20-1675
No.

IN THE

Supreme Court of the United States

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

Petitioners,

—v.—

ONEIDA INDIAN NATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WOODRUFF L. CARROLL
Counsel of Record
WOODRUFF LEE CARROLL P.C.
334 Nottingham Road
Syracuse, New York 13210
(315) 474-5356
carrollcarroll@carrolloffice.com
Attorney for Petitioner

QUESTIONS FOR REVIEW

JURISDICTION

Can the federal court exercise jurisdiction over this case when the land is listed on a tax map and the tax rolls in the name of New York State?

If New York is involved is there jurisdiction in the federal courts?

Is the State of New York a necessary party because it is listed in the tax roles and the tax map as having an interest in the land?

Should there have been discovery to determine the role of New York State regarding this land?

CENTRAL ISSUES

Can the Oneida Indian Nation set aside a deed of the Orchard Party/Marble Hill Oneida (otherwise known as Orchard Hill Oneidas) land by the designated head of the Orchard Party, Melvin Phillips when he is placing these Lands in trust for the benefit of the residents of the Marble Hill and the Orchard Party?

Has this land been under the control of the Orchard Party since the filing of the map at 111a of the appendix in 1842?

Does the Oneida Indian Nation have any interest in this land?

Has federal recognition of this parcel as Orchard Party land this been admitted by the Plaintiff Oneida Indian Nation at paragraph 85a, paragraph 17 of the complaint?

Does federally filed map at page 111a of the appendix describing the "Orchard Party

Reservation" and the land contested herein create federal recognition of the Orchard Party Reservation?

Is the Orchard Party a separate tribe from the Oneida Indian Nation?

Does the map at page 111a of the record purporting to show Orchard Party land create any rights of the Oneida Indian Nation in Lot 3?

Does the filed map of the 1842 sale to New York by the Orchard Party with the name of the Orchard Party on it showing Lot 3 to be Orchard Party land at page 111a of the record, give federal recognition of Lot 3 as Orchard Party Land or Oneida Indian Land?

Has the Orchard Party and the Oneida Indian Nation merged?

Does the 2013 Oneida Indian Land claim Settlement give the Oneida Indian Nation title to the contested land when:

1. the land is historically recognized and federally recognized as land of the of the Orchard Party by said map and treaty
2. The settlement with New York has never been federally approved but
3. Orchard Party never participated in said settlement
4. the treaty is not congressionally approved
5. It contains a clause stating that the land claim cannot be used a precedent

Can the 2013 Oneida Land claim Settlement transfer land federally registered as an Indian reservation without congressional approval?

Is construction of the Oneida Indian Nation of the 2013 Oneida Land claim settlement precluded by the express terms of the 2013 Oneida Nation Settlement Agreement under the Procurement clause that states the settlement agreement is restricted to settling the land claim?

Has Congress dissolved the Orchard Party?

Did the lower courts accept the pleadings of the Orchard Party Defendant as true in resolving the claim against them?

Did the lower courts consider the admissions of the Defendant when deciding the case?

Is discovery needed to obtain the full history of both tribes from the Bureau of Indian Affairs and the State of New York rather than just relying on the pleadings?

Did the court accept the denials of the Defendant Orchard Party as true or did they ignore them?

Did the Oneida Indian Nation acquire title without the consent of the Orchard Party by:

1. the 2013 Oneida Land claim Settlement Agreement or
2. Alleging that this parcel of land was under the historic control of the Oneida Indian Nation from time immemorial.
3. claiming a merger of the tribes

Did the Orchard Party create a question of fact by alleging that:

1. They controlled this parcel from time immemorial
2. The 2013 Land Claim settlement is restricted to its itself by the "No Precedent" clause?

3. Denying a merger and all the facts alleged to support it

Are there questions of fact regarding:

1. the construction of the 2013 Oneida Settlement Agreement as to the Orchard Party, the text of the document and the "No Precedent" clause
2. Does the construction of the Oneida Indian Nation of the 2013 Settlement Agreement affect other parcels on the reservation who were not a party to the settlement?
3. Is the Oneida Indian Nation lying about controlling the parcel since time immemorial when the parcel was created in 1842 130 years before the Oneida Nation was formed?
4. who owned and controlled this land since 1842
5. the merger of the tribes

Is the Oneida Indian Nation formed circa 1977 lying about having ownership or control of this land since 1842?

