in Article II of the Treaty of Canandaigua of 1794, 7. Stat. 44, November 11, 1794 ("1794 Treaty"); and (b) barred OIN from involuntarily quieting title to any such property?

3) Whether the district court erred in deciding that the Appellee OIN is entitled to sovereign immunity from suit with respect to Phillips' counterclaim for quiet title in this dispute over immovable property that lies outside the sovereignty and jurisdiction of OIN?

STATEMENT OF THE CASE

Defendant-Appellant Melvin L. Phillips, Sr., is an octogenarian, full-blooded Native American of Oneida and Mohawk ancestry and is the lineal descendant of certain members of the Orchard Party of the historic Oneida Tribe identified in Article 13 of the 1838 Treaty of Buffalo Creek.[2] Phillips' ancestors did not remove from New York with the Oneida Tribe after the Buffalo Creek Treaty. Instead, they remained on the land that they had already occupied and improved. Phillips and his direct ancestors (predecessors in title) continuously owned, improved and used the land at-issue since 1842. They did so under the jurisdiction of New York State, governed by its Real Property Law, as authorized in Article 13 of the 1838 Treaty of Buffalo Creek. Phillips' lands have not been treated as tribal lands for 175 years. The Phillips family has exclusively possessed the lands for generations at all times in amity with and subject to the sovereignty of the State of New York.

On September 1, 2015, Phillips established the Melvin L. Phillips, Sr./Orchard Party Trust (Trust) under New York Law to memorialize the

[2] Phillips is the great, great grandson of Moses Day and Susan Johnson, the sister to William Johnson, the Chief of the Orchard Party referred to in the Treaty of Buffalo Creek. (A27, A66.)

title record of intergenerational transfers of lands in continuous possession of the Phillips family. Phillips caused the Trust deed to be recorded in Oneida County, New York, on September 9, 2015. The Trust deed is in the record as an attachment to OIN's complaint in this action. (A59.)

For the purposes of this litigation, Phillips' title and possession derive from the Buffalo Creek Treaty's special provisions in Article 13, which fulfilled the congressional approval requirement of the Indian Trade and Intercourse Act, and the ensuing June 24, 1842 state treaty ("1842 Treaty"). In the 1842 Treaty New York State exercised its right of preemption to purchase Indian lands upon the lawful termination of Indian occupancy under federal law.[3] The Trust deed's "Being and

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[3] In *Oneida Indian Nation of N.Y State v. County of Oneida, New York*, 414 U.S. 661, 670 (1974), the Supreme Court noted the

> rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the State, *Fletcher v. Peck*, 6 Cranch 87, 3 L.Ed. 162 (1810). But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.

Accordingly, the grant of authority for Phillips' ancestors referred to in Article 13 of the Buffalo Creek Treaty to "make satisfactory arrangements" about the disposition of their land made way for the State to act upon its preemption rights in the 1842 Treaty.

Habendum" provisions set out detailed facts about Phillips' chain of title from the time of the Buffalo Creek Treaty to the present day.

On September 19, 2017, OIN filed suit in the Northern District of New York to set aside the trust deed and quiet title in OIN to 19.6 acres of the land identified in the trust deed. (A9.) Phillips answered and counterclaimed. (A112.) OIN moved to dismiss Phillips' counterclaim. (ECF No. 24.) On November 15, 2018, the District Court granted OIN's motion and dismissed Phillips' counterclaim. (A145.) OIN then filed a motion for judgment on the pleadings. Following the submission of opposing and supporting papers the District Court granted OIN's motion for judgment on the pleadings on July 31, 2018. (A163.) The District Court did not entertain oral argument on the motion even though Phillips had requested it. (A165.)

This appeal will determine whether Article 13 of the Buffalo Creek Treaty, in compliance with the Indian Trade and Intercourse Act, authorized Melvin L. Phillips' direct ancestors, who were individual signatories of the Buffalo Creek Treaty (and subsequent 1842 Treaty), to make satisfactory arrangements personally with the State of New York to secure individual title in them to the lands that are the subject of this litigation.

At its core, this appeal addresses the right of individual Indians in 1842 to take title to land under federal and state law, 175 years of State and local governance with respect to those non-tribal lands, and the settled

expectations of landowners in central New York—both Indian and non-Indian—to own and occupy lands within the historic Oneida Reservation free of tribal claims to those privately owned lands.

STATEMENT OF FACTS

I. The land in question

The land at issue here is 19.6 acres in the Town of Vernon, Oneida County, NY. (A65, A71-72, A97) That land is a portion of the 76 acres that comprised Lot 3 identified in the 1842 Treaty (Treaty of June 25, 1842), between the State of New York and the Orchard Party of Oneida Indians. (A65, A97.)

II. Early history and treaties

Since time immemorial, Indians of the historic Oneida Tribe of Indians have lived on lands located in what is now the State of New York. In the 18th and 19th centuries, the Oneidas entered into treaties with the State of New York that significantly diminished the area of Oneida lands in the State. *See Sherrill*, 544 U.S. at 203-205. First, through the exercise of preemption prior to the ratification of the Constitution, New York made the Treaty of Fort Schuyler, in 1788, with the Oneidas. *Id*. That treaty resulted in reducing Oneida lands from around six million acres to closer to 300,000 acres. *Id*. Following ratification of the Constitution and enactment of the Indian Trade and Intercourse Act, the United States made a Treaty with the Six Nations (1794 Treaty). In Article II, the United States acknowledged the lands reserved to the Oneida Nation in its treaty with

the State of New York resulting in federal recognition of the Oneida reservation comprising the approximately 300,000 acres of land retained by the Oneidas in the Treaty of Fort Schuyler. *Id*.

The property at issue in this case was once part of the original Oneida reservation, but, as discussed below, has long since passed out of the ownership and sovereignty of the Oneidas as a tribal entity. Instead title and possession became individually vested in Phillips and his ancestors.

III. The Indian Trade and Intercourse Act

The United States enacted the first Indian Trade and Intercourse Act in 1790 as a measure to control or reduce conflicts in commerce between Indians and non-Indians; its principal provisions for the purposes of this litigation remain in effect. 25 U.S.C § 177. Specifically, the act bars sales of tribal land without the acquiescence of the Federal Government.

IV. The Buffalo Creek Treaty

The Buffalo Creek Treaty was made with "Oneidas residing in the State of New York, for themselves and their parties."[4] Treaty of Buffalo

[4] The history of the Oneidas in the late 18th and 19th centuries "was marred continually by conflict between the so-called Pagan Party and Christian Parties." *The Oneida Indian Journey: From New York to Wisconsin, 1784 – 1860*, pp. 127 (L. Hauptman & L. McLester eds. 1999); *see generally id.* at 128-133. The Oneidas were "severely fractionated in their policy and religion." *Id*. at 11. "Although members of all factions advocated leasing or selling lands at one time or another, … divisions were exacerbated by debates over leasing and land sales." *Id*. at 63. These divisions are reflected in treaties at the time which make reference to "parties" of Oneidas.

Creek, Act of Jan. 15, 1838, 7 Stat. 550, 554. (A130.) Phillips' ancestors were members of the Orchard party residing at Oneida. (A65.) The Buffalo Creek Treaty implemented federal removal policy and "envisioned removal of all remaining New York Indians, including the Oneidas, to Kansas." *Sherrill*, 544 U.S. at 206. Article 4 of the Buffalo Creek Treaty transferred Oneida tribal sovereignty to the western territory, where the Buffalo Creek Treaty established a new homeland for the Oneidas who removed.

> The United States hereby *guaranty to protect and defend them in the peaceable possession and enjoyment of their new homes*, and hereby secure them, *in said county*, the right to establish *their own form of government, appoint their own officers, and administer their own laws*; subject, however, to the legislation of the Congress of the United States, regulating trade and intercourse with the Indians. The lands secured to them by patent under this treaty shall never be included in any State or Territory of this Union (emphasis added).

7 Stat. 550, Arts. 4. Article 13 of the Buffalo Creek Treaty, however, made "special provisions for the Oneidas residing in the State of New York." 7 Stat. 550, Arts. 13. Article 13 did two things: (1) it provided funds to assist the Orchard Party Oneidas, who included Phillips' ancestors, to prepare for removal; and (2) it authorized those same Oneidas to "make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida."[5] At the time the United States and the Oneidas

[5] The Buffalo Creek Treaty authorized the Oneidas specified in Article 13 to make the "satisfactory arrangements" for their lands directly with New York. Whether the lands would be sold and the price for any sale was left to the Oneidas and the State to negotiate. The federal government removed itself from those discussions by virtue of Article 13 and New York

signed the Buffalo Creek Treaty, all understood that Article 13's "satisfactory arrangements" included those by which the Oneidas who chose not to remove west could remain on their individual lands in New York.

> As a condition of the [Buffalo Creek] treaty's ratification, the Senate directed that a federal commissioner "fully and fairly explai[n]" the terms to each signatory tribe and band. *New York Indians v. United States*, 170 U. S. 1, 21-22 (1898). Commissioner Ransom H. Gillet, who had originally negotiated the [Buffalo Creek] treaty terms with the Oneidas, met with them again and assured them they would not be forced to move but could remain on "their lands *where they reside*," *i.e.*, they could "if they ch[ose] to do so remain *where they are forever*." App.146 (emphases added).

Sherrill, 544 U.S. at 206.

Article 13, unlike Article 4, made no mention of any form of government for the Oneidas remaining in New York. The seat of governance was being transferred West and with it the tribe's organization and principal body of tribal Indians. The Oneidas remaining in New York were not considered by the United States to have any political identity or existence separate from citizenry of New York. *See United States v. Elm*, 25 F. Cas. 1006, 1008 (N.D.N.Y. 1877) (stating that since 1838, the Oneidas' "tribal government ha[d] ceased as to those who remained in this state."). The few remaining Oneidas in New York became assimilated. *Id*. ("20 families which constitute the remnant of the Oneidas reside in the vicinity

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exercised its preemptive right to purchase from the Oneidas. *See Sherrill*, 544 U.S. at 204 n.1.

of their original reservation . . . their dwellings . . . interspersed with the habitations of the whites.").[6] While Phillips and his ancestors preserved Oneida customs, traditions, and culture, they lived as citizens of the State of New York subject to New York law.

V. The 1842 Treaty

Pursuant to the Buffalo Creek Treaty's Article 13 special provisions, the State of New York made a treaty with the Orchard Party Oneidas on June 25, 1842. (A21 [Trust deed, Exhibit 2].) The 1842 Treaty provided for New York to purchase the majority of remaining lands occupied by Orchard Party Oneidas, including Phillips' direct ancestors, in what is today the Town of Vernon, Oneida County, New York. (A37 [Trust deed, Exhibit 9].) The lands are identified as Lots 1, 2, and 4 on that exhibit. The 1842 Treaty further arranged for New York not to purchase Lot 3, which New York agreed would remain the property for the "Home party of the Orchard Indians" who decided to remain on their lands in New York. The Home party of the Orchard Indians included Phillips' direct ancestors who resided on a portion of Lot 3. Phillips is the great, great grandson of

[6] In keeping with federal removal policy and the intent of the 1838 Treaty of Buffalo Creek to remove New York Indians, the main body of Oneidas (numbering 659) emigrated from New York to Wisconsin in 1838 *The Oneida Indian Journey, supra,* at 70. Another 241 Oneidas removed to Ontario, Canada in 1840. *Id*. at 135, 137. This left only about 200 Oneidas in New York. *Id*. at 139. The transference of the Oneidas' governance and jurisdiction to a new reservation in Wisconsin paid dividends for the tribe, as it doubled in size within thirty years. *Id*. at 70.

Moses Day, who is listed on Document A of the 1842 treaty as an Orchard Party Oneida member intending to remain on Lot 3, and Susan Johnson, the sister to Orchard Party Oneida Chief William Johnson, who is also listed in Document A.

Article 4 of the 1842 Treaty states that Lot 3, being "so reserved for such of the Orchard Party as intending to remain in the State is to be had, held, enjoyed and occupied by them collectively in the same manner and with the same right, title and interest therein as appertained to them, the party so remaining before the execution of this treaty."[7] Phillips' ancestors, as individual Indians, took possession of the lands that they had previously occupied and improved, effectively becoming individual landowners of tracts that were to be kept within the family by tradition.

[7] Article 4 of the 1842 Treaty states in full:

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

VI. Treatment of the land since 1842

Phillips' family continued to own and occupy the lands over the generations, respecting the ancestral tradition. The Trust deed's Being and Habendum provisions specifically establishes that the ancestors of Phillips have used and occupied 19.6 acres of Lot 3's 76.16 acres ever since the 1842 Treaty. (A65.) No part of the 19.6 acres was ever alienated. These lands have been recognized by the State of New York and Oneida County as lands owned by Philips. Both State and local governments chose to exempt these lands from taxation, and to exempt the property from laws regulating hunting and gathering rights, based on the 1842 Treaty and the fact that the land had remained within the Phillips' family all that time. In all other respects, the lands (and landowners) are treated like any other private lands and landowners subject to the plenary power of New York State and its political subdivision, including criminal and civil laws, rules, ordinances and regulations.[8] None of the Trust deed lands are held in trust by the United States for any Indian or Indian tribe. None have ever been identified as tribal lands protected by federal law since 1842.

[8] New York State exercised governmental power specifically over the lands in question by authorizing the Indian landowners to alienate their lands under the 1843 Severalty Act (A86) and further by providing for compensation with respect to Lot 3. *See* NYS Legislature, 72d Sess., Ch. 386, April 11, 1849.

VII. Oneida Lands in New York were reduced to 32 acres at least a century ago and do not include the 19.6 acres in this case.

The Supreme Court in *Sherrill* recounted the loss of Oneida tribal lands in New York:

> The Oneidas who stayed in New York after the proclamation of the Buffalo Creek Treaty continued to diminish in number and, during the 1840's, sold most of their remaining lands to the State. A few hundred Oneidas moved to Canada in 1842, and "by the mid-1840's only about 200 Oneidas retained in New York State." By 1843, the New York Oneidas retained less than 1,000 acres in the State. That acreage dwindled to 350 in 1890; ultimately by 1920, only 32 acres continued to be held by the Oneidas.

Sherrill, 544 U.S. at 206-207 (internal citations omitted).

None of the lands under Phillips' Trust deed are within the 32 acre remnant referred to in *Sherrill*, which lies in Madison County. *See United States v. Boylan*, 265 F. 165, 165 (2d Cir. 1920), *appeal dismissed* 257 U.S. 614 (1921). Phillips' Trust deed lands are in Oneida County. They are titled in Phillips, whose ancestors relied on the authorization of the Buffalo Creek Treaty and the commitment of the United States Senate as conveyed by Treaty Commissioner Gillette to make "satisfactory arrangements" with the State of New York to secure title to their land. Phillips and his direct lineal ancestors have continuously held the land for their individual families, subject to the law of New York State, and have lived peaceably as citizens of New York State.