What is the political structure of the Oneida Nation?

How do the two New York tribes the Oneida Indian Nation and the Orchard Party relate to each other in that structure?

Is the Orchard Party a federally recognized tribe because there is a map of their reservation filed in the Bureau of Land management and because they signed the Treaty of Buffalo (244a) Creek as a separate tribe named Orchard Party?

PARTIES TO THE PROCEEDING

PLAINTIFF: Oneida Indian Nation Appellee

DEFENDANTS: MELVIN L. PHILLIPS, SR., individually Appellant

and

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

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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.

Directly Related proceedings

The Defendant may be filing a Motion to Amend the answer or submit additional papers on appeal which has not been filed yet.

The Defendant Oneida Indian Nation brought a motion to Dismiss the Answer pursuant to Rule 12 (6) for a Judgment on the Pleadings in the Northern District of New York case (Docket number 5:17–cv–01035–GTS–ATB) caption:

Final Judgment of dismissal was entered on 7/31/19 in favor of the Oneida Indian Nation in the Northern District of New York.

The Defendant Melvin Phillips, Sr. individually and as trustee Melvin Phillips Sr/Orchard Party Trust appealed to the United States Court of Appeals for the Second Circuit, Docket number: 19-2737 with the same caption.

Final Judgment of dismissal was entered on 11/24/20 in favor of the Oneida Indian Nation.

The Defendant Melvin Phillips, Sr. individually and as trustee Melvin Phillips Sr/Orchard Party Trust Petitioned for a Rehearing and En Banc Hearing in Docket number: 5:17–cv–01035–GTS–ATB with the same caption. A denial of the petition was entered on 12/30/20

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TABLE OF AUTHORITIES

JURISDICTION

The Defendant appeals from a final judgment of the Second Circuit dated 11/24/20 and entered 11/24/20. The Defendant filed a Petition for Rehearing and Hearing En Banc that was denied on 12/30/20 under section 28 USC 1291 and 28 USC 1254. The Plaintiff appeals from the denial of the Second Circuit.

The district court entered final judgment on July 31, 2019. Phillips filed a notice of appeal on August 29, 2019. 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; *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. The district court dismissed Phillips 'counterclaim for lack of jurisdiction because of tribal sovereign immunity.

The Plaintiff brought the suit alleging jurisdiction to be:

> 28 U.S.C. §§ 1331 & 1362 establish subject matter jurisdiction. The Nation is an Indian tribe with a governing body duly recognized by the Secretary of the Interior. This action

> and the matter in controversy arise under the Constitution (Indian Commerce Clause and Supremacy Clause), a statute (Non-intercourse Act), the treaties (Treaty of Canandaigua) and the common law of the United States – which protect the Nation's right to possess the 19.6 acres.6. This district is an appropriate venue pursuant to 28 U.S.C. § 1391(b)(1)-(2). All defendants reside in it and are New York residents. The events giving rise to the Nation's claim occurred in this district. The property that is the subject of this action is situated in this district.

The Petitioner has made a certiorari application herein to the Supreme Court of the United States of America under 28 USC 1254, appealing the final order of the Second Circuit based on the federal questions presented in the Circuit Court and the district court.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

11th Amendment

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

> 2013 Oneida Land Claim Settlement
>
> VIII IMPLEMENTATION
>
> G. No Precedent. The parties agree that no provision of this settlement shall be interpreted to be an acknowledgment of the validity of any of the allegations or claims

that have been made in any litigation covered by this agreement. This settlement does not constitute a determination of, or admission by any party to any underlying allegations, facts or merits of their respective positions. The settlement of the litigation covered by this agreement is limited to the circumstances in those actions alone and shall not be given effect beyond the specific provisions stipulated to. This settlement does not form and shall not be claimed as any precedent for, or an agreement by the parties to any generally applicable policy or procedure in the future.

BUFFALO CREEK TREATY 1838

SPECIAL PROVISIONS FOR THE ONEIDAS RESIDING IN THE STATE OF NEW YORK.

ARTICLE 13. The United States will pay the sum of four thousand dollars, dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing theGreen Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in 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.

At 244a

18th January 1839.