VIII. Prior judicial determination that Orchard Party Oneida lands do not belong to OIN

The District Court in separate litigation, *Shenandoah v. U.S. Dept. 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), determined that Orchard Party Oneida lands do not belong to OIN. There, the District Court determined that Orchard Party Oneida Clan mother Thelma Buss, who resided on Orchard Party Oneida lands located on Lot 2, directly adjacent to Lot 3, "does not reside on Oneida Nation territory." *Id.* (citation omitted).

IX. Prior representation by Bureau of Indian Affairs that modern Oneida Nation is derived from First and Second Christian Parties, not the Orchard Party

The Bureau of Indian Affairs (BIA) submitted an affidavit *in Oneida Indian Nation v. State of New York*, Civil Action No. 74-cv-187, that recognized that OIN's lands do not extend to the Orchard Party Oneida land at issue. Specifically, the Affidavit of BIA Deputy Commissioner, M. Sharon Blackwell, sworn to June 14, 2001, described the "Oneida Nation of New York" as the "Indian tribe that remained on the New York Oneida Reservation, 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." The May 23, 1842 Treaty is a different treaty, regarding different land and different Oneida Indians; it is entirely unrelated to the lands in this case that are dealt with in the separate June

25, 1842 Treaty. Notably excluded from Deputy Commission Blackwell's affidavit is any mention of the Orchard Party Oneida or its lands.[9]

X. Prior representation by OIN that the at-issue lands are not OIN tribal lands

The OIN, as part of Chairman Ray Halbritter's testimony before the United States Senate Committee on Indian Affairs presented a table of OIN owned lands, including lands it owned prior to repurchasing lands within its historic reservation. The only "territory" identified as owned by the OIN prior to 1990 is 32 acres in Madison County.[10]

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[9] *See also*, Bureau of Indian Affairs, Draft Environmental Impact Statement, Oneida Nation of New York Conveyance of Lands Into Trust, 3-166 ("By 1920, the Nation retained only 32 acres located in Madison County of their original reservation in New York State.") https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc-000256.pdf. Appellants request the Court to take judicial notice of the various referenced court and public records. *See Jaques v. United States R.R. Retirement Bd.*, 736 F.2d 34, 40 (2d Cir. 1984) (taking judicial notice of official court record in related case of inferior court in same jurisdiction); *Lafluer v. Whitman*, 300 F.3d 256, 267 n. 1 (2d Cir. 2002) (taking judicial notice of state court record of Article 78 proceeding); *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156, 16 (S.D.N.Y. 2015 (courts "routinely" take judicial notice of documents from official government websites). Judicial notice is especially appropriate here because Appellants had no ability to develop the record in the District Court.

[10] Indian Gaming Regulatory Act Amendments, Hearing before the Committee on Indian Affairs, United States Senate, 103d Cong., 2d Sess., July 19, 1994 Part 1, 226, at 266. S. Hrg. 103-874, Pt. 1. https://books.google.com/books?id=wXudx1OkOK4C. *See also*, Bureau of Indian Affairs, Draft Environmental Impact Statement, Oneida Nation of New York Conveyance of Lands Into Trust, 3-166 ("By 1920, the Nation

XI. Prior representation by Department of Justice that Phillips has continued right to possess lands pursuant to 1842 Treaty

Further, in 2002, the Department of Justice, exercising the federal trust responsibility for the OIN informed this Court that the litigation then pending would "not result in the ejection of anyone from the land on which they reside" and that "[t]he United States never has claimed the Marble Hills [that is, those Oneida descendants and beneficiaries of the 1842 Treaty] are not entitled to continued possession of their lands."[11]

XII. *Sherrill* and its progeny

In *Sherrill*, the Supreme Court concluded that OIN is not entitled to unilaterally assert sovereignty over any of the lands within its 300,000 acre historic Oneida reservation. The Supreme Court wrote that the Indian treaty history in New York, the long passage of time during which OIN had claimed neither sovereignty nor title, the acquisition of title by others, and the governance of the land by the State of New York "preclude[d] the Tribe from rekindling embers of sovereignty that long ago grew cold." *Sherrill*, 544 U.S. at 214.

The decision in *Sherrill*, and subsequent decision by this Court applying *Sherrill*, determined that the Oneidas' possessory land claims, which had clouded title over real property within central New York for

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retained only 32 acres located in Madison County of their original reservation in New York State.").

[11] Answering Brief for Federal Intervenor-Appellees, *Marble Hill Oneida Indians v. Oneida Indian Nation of New York*, No. 02-6171, U.S. Court of Appeals 2d Cir., at 15 and note 2.

decades, were likewise disruptive. *See Stockbridge*, 756 F.3d at 165 ("it is now well-established that Indian land claims asserted generations after an alleged dispossession are inherently disruptive of state and local governance and the *settled expectations of current landowners*, and are subject to dismissal on the basis of laches, acquiescence, and impossibility." (Emphasis added). These cases bar OIN from asserting tribal sovereignty, title, possession or ownership with respect to any land within the 300,000 acres unless two conditions are met: OIN purchases the land in open-market, arms-length transactions; and (2) successfully petitions the Secretary of the Interior to place the land in federal trust status. *Sherrill*, 544 U.S. at 219-221.

XIII. OIN land into trust application

In 2005, days after *Sherrill* was decided, OIN filed an application to put land it owned within its historic reservation into federal trust. Phillips' land was not included in OIN's application. The Tribe has never attempted to put the land at issue in this case into federal trust,[12] and, indeed, could not, as it has always been in the possession and ownership of Phillips and his direct ancestors.

[12] *See* the summary of Oneida litigation regarding land claims in *Sherrill,* 544 U.S. at 203-212.

XIV. 2013 Settlement

In 2013, OIN, the State of New York, and Madison and Oneida Counties entered into a comprehensive settlement[13] of litigation over land that had previously been part of the 1794 Treaty reservation, some of which OIN had purchased from non-Indian owners, some of which OIN had applied to put into federal trust, and some of which the settlement parties agreed OIN could in the future acquire in voluntary, arms-length transactions and make application to the Secretary of the Interior for placing lands so acquired into federal trust.[14] Complaint, Ex. D; see *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985); see also *Sherrill*, 544 U.S. 197 (examples of the litigation). Secretarial approval of a trust acquisition would establish OIN sovereignty over the land. The settlement was approved by this court in *New York v. Jewell*, 2014 U.S. Dist. LEXIS 27042 (N.D.N.Y. Mar. 4, 2014). In the Settlement neither the State nor Madison or Oneida Counties conveyed any land title to the OIN. Phillips was not

[13] "Settlement Agreement by the Oneida Nation, the State of New York, the County of Madison, and the County of Oneida," May 16, 2013 (A39 [Exhibit D to the Complaint] (2013 Settlement)).

[14] Trust land acquisitions are governed by federal statute and regulations, 25 U.S.C. § 465 and 25 CFR Part 151, respectively.

notified of the settlement negotiations, did not participate in the settlement negotiations, and is not a party to the settlement.

The 2013 settlement includes provisions which incorrectly describe the "Marble Hill tract" as "land retained by the Oneida Nation as Lots 2 and 3 in the June 25, 1842 Orchard Party treaty," and as "Nation Land" possessed by OIN. Complaint, Ex. D, Sec. II.G, L. Rather, this non-tribal land was retained and continuously owned and possessed by Phillips and his direct ancestors pursuant to the Buffalo Creek Treaty and the 1842 Treaty.

XV. The Trust Deed

On September 1, 2015, Melvin L. Phillips, Sr., acting as steward of the legacy of his ancestors, as an Orchard Party Oneida descendent and member presently vested with ownership and occupancy of the land—on which he was born and raised--executed a quitclaim deed, transferring his rights in those parcels to the Melvin L. Phillips, Sr. / Orchard Party Trust. Complaint, Ex. E.[15] The lands under the Trust deed include the land at

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[15] The "Being and Habendum" Clause to the Trust deed includes records documenting the intergenerational transfer of lands under the Trust deed that theretofore had not been recorded on the Oneida County land records.

> Where title to real property passes by operation of law to a decedent's distributes, heirs-at-law or surviving joint owners, in many cases there are no proceedings in a surrogate's court wherein petitions, affidavits of heirship or other verified documents might be found to establish the heirs or survivors. In such situations, it is not uncommon to find recitals of such information in a deed or other

issue in this case, as well as other parcels located in Lots 2 and 3. OIN's complaint to quiet title is limited to 19.6 acres of Phillips' lands.

Pursuant to the trust, Phillips is trustee "for the benefit of his lineal heirs and all current and future members of the Orchard Party." *Id.* at Ex. 12, p. 1. The trust fulfills the "intent of the ancestors of Melvin L. Phillips, Sr.," as well as "the members of the Orchard Party past, present and future" to reserve the lands in question to Mr. Phillip's "heirs and lineal descendants" and "other members of the Orchard party who actually live on and occupy the said lands described herein." *Id.* at p. 2–3.

XVI. The District Court's decisions

A. Granting OIN's motion to dismiss Phillips' counterclaim

In ruling on Phillips' counterclaim for quiet title to the 19.6 acres, the District Court concluded essentially that Article 13's special provisions for the Oneida in the Buffalo Creek Treaty were not federal authorization or consent for the Oneidas identified in Article 13 to make satisfactory arrangements for the disposition of their lands. Article 13, its surrounding

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> instrument as the only evidence of such facts. If the deed or other instrument was executed, acknowledged and recorded more than ten years ago, the recitals become presumptive evidence of such heirship or survivorship. (Citing N.Y. Real Property Actions & Proceedings, §341, Recitals as to Heirships in Conveyances.)

Real Estate Titles, Third Edition, New York State Bar Association, Editor-in-Chief James M. Pedowitz, Esq., §7.19 Recital of Heirship or Survivorship.

circumstances and the subsequent 1842 Treaty "fail to plausibly suggest a claim to the 19.6 acres in dispute." (A161.)

Further the court concluded that the immovable property exception to tribal sovereign immunity was not definitively resolved in *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018) and adhered to prior precedent on sovereign immunity in this Circuit.

B. Granting OIN's motion for judgment on the pleadings

The District Court chose to decide the Rule 12(c) motion without argument and concluded that the competing claims to quiet title did not raise any disputed facts. (A183.) The District Court determined that the 19.6 acres are still part of the Oneida reservation that was never disestablished. The court did not read Article 13 of the Buffalo Creek Treaty as authorizing the 1842 state treaty. And rather than consider the historical treatment of the lands in question as a matter of fact following the 1842 Treaty, the District Court concluded as a matter of law that no transfer to Individual Indians holding non-tribal lands pursuant to state law was legally possible, notwithstanding the special provisions in Article 13 for particular Oneidas and particular Oneida lands. The court stated that the United States had always treated with the Oneidas as a single unified nation which prevented any type of separate tribe, with separate tribal rights, to attain rights in the property in question, even though Phillips did not claim any such separate

tribal status or rights and instead relied on the terms of the 1842 Treaty pertaining to his lineal ancestors.

STANDARD OF REVIEW

This Court reviews a district court's grant of a motion to dismiss de novo. *See Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994).

In a motion for judgment on the pleadings, "the movant bears the burden of establishing 'that no material issue of fact remains to be resolved and that [it] is entitled to judgment as a matter of law.'" *Multimedia Plus, Inc. v Playerlync, LLC* 198 F. Supp. 3d 264, 267 (S.D.N.Y. 2016), aff'd, 695 F. App'x 577 (Fed. Cir. 2017). "A court may grant a rule 12 (b) (6) [or 12 (c)] motion . . . only 'when it appears beyond doubt that the [non-movant] can prove no set of facts in support of his claim which would entitle him to relief.'" *Rolon v Henneman*, 389 F. Supp. 2d 517, 518 (S.D.N.Y. 2005), aff'd 517 F.3d 140 (2d Cir. 2008) (quoting *Phillip v. University of Rochester*, 316 F.3d 291, 293 (2d Cir. 2003) (citation omitted)). "In evaluating a Rule 12 (c) motion, the court must view the pleadings in the light most favorable to, and draw all reasonable inferences in favor of, the nonmoving party." *Madonna v. United States*, 878 F.2d 62, 65 (2d Cir. 1989). Additionally, "[a] material issue of fact that will prevent a motion under Rule 12 (c) from being successful may be framed by an express conflict on a particular point between the parties' respective pleadings" or "from defendant pleading new matter and affirmative defenses in his answer." *Saratoga Harness Racing, Inc. v. Veneglia*, 1997 WL 135946, at *2 n.5 (N.D.N.Y Mar. 18, 1997)

(quoting 5A C. Wright & A. Miller, Federal Practice and Procedure § 1368, at 529 (1990)).

"[W]hen it is a plaintiff who files such a motion, the Court accepts as true only the allegations in the complaint that the defendant has not denied." *Edwards v Jenkins*, 2013 WL 8366052, at *1 (E.D. Mich. Nov. 21, 2013), citing *Kule-Rubin v. Bahari Grp. Letd.*, 2012 WL 691324, at * 3 (S.D.N.Y. Mar. 5, 2012). Affirmative defenses usually bar judgment on the pleadings if they raise issues of material fact that, if true, would bar the recovery sought by the moving party. See *Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventists Congregational Church*, 887 F.2d 228, 230 (9th Cir 1989), citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1368 (1969).

SUMMARY OF THE ARGUMENT

Phillips possesses and has the right to possess the 19.6 acres of land at issue in this case, and other lands under the Trust deed that were last tribal lands in 1842. That right arises from, and is protected from infringement by, federal treaty, state treaty, statutory and common law, and the Constitution. Phillips and his ancestors have owned, possessed, used and occupied the land for more than 175 years under the jurisdiction of New York State and under protection of New York law. Special provisions in Article 13 of the Buffalo Creek Treaty, among other things, authorized Phillips ancestors to make "satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." Phillips'

ancestors did just that for the land at issue in this case. Phillips' family has had unbroken ownership, use and occupancy of that land for the past 175 years, as described in detail in the Trust deed recorded in Oneida County. Recording that deed was a lawful action to document Phillips' ownership.

This is a case about New York State land title established in compliance with federal law and recognized for generations under New York law. It is not about Phillips' tribal membership or identity, or any claim by Phillips to possess tribal sovereignty or identity separate from OIN. Phillips' vested personal right to own and occupy the property under New York law is not vitiated because he is an enrolled member of the Oneida Nation, or because the land at issue was once part of the historic Oneida reservation. As to this separately owned and possessed non-tribal land, where title vested and remained in Phillips' ancestors for the past 175 years ago under New York law, Phillips, who is a citizen of the United States and resident of New York State, stands in the same position as non-Indian landowners in Oneida County.