We the undersigned chiefs of the Oneida tribe of New York Indians do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet, a. commissioner on the part of the United States and fully and fairly explained by him to our said tribe in council assembled.

Dated August 9th 1838 at the Oneida Council House.

Executed in the presence of:

First Christian Party:

Baptiata Powlis
Anthony Biiz Knife,
Peter Williams,
Jacob Powlis,
Anthony Anthony,
Peter Martin,
Cornelius Summer,
IsaacWheelock,
Thomas M Doxtater,
William Hill,
Baptiste Denny.
Timothy Jenkins.

Orchard Party:

Jonathan Jordon,
Thomas Scanado,
Henry Jordon,
William Day.

Second Christian Party:

Abraham Denny,
Adam Thompson,
Peter Elm,
Lewis Denny,
Martin Denny

(To the Indian names are subjoined marks.)

The above assent was voluntarily freely and fairly given in my presence. after being fully and fairly explained.by me.
R. H. Gillet, Commissioner, &c.

ARTICLE 4. Perpetual peace and friendship shall exist between the United States and the New York Indians; and the United States hereby guaranty to protect and defend them in the peaceable possession and enjoyment of their new homes, and hereby secure to them, in said country, 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 them by patent under this treaty shall never be included in any State or Territory of this Union. The said Indians shall also be entitled, in all respects, to the same political and civil rights and privileges, that are granted and secured by the United States to any of the several tribes of emigrant Indians settled in the Indian Territory.

Treaty of Canandaigua 1794 7 Stat 44

> Article II. The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States who have right to purchase.

> Article IV. The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas, and Senecas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

New York Indian Law 7

> New York Indian Law § 7. Partition of tribal lands
>
> Any nation, tribe or band of Indians which owns and occupies land in this state as the common property of such nation, tribe or

band may, by the act of its Indian government, divide such lands into lots, and distribute and partition the same, quantity and quality relatively considered, among the individuals and families of such nation, tribe or band, so that the same may be held in severalty and in fee simple, according to the laws of this state. No lands occupied and improved by any Indian according to the laws, usages or customs of the nation, tribe or band shall be set off to any person other than the occupant or his family. The officers, agents or commissioners to execute the deeds to effect such partition shall be appointed by the nation, tribe or band, whose lands are to be distributed, subject to the approval of the commissioner of general services. They shall go before the county judge of the county in which such lands are situated, and prove to his satisfaction that they are authorized to effect such transfers, and shall acknowledge before him the deeds necessary therefor. The county judge shall examine such deeds, and his endorsement thereon that he has examined the same, and that they are executed in pursuance of authority duly conferred, shall authorize the county clerk to record such deeds.

Lands partitioned or distributed in pursuance of this section shall not be subject to any lien or incumbrance, by way of mortgage, judgment or otherwise, or be alienable by the grantee or his heirs, for twenty years after the recording of the deed effecting the partition; but may be

partitioned among the heirs of a grantee who dies.

CONCISE STATEMENT OF THE CASE

State of New York

The State of New York office Wildlife and Forest is listed on the tax roles as having an interest. in this property. (195a)

The 11th amendment precludes exerting jurisdiction over the State of New York. *Seminole Tribe v. Fla.*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 1996 U.S. LEXIS 2165, 64 U.S.L.W. 4167, 67 Empl. Prac. Dec. (CCH) P43,952, 96 Cal. Daily Op. Service 2125, 34 Collier Bankr. Cas. 2d (MB) 1199, 96 Daily Journal DAR 3499, 42 ERC (BNA) 1289, 9 Fla. L. Weekly Fed. S 484 and *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842, 1890 U.S. LEXIS 1943 et seq.

Therefore the Oneida Indian Nation cannot bring this action if the land is held in the name of New York State.

There has been no discovery as to what the involvement of the State of New York is in this matter, why it is listed on the tax roles as the owner or a determination of the related jurisdictional issues under the 11th Amendment.

Therefore the Federal Courts have no jurisdiction over this case or discovery is needed to determine the relationship between the land and the State of New York as there has been no deed to the State of New York.