The principles of laches, acquiescence and impossibility that the Supreme Court applied in *Sherrill* prevent the OIN (as the recognized successor to the historic tribe that removed from New York) from unilaterally asserting tribal ownership and jurisdiction over these non-tribal lands. *Sherrill* (544 U.S. at 220) established the means available to OIN to obtain title and sovereignty with respect to any land within the historic Oneida reservation. First by voluntary title acquisition and then by

successful trust application to the Secretary of the Interior. As previously stated, the 19.6 acre parcel is not part of the 32 acres that remained in OIN possession and has never been held by OIN whether by trust or official title. The District Court erred in quieting title in OIN and terminating Phillips' rights under New York Real Property Law.

Finally, OIN's claim of tribal sovereign immunity to Phillips' counterclaim for quiet title must fail under the circumstances of this case where, the sovereign seeks to quiet title to immovable property that lies outside the Tribe's sovereign territory.

ARGUMENT

I. The Buffalo Creek Treaty authorized title to vest in Phillips.

The general provisions of the Buffalo Creek Treaty provided for the removal of the Indians of the historic Oneida Nation from New York. In Article 4 of the Treaty, the United States pledged to "guaranty to protect and defend them in the peaceable possession and enjoyment of their new homes [in the west], and hereby secure them, in said county, the right to establish their own form of government, appoint their own officers, and administer their own laws." No such guaranty was made with respect to Oneidas who remained in New York on lands of the historic Oneida reservation.

Instead, the special provisions in Article 13 of the Buffalo Creek Treaty, to which Phillips ancestors were signatory, authorized Phillips' ancestors to make "satisfactory arrangements" directly with the governor

of New York for the sale of their lands. The United States would not be involved further than making this prior authorization for those Oneidas to choose whether and how to arrange with New York to dispose of their lands. The United States was indifferent whether Phillips' ancestors sold and removed west, or stayed on their lands. As the Supreme Court stated in *Sherrill* (544 U.S. at 206), with emphasis added, the United States Treaty commissioner

> assured them they would not be forced to move but could remain on "their lands *where they reside," i.e.*, they could "if they ch[ose] to do so remain *where they are forever*."

Thus, the "satisfactory arrangements" contemplated by the United States necessarily included the authority of Phillips' ancestors to reach an outcome in which they did not sell their land to New York but remained individually possessed of it with the right to reside forever in the homes and farms they had built as citizens under the jurisdiction of the State of New York. Phillips' ancestors chose to do that, as documented in the Trust deed's Being and Habendum provisions. Upon the lands being allocated under the 1842 Treaty to the individual Indians who had occupied and improved them, the lands were no longer tribal lands. See *Sherrill*, 544 U.S. at 202 (observing that the historic Oneida Tribe, last possessed the lands at issue in that case "as a tribal entity in 1805"); *Elm*, 25 F. Cas. at 1008.

II. The Buffalo Creek Treaty's Article 13 special provisions for "satisfactory arrangements" fulfilled the requirements of the Indian Trade and Intercourse Act.

The Indian Trade and Intercourse Act "bars sales of tribal land without the acquiescence of the Federal Government." *Sherrill*, 544 U.S. at 205. More specifically that act provides that

> no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138, 25 U.S.C. §177. Phillips' land tenure comports with the Indian Trade and Intercourse Act in every respect: the "sale" document is the 1842 Treaty with New York; the "Indians" are Phillips and his ancestors; the "State" is New York; and the "treaty" is the Buffalo Creek Treaty.

The District Court, however, accepted the OIN's arguments that the historic Oneida Tribe had never ceded the rights to those lands, and the federal government had not consented under the Indian Trade and Intercourse Act to Phillips and his ancestors obtaining title to the land. To reach that conclusion the District Court ignored entirely Article 13's special provisions. In doing so, the District Court erred in assessing the Indian Trade and Intercourse Act's relationship with the Buffalo Creek Treaty's

special provisions that expressly authorized alienation of Oneida lands on such terms as could be reached with the Governor of New York State.

The District Court wrongly accepted OIN's contention that the land at issue is Oneida tribal land that had not been authorized for sale. That contention rested on the incorrect premise advanced by OIN that the federal government treated the Oneidas as a unified, monolithic entity in the Buffalo Creek Treaty negotiations. Document 30, at 17 note 8. In large part the District Court's decision on this point was derived from a statement in *Oneida Indian Nation of New York v. New York*, 194 F.Supp.2d 104, 118-119 (footnote omitted) (N.D. N.Y., 2002) which addressed standing requirements to assert land claims pertaining to the historic Oneida reservation. The Article III analysis for standing to assert a land claim for allegedly illegal dispossession of tribal lands through a series of state treaties in violation of the Indian Trade and Intercourse Act (as in the cited case) is different from determining whether title *lawfully* passed to certain Individual Indians under a particular treaty, as is the case here. The question before this Court is whether language in the 1838 Treaty of Buffalo Creek authorized state treaty making with the faction of Oneida Indians known as the Orchard Party / Home Party of Oneidas. That legal transaction with New York State falls outside the scope of any land claim alleging a violation of the Indian Trade and Intercourse Act.

The standing analysis in *Oneida,* 194 F.Supp.2d at 118, actually documents the fact that New York State treated with various factions,

groups or sects of Oneidas (e.g., First and Second Christian Party, Orchard Party, Home Party). The district court in that case relieved OIN from having to trace its members' lineage back to particular factions for each specific alleged illegal transaction. *Id.* at 118-119.

Simply put, the Buffalo Creek Treaty provided for both general tribal rights and special individual Indian property rights. In doing so, the Buffalo Creek Treaty accounted for the practical reality that the Oneida population by 1838 was undergoing a Diaspora. *Sherrill*, 544 U.S. at 206. The Buffalo Creek Treaty, in a way, bifurcated the tribal entity and its membership; it transferred the tribal entity from New York to the west and gave individual Oneidas the choice of emigrating or remaining were they were residing "forever." Viewed through the lens of the Indian Trade and Intercourse Act, the Buffalo Creek Treaty's Article 13 provisions were the required authorization from Congress for Phillips' ancestors to make the 1842 Treaty with New York, pursuant to which they sold some of their land and lawfully retained and became vested with other land that is at issue here.

Phillips has found no precedent contradicting the plain meaning of Article 13's special provisions enabling Phillips' ancestors to secure individual ownership of and remain on the land they had settled and

improved,[16]rather than remove to a new Oneida reservation in the west. The District Court erred by rejecting Article 13 as the authorization by Congress for Phillips' ancestors to make whatever "arrangements" that would be "satisfactory" to them in selling lands to New York State, which was in fact consummated in the 1842 Treaty.

III. The Supreme Court and this Court prohibit involuntary quiet title and dispossession actions by OIN.

Phillips and his ancestors possessed quiet enjoyment of their land under the satisfactory arrangements they had made with the State of New York in 1842 until the 2013 Settlement. In that document, OIN claimed for the first time since prior to the Buffalo Creek Treaty that it possess the at-issue lands long held by Phillips and his ancestors under the 1842 Treaty , as well as other lands under the 1842 Treaty now owned, possessed, used and occupied by non-Indians.[17] That was followed by OIN's action to quiet title in 2017.

Phillips who is a citizen of the United States and resident of New York State is entitled to the same shield from involuntary dispossession by

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[16] Article 5 of the 1842 Treaty specifically recognizes and accounts for the improvements Appellants ancestors and other Oneidas had made to the lands on which they resided.

[17] Sections II.G and L of the 2013 Settlement refer to "the 104 acres (more or less) of state tax-exempt land retained by the Oneida Nation as Lots 2 [28 acres] and 3 [76 acres] in the June 25, 1842 Orchard Party Treaty." The Oneida Nation was not a party to the 1842 Treaty and the exemption is not based on federal law or historic reservation status. Moreover, the majority of the 104 acres is today in non-Indian ownership and is not tax exempt.

OIN that was established for non-Indian residents of New York in *Sherrill (*544 at 216-217*)*. The distance from 1842 to the present day, OIN's long delay in seeking equitable relief, and development of the land spanning several generations, similarly evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the OIN's long abandoned claim to the land. *See Sherrill*, 544 at 221.

Shortly after the Supreme Court's decision in *Sherrill*, this Court addressed another pending Indian land claim in *Pataki*, 413 F.3d 266, 275. This Court stated

> The nature of the claim as a "*possessory claim*," as characterized by the District Court, underscores our decision to treat this claim like the *tribal sovereignty* claims in *Sherrill*. Under the *Sherrill* formulation, this type of possessory land claim—seeking possession of a large swath of central New York State and the ejectment of tens of thousands of landowners—is indisputably disruptive. Indeed, this disruptiveness is inherent in the claim itself—which asks this Court to overturn years of settled land ownership—rather than an element of any particular remedy which would flow from the possessory land claim. Accordingly, we conclude that possessory land claims of this type are subject to the equitable considerations discussed in *Sherrill*.

The logic of Appellee's position and the district court's decision is that all land under the 1842 Treaty is subject to a quiet title action by the Appellee. This quiet title action, then, is a stratagem to circumvent *Sherrill* and its Second Circuit progeny.

The reasoning this Court applied to the thousands of land titles at stake in *Pataki* applies equally to the single title in this case.

Further, in assessing the effect of *Sherrill*, this Court wrote in *Onondaga Nation v. New York*, 500 Fed. Appx. 87, 89 (2d Cir. 2012) (Summary Order) that there is an:

> equitable bar on recovery of ancestral land in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) ("Sherrill"), and this Court's cases of *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005) ("Cayuga") and *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2010) ("*Oneida*"). Three specific factors determine when ancestral land claims are foreclosed on equitable grounds: (1) "the length of time at issue between an historical injustice and the present day"; (2) "the disruptive nature of claims long delayed"; and (3) "the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury." *Oneida*, 617 F.3d at 127; *see also Sherrill*, 544 U.S. at 214, 221 (summarizing that the equitable considerations in this area are similar to "doctrines of laches, acquiescence, and impossibility," and grew from "standards of federal Indian law and federal equity practice") (internal quotation marks omitted). All three factors support dismissal.
>
> As to length of time, the district court noted that "approximately 183 years separate the Onondagas' filing of this action from the most recent occurrence giving rise to their claims." *Onondaga v. New York*, No. 5:05-cv-0314, 2010 WL 3806492, at *8 (N.D.N.Y. Sept. 22, 2010). The disruptive nature of the claims is indisputable as a matter of law.

As illustrated by *Onondaga Nation*, the District Court erred in failing to apply the three factors to the 19.6 acre parcel at issue, each of which naturally requires discovery to determine.

This Court returned to the issue in *Stockbridge* (756 F.3d at 165-166) and once again concluded that the ancestral tribal land claim there was "foreclosed" because:

> it is now well-established that Indian land claims asserted generations after an alleged dispossession are inherently disruptive of state and local governance and the settled expectations of current landowners, and are subject to dismissal on the basis of laches, acquiescence, and impossibility. The claims at issue here share all of these characteristics: the Stockbridge have not resided on the lands at issue since the nineteenth century and its primary reservation lands are located elsewhere (in Wisconsin); the Stockbridge assert a continuing right to possession based on an alleged flaw in the original termination of Indian title; and the allegedly void transfers occurred long ago, during which time the land has been owned and developed by other parties subject to State and local regulation. Such claims are barred by the *Sherrill* equitable defense.

Similar to the unsuccessful tribal claimant in *Stockbridge*, OIN asserts a claim to title generations after an alleged dispossession. OIN's claim is inherently disruptive of the settled expectations of Phillips as well as the long accepted status of the lands under state and local governance. OIN had neither resided on nor claimed the land since the 1838 Buffalo Creek Treaty and the 1842 Treaty that implemented it. OIN's reservation is on other lands that are now in federal trust. OIN cannot sustain its quiet title

claim in the face of the governing precedent established by the Supreme Court and this Court. Accordingly, it was error for the District Court not to apply the rulings in those decisions to OIN's quiet title action.

IV. The District Court erred in rejecting Phillips' affirmative defenses

A. Legal standard

The District Court observed that affirmative defenses usually bar judgment on the pleadings if they raise issues of material fact that, if true, would bar the recovery sought by OIN. (A176.) Despite its recognition of the correct legal standard, the District Court based its Rule 12(c) ruling in part on the OIN's argument that Phillips had failed to "explain" or "sustain" his affirmative defenses. (ECF No. 38 at 9.) But a non-moving party is not required to "explain" or "sustain" its affirmative defenses. Instead, OIN, as the movant, has the burden to show that Phillips' affirmative defenses fail. See *Multimedia Plus, Inc.*, 198 F. Supp. 3d at 264 ("[i]n a motion for judgment on the pleadings pursuant to Rule 12(c), the movant bears the burden of establishing . . . 'that [it] is entitled to judgment as a matter of law.'").[18] As a result the District Court erred in ruling that the affirmative defenses did not raise any issues of material fact that would bar OIN's quiet title action. (A177.)

[18]OIN offered no case law supporting its attempt to shift the burden of a 12(c) motion.

B. OIN did not carry its burden to show that Phillips' affirmative defenses fail as a matter of law.

Phillips asserted fourteen affirmative defenses in his Answer: (1) the Eleventh Amendment of the U.S. Constitution; (2) the failure to join all indispensable parties including the United States, the State of New York, Oneida County and the Town of Vernon; (3) the statute of limitations; (4) the doctrine of collateral estoppel; (5) the doctrine of res judicata; (6) release; (7) accord and satisfaction; (8) Congressional act; (9) the doctrine of laches; (10) impossibility; (11) the failure to present a justiciable dispute; (12) the abandonment by OIN of any rights it may have to Trust deed lands; (13) the failure to state a claim upon which relief can be granted; and (14) the doctrine of acquiescence and estoppel. (A177-178.)

OIN has not shown that these defenses are untenable as matter of law. Even a single surviving affirmative defense would bar OIN's motion, and many of OIN's attacks are legally insignificant. The District Court should have denied OIN's Rule 12(c) motion and allowed the case to proceed through its normal course to discovery.

1. Failure to join an indispensable party

OIN contended that this affirmative defense (A122) fails because it "must be made before pleading." (ECF No. 38 [Reply Brief] at 7). This is not true. The Federal Rules of Civil Procedure permit a party to raise the failure to join a necessary party "in any pleading allowed or ordered under Rule 7(a)," including an answer to a complaint. Fed. R. Civ. P. 12(h)(2)(A); Fed.

R. Civ. P. *7(a)(2);* see *Legal Aid Soc'y v. City of New York,* 114 F. Supp. 2d 204, 219 (S.D.N.Y. 2000) (explaining that it "is not a threshold defense that must be asserted at the pleading stage."). Accordingly, Phillips correctly pled the defense at the appropriate time, in the Answer.

The District Court dismissed this affirmative defense because Phillips had not "alleged–even conclusorily–that the United States, State of New York, County of Oneida, Town of Vernon, or any other individual or entity has any claim to, or interest in, the Property, or is necessary for the Court to accord complete relief." But the United States is interested because it was a signatory to the Buffalo Creek Treaty that authorized Phillips' ancestors to make the 1842 Treaty with New York. The State of New York is interested because it is a party to the 1842 Treaty and has jurisdiction over the land at issue. The County of Oneida and Town of Vernon are interested because they have jurisdiction over the land at issue. The State, County, and Town all have an interest based on OIN's misrepresentation of the 2013 Settlement in this litigation not only as to Phillips' interest but also because of the numerous non-Indian titles to lands in Lots 2 and 3 that are implicated in the District Court's decision.