STATEMENT

Melvin Phillips pursuant to his authority as appointed head of the Orchard Party/Marble Hill Oneidas (hereinafter the Orchard Party Oneidas) by the Haudenosaunee (Iroquois Central governing council) (179a) placed a portion of Lot 3 of the Orchard Party Tract of 1942 into trust for the Orchard Party and his descendants who are also Orchard Party members. (154a) (201a) The trust agreement states: (201a)

> **TRUST PROPERTY.** The Grantor, desiring to create a Trust for the benefit of himself, his lineal heirs as well as the present and future members of the Orchard Party, hereby transfers and conveys to the Trustee (by deed recorded in the Oneida County Clerk's Office) certain real property as more particularly and specifically described on the attached Schedule "A" (herein-after referred to as the "trust property"), in trust for the following uses and purposes, and on the conditions hereinafter stated. It is the intent of MELVIN L. PHILLIPS, SR., to relinquish all personal ownership interest, occupancy and possessory rights in all real property now or hereafter transferred and assigned to the Trustee.

This land was used historically by Melvin Phillips and his family for 180 years. (152a-208a) The Appendix from 152a to 208a contains the entire Phillips family history of the property.

The land had been federally recognized as Orchard Party land pursuant to a map filed with the federal government in 1842 under the Treaty of (244a) Creek as Orchard Party land and has been under the

control of the Orchard Party since at least 1842. (111a)

The Oneida Indian Nation objected and moved for judgement on the pleadings pursuant to Rule 12 (c) to set aside the trust deed on the grounds (85a):

1. that the Oneida Indian Nation (formed circa 1977) owned or controlled the land from time immemorial
2. the Oneida Indian Nation had obtained the land under the 2013 Oneida Land Claim Settlement (151a)
3. the two sub tribes of the Oneida Nation had merged.(86a-90a of the appendix or paragraphs 19-28 of the complaint and 217a-220a of the answer.)

The Orchard Party responded:

1. The admission of the Plaintiff at complaint 85a paragraph 17 prove that this is the federally recognized federal land of the Orchard Party based on the map at 111a
2. claiming the land in the map at page 111a had been theirs since from time immemorial or at least 1842, (214a, 217a, 223 a, 223 a)
3. that the 2013 Oneida Land claim Settlement (to which the Orchard Party was not a party) was restricted to just the land claim under the paragraph VII G No precedent clause (150a) The Orchard Party was not a party to the litigation and was not represented in the settlement and lastly the settlement transferred a federally recognized reservation under a state compact without congressional approval
4. the Defendants Orchard Party denied any merger had occurred (210a)

5. That the Plaintiff was formed circa 1977 and Orchard Party had continuously occupied the land since 1842
6. that the Plaintiff was formerly the Oneida Nation of New York with no historical connection to the Marble/Orchard Party of this parcel since 1805
7. Denied that Melvin Phillips was a member of the Oneida Indian Nation.
8. Oneida Indian Nation was lying to get the land (infra)
9. Claimed that the Orchard Party and the Oneida Indian Nation were equal but separate tribes of the Oneida Nation. There has been no unified Oneida government since 1805.

Plaintiff seeks to have the matter reversed and remanded to obtain the records of the BIA and the State of New York and have discovery to clarify the matter and reach a just and proper decision.

THE ADMISSIONS OF THE PLAINTIFF

The Plaintiff has admitted in his compliant that this is Orchard Party Land and that the filed map federally recognizes an Orchard Party Reservation as of 1842 (85a paragraph 17 and 111a).

The Plaintiff also admits that

the Orchard party and Oneida Indians are separate tribes on separate reservations. (86a-87a P 21)

That they have separate clerks who keep the separate rolls (87a p 23 b) (86a-87a P 21,)

Paragraph 17 of the Plaintiff's compliant states (85a)

> The United States recognizes the 19.6 acres as a part of the reservation that was not conveyed in the June 25, 1842 treaty. Attached as Exhibit C to this complaint is a Bureau of Land Management map, filed by the United States in Oneida Land Claim Litigation depicting the land within the reservation that the State Sought to obtain. The June 25, 1842 treaty transaction is depicted as number 27. The white rectangle within number 27 represents Lot 3, depicting it s not sold under the treaty terms. The 19.6 acres are within the white space that represents Lot 3.

This an admission of federal recognition and that the land is the Orchard Party.