OIN did not carry its burden to show that the defense is either improper or fails as a matter of law.

2. Release, accord, and satisfaction

In the Answer, Phillips asserted that (1) OIN's claims are barred by release; and (2) OIN's claims are barred by accord and satisfaction. (A122.) Phillips also discussed the significance of the Buffalo Creek Treaty to tribal rights in the 19.6 acres in the Answer and Opposition Brief. (A116, A119.) The Buffalo Creek Treaty is a federal treaty between the United States and the historic Oneida Tribe with special provisions that authorized the Orchard Party Oneidas, who included Phillips' lineal ancestors by themselves and for themselves, to "make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." The Treaty thus authorized Phillips' ancestors to make the satisfactory arrangement without the further participation of either the United States or the Oneida Tribe. Phillips contends that Article 13.s special provisions extinguished OIN's rights in all the lands under the 1842 Treaty, including the 19.6 acres and established Phillips' proprietary interest in the land at issue.

OIN's assertion, and the District Court's acceptance of it, that Phillips' release and accord and satisfaction defenses fail because Phillips' "Answer does not identify such a [federal] statute or treaty" affecting tribal rights in the land at issue is erroneous.[19] (Reply Brief at 8.) Phillips

[19] OIN criticized Phillips because "the opposition does not mention or discuss release or accord and satisfaction." (Reply Brief at 8). The purpose of the Opposition Brief was not to discuss at length the underlying legal

identified the Buffalo Creek Treaty of 1838, which is a treaty or convention within the meaning of the Indian Trade and Intercourse Act, 25 U.S.C. § 177, as a basis for the arrangements the Orchard Party made with New York for the 19.6 acres and other Orchard Party land in the 1842 Treaty with New York. OIN has made no other argument regarding the release and accord and satisfaction defenses. *(See* Reply Brief at 8.) Accordingly, OIN failed to carry its burden to show that Phillips' defenses fail as a matter of law.

3. Failure to state a claim

OIN argues that Phillips' failure to state a claim defense fails because "Fed. R. Civ. P. 12(b) required Phillips, before answering, to move to dismiss." (ECF No. 38 [Reply Brief] at 9.) Appellee has again misunderstood the law. Rule 12(h)(2) states that a "failure to state a claim" defense "may be made in any pleading permitted . . . or by motion for judgment on the pleadings, or at the trial on the merits.'" *Patel v. Contemporary Classics of Beverly Hills,* 259 F.3d 123, 126 (2d Cir. 2001).

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theories of the affirmative defenses, but to respond to OIN's bare-bones Opening Brief, which never mentioned affirmative defenses at all. Rather than discuss specifics from Defendants' Answer, Plaintiff's Opening Brief contained only four pages of argument and focused almost exclusively on the Court's Order dismissing the Counterclaim, which had not referred to the affirmative defenses. Plaintiff cannot carry its burden by failing to address key points of contention and then attacking Defendants for not responding to Plaintiff's unspoken positions.

Courts within this circuit have held that "[t]he language of Fed. R. Civ. P. 12(b)(6) can be used on a motion to dismiss or as an affirmative defense, at the pleader's option" and "it is well settled that the failure-to-state-a-claim defense is a perfectly appropriate affirmative defense to include in the answer." *Saratoga,* 1997 WL 135946, at *7.

OIN's only other argument is that Phillips' "opposition to judgment does not say a thing about this defense." (Reply Brief at 9). However, OIN's mischaracterization of the law and its attempt to shift the burden to Phillips fails to show how Phillips' affirmative defense fails. For the purposes of the Rule 12(c) motion, the burden is on OIN to show that every asserted defense fails; it is not Phillips' responsibility to show that they succeed.

4. Acquiescence and estoppel

Phillips' Answer raises the affirmative defense of acquiescence and estoppel. (A122). OIN argues that this affirmative defense fails because "there is no claim today that the Orchard Party is a separate tribe from Plaintiff's Oneida Indian Nation . . . ." (ECF No. 38 at 11 Reply Brief at 9).[20]

[20] OIN argued that the District Court's previous ruling dismissing the Counterclaim was an acceptance of each and every statement by OIN in its Motion to Dismiss the Counterclaim, and heavily relied on this assumption in its motion for judgment on the pleadings. In doing so, OIN conflated two separate motions and failed to meet its burden to separately meet its burden to show entitlement to judgment on the pleadings.

The proprietary interests of the Defendants in the 19.6 acres do not rely on independent sovereignty from the Oneida Indian Nation. Simply put, this is a case regarding the conveyance of real property rights by the historic Oneida tribe at the direction and under the auspices of the United States in compliance with the Nonintercourse Act. This is not a sovereignty case at all let alone a dispute about sovereignty between two claimants.

OIN's repeated refrain regarding sovereignty is a makeweight argument to distract from the crux of the case. Further proceedings are warranted to understand the factual basis underlying Phillips' affirmative defense. Accordingly, OIN did not carry its burden and cannot show that "no material issue of fact remains to be resolved and that [it] is entitled to judgment as a matter of law.' See *Multimedia Plus, Inc.,* 198 F. Supp. 3d at 267.

5. Abandonment

Phillips has asserted the defense of abandonment, alleging that OIN ceded its rights to the 19.6 acres. (Document 17 Answer at ¶ 51). OIN argues that Phillips' abandonment defense fails because Phillips "do[es] not allege that [OIN] ever ceded rights to the land or that the federal government gave its consent to such a transaction . . . ." (Reply Brief at 10.) Although OIN relies on the Court's previous Order dismissing the Counterclaim, that Order was only about the allegations of the Counterclaim, not Phillips' general denials and affirmative defenses

asserted in the rest of the Answer,[21] where Phillips *did* allege that OIN ceded its rights to the land. (A30 [Answer at ¶ 51]). Additionally, OIN presumes to rely on Phillips' own continuous possession of the 19.6 acres to support OIN's continuity of occupation. (Reply Brief at 10). However, Plaintiff's presumption is rebutted by the facts and law, as recited in *Sherrill* (544 U.S. at 204-207) and discussed herein. Phillips is not the OIN and vice versa. Phillips' membership in OIN does not convert private property under New York real property law into tribal property.

Phillips suggests that OIN's radical claim of identity with Phillips exposes a critical flaw in Phillips' quiet title claim. New York real property law bars a quiet title action unless among other things the claimant is in actual or constructive possession of the property at issue.[22] OIN is not in

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[21] As previously argued, the Court's decision to dismiss the counterclaim "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, . . . [did] not imply a determination that Defendants 'can prove no set of facts in support' of their counterclaim . . . ." (Opposition Brief at 4). Plaintiff has not defended its attempts to improperly stretch the holding of the Court's order in this way, but has continued to do so in the Reply Brief.

[22] *Zap vs. Federal Home Mortgage Electronic Registration Systems, Inc.* 6:15-cv-00624, 2016 WL 6471229 at *3-4 (N.D.N.Y 2016)

> In New York, a plaintiff may bring an equitable common law action to quiet title or an action pursuant to Article 15 of the Real Property Actions and Proceedings Law ("RPAPL"). *See Barberan v. Nationpoint*, 706 F. Supp. 2d 408, 416-17 (S.D.N.Y. 2010). "To maintain an

possession and has not been since the 1842 Treaty if not before. See *Sherrill*, 544 U.S. at 202.

If OIN cannot, as a threshold matter, establish constructive possession through Phillips that alone should bar the quiet title claim.[23] Further, OIN's presumed constructive possession is belied by the Buffalo

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> equitable quiet title claim, a plaintiff must allege actual or constructive possession of the property and the existence of a removable 'cloud' on the property, which is an apparent title, such as in a deed or other instrument, that is actually invalid or inoperative." Id. (citing *Piedra v. Vanover*, 579 N.Y.S. 2d 675, 678 (N.Y. App. Div. 1992)) (other citation omitted). To maintain a quiet title action pursuant to RPAPL Article 15, a plaintiff must allege
>
> > (i) the nature of the plaintiff's interest in the real property and the source of this interest; (ii) that the defendant claims or appears to claim an interest in the property adverse to the plaintiff's interest, and the nature of the defendant's interest; (iii) whether any defendant is known or unknown and whether any defendant is incompetent; and (iv) whether all interested parties are named and whether the judgment will or might affect other persons not ascertained in the commencement of the action.

(Emphasis added) *Id*. at 7.

[23] In OIN's complaint (A65 [paragraphs 19-25]), the Tribe alleges the membership status and good standing of Phillips in OIN. Phillips is not receiving quarterly payments from OIN's casino. In any event, it is incorrect to assume that eligibility for membership or good standing in OIN is a basis for seizing title and possession of Phillips' real property that vested in his ancestors 175 years ago pursuant to federal and state law.

Creek Treaty and the 1842 Treaty and the facts and law on which *Sherrill* and its progeny in this circuit were decided, and fails to account for the discontinuities between the historical Oneida tribe and the modern Oneida Indian Nation, which undermine OIN's claims of continuous possession of the 1and—a subject for which discovery is critical. Moreover, courts in this district have held that the abandonment defense in Indian land disputes may raise material issues of fact requiring further discovery. See *Oneida Indian Nation of New York,* 194 F. Supp. 2d at 127 ("[t]his issue requires further discovery and a thorough statutory and treaty interpretation."). Accordingly, Appellee cannot show at this early stage that Defendants' abandonment defense fails as a matter of law.

Given the merits of Phillips' affirmative defenses, Phillips submit that it was error for the district court to grant OIN's Rule 12(c) motion.

V. Material facts are in dispute that require the development of the factual record and an examination of the historical context of treaties prior to resolution.

Most quite title actions are immune to resolution on the pleadings given the competing factual claims to the property. This case is no exception. The historical record as to the Phillips family's 175-year long land tenure of the 19.6 acre parcel (how the ancestors held the land, what they did with it, and how they passed it from generation to generation) and the OIN's equally long acquiescence to the Phillips family' separate ownership, occupation and development of the land, is heavily based on facts. The relationship between the 1838 Treaty of Buffalo Creek and the

1842 Treaty—whether the 1842 Treaty was implementing the 1838 Treaty—presents a question of fact. The District Court by misreading the treaties failed to perceive the legal and factual ties between the 1838 Buffalo Creek Treaty and the 1842 Treaty with New York State, and how that federally-authorized state treaty placed ownership in individual Indians who are direct lineal ancestors to Phillips.

Given the many questions of fact that underlie the competing claims to quiet title, the District Court erred in granting judgment on the pleadings to OIN.

VI. The District Court erred in concluding that OIN had sovereign immunity from suit.

The United States Supreme Court in *Upper Skagit Indian Tribe v. Lundgren,* 138 S.Ct. 1649 (2018) *("Upper Skagit")* demonstrates why the District Court erred in dismissing Phillips' counterclaim against OIN based on sovereign immunity from suit. As in this case, *Upper Skagit* involved real property that formerly was Indian land but had long since passed out of Indian ownership pursuant to treaty. The Upper Skagit tribe purchased a portion of the land in an open market transaction, following which a boundary dispute arose with non-Indian neighbors. The neighbor sued the Upper Skagit tribe for quiet title in state court in Washington under state law. The tribe interposed the defense of sovereign immunity from suit. The Washington State courts agreed with the neighbors that a certain Supreme Court decision involving the Yakima Tribe in Washington

(*Yakima v. Confederated Tribes*, 502 U.S. 251 (1992)) established a so-called *in rem* exception to tribal immunity from suit. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1652 (2018). After the tribe successfully petitioned the Supreme Court to accept the case, counsel for the Lundgrens (neighbors) raised the argument that the "immovable property" rule provided an alternative ground to affirm the judgment in favor of the neighbor. *Id*. at 1653-1654. Writing for the Court, Justice Gorsuch explained that the *Yakima* case did not stand for the proposition for which the Washington courts had cited it, rejecting the claimed *in rem* exception to tribal immunity from suit. *Id*. at 1652 ("*Yakima* did not address the scope of tribal sovereign immunity. Instead, it involved only a much more prosaic question of statutory interpretation concerning the Indian General Allotment Act of 1887. See 24 Stat. 388.") But Justice Gorsuch acknowledged the long-standing common-law "immovable property" rule that deprives a sovereign of its immunity from suit with respect to real property it owns within the territorial jurisdiction of another sovereign:

> At common law . . . 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 (1812). Relying on this line of reasoning, the Lundgrens argue, the Tribe cannot assert sovereign immunity because this suit relates to immovable property located in the State of Washington that the Tribe purchased in the "the character of a private individual."

Id. at 1653-1654.

Ultimately, Justice Gorsuch and a majority of the Court agreed to let the Washington Supreme Court address these arguments in the first instance. *Id*. at 1654. Even so, the concurrence, dissent and transcript of the oral argument[24] all indicate that the Supreme Court would have applied the immovable property exception if the argument had been properly preserved. *See* 138 S. Ct. at 1655-1656 (Roberts, CJ. concurring); *id.* at 1657-1658 (Thomas, J. dissenting). This case presents the issue raised but not decided in *Upper Skagit*: May an Indian tribe use the shield of sovereign immunity as a sword to claim land that it has not possessed for 175 years, over which it has no tribal jurisdiction, and which the decisions of the Supreme Court and this Court have barred the OIN (and other New Yok tribes) from taking any action to dispossess landowners or assert sovereignty over them, unless the land has been purchased in an arms-length market transaction and the tribe has successfully petitioned the Secretary of the Interior to place the land into trust.

For the reasons stated in the concurring and dissenting opinions in *Upper Skagit*, the immovable property rule applies equally to the OIN as a as "semi-sovereign" entity acting outside its territorial and governmental jurisdiction. Here OIN has left its realm to claim immovable property

[24] The transcript of the argument on March 21, 2018 is available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-387_097c.pdf

lawfully obtained by Phillips pursuant to federal treaty and statute and is used and occupied under the auspices of State law and sovereignty.

Phillips will never have quiet enjoyment of the lands at issue if quiet title cannot be secured against OIN. Moreover, if the District Court decision stands, non-Indian private landowners may be subject to OIN's quiet title actions based on ownership of parcels within land conveyed under the 1842 Treaty.

CONCLUSION

Based on the foregoing, Phillips requests this Court to vacate the District Court's November 15, 2018, and July 31, 2019 decisions and orders and declare quiet title in Appellants (and otherwise grant the relief requested in Appellants' counterclaim) or in the alternative remand to the District Court for further proceedings to permit resolution of all issues on a full record rather than on the pleadings alone.

Dated: December 30, 2019

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CERTIFICATE OF COMPLIANCE

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