THE 2013 LANDCLAIM SETTLEMENT

The 2013 Land claim settlement is limited to itself and has no application outside the landclaim (150a). The 2013 Oneida Land Claim Settlement states: (150a)

VIII IMPLEMENTATION

> G. No Precedent. The parties agree that no provision of this settlement shall be interpreted to be an acknowledgment of the validity of any of the allegations or claims that have been made in any litigation covered by this agreement. This settlement does not constitute a determination of, or admission by any party to any underlying allegations, facts or merits of their respective positions. The settlement of the litigation covered by this agreement is limited to the

> circumstances in those actions alone and shall not be given effect beyond the specific provisions stipulated to. This settlement does not form and shall not be claimed as any precedent for, or an agreement by the parties to any generally applicable policy or procedure in the future.

The effect of all this is that the Orchard Party has lost any right to bring a landclaim (which it does not wish to do) but keeps all its other rights and property unaffected including this parcel.

Also, the Orchard Party was a not party in the land claim proceeding and had no say in the settlement. Despite being a separate federally recognized tribe for over 150 years they were not allowed to be in the land claim. Their attempts to intervene failed. Judge Port stated: (*Oneida Indian Nation of New York v County of Oneida* 6/7/79 unpublished decision appendix 250a):

> Affidavits and exhibits on this motion indicate that the balkanization of the Oneidas of New York with its internecine sniping and worse, should not be introduced into this lawsuit. As indicated by the exhibits, this is not the forum in which to resolve the internal problems of governance.

This set the approach for the land claim and every single intervenor lost thereafter.

The Orchard Party a/k/a the Marble Hill Oneidas tried to intervene in the Oneida Land claim several times. (62 Fed App 389, See Appendix 250a, 680 F2d 285 (1980) Finally the contentious issue of representation was resolved in favor of the Oneida Indian Nation of New York (the Plaintiffs herein) and

no one else. The court ordered that Oneida Nation of New York represented them for the purposes of the litigation. (see the No precedence clause at 150a) But never ruled that Orchard Party land was to be involuntarily transferred to the Oneida Indian Nation.

The court in the land claim did recognized the fractured nature of the government of the Oneida Nation. But wanted one defendant who could control the action. This position was routinely reaffirmed and reaffirmed again against every attempted intervenor in the land claim as a matter of judicial convenience without consideration of tribal sovereignty.

This approach to the Oneida Sovereignty is restricted to the land claim by the No Precedent clause (supra)

But nothing was said in any decision or settlement about transferring the land of the Orchard Party to the Oneida Nation of New York.

Further the 2013 Oneida Land Claim Settlement with the State of New York lacks federal Congressional approval. Federally registered indian reservation land cannot be transferred by a state agreement without congressional approval.224a

MERGER

The Orchard Hill Party has been separate tribe from the Oneida Nation of New York and its alleged predecessors since at least 1805 when the ancient Oneida Nation split into several politically distinct tribes because of religious differences and federal relocation policies. The Orchard Party is the only Oneida Tribe to continuously occupy is reservation. The Oneida Indian Nation of New York *now the

Oneida Indian Nation) appeared in the late 20th century circa 1977. See the History of the Oneida Nation by the BIA at 6:08-cv-006600 Document 40-12, and affidavit of Melvin Phillips at 6:08-cv-00660 Docket 40-4 dated 11/19/08, the appendix at 224a-228a et al

The Orchard Hill Party denied the allegations alleging merger. (217a et seq) The allegations are at 86a-90a of the appendix or paragraphs 19-28. There has been no merger. No dissolution by congress of eh Orchard party is alleged. The claims in the complaint often support Defendants position of two separate governments. The complaint and answer state:

Paragraph in complaint Answer of Defendant

21. This Defense admits that these are separate tribes on separate reservations. (86a, 87a)

22. Answered at 218a not all Marble Hill members are Oneida Indian Nation. Some are and some are not. (87a, 218a)

23a. The Oneida Indian Nation did not exist at the time of the alleged IRA vote in 1936, The Orchard Party was the sole organized and recognized Oneida tribe in New York at that time. (87a, 218 a)

23b. This is another admission supporting the Defendants position. There were two separate (87a p 23 b)s because there were two separate tribes One on Marble Hill and one on the 32 Acre Boylan parcel (87a, 281a)

23c. Denied except as to some (but not all members) are members of both tribes. (87a, 218a)

23d. The Orchard Party is a state indian tribe who receives no federal benefits and therefore is not listed in the federal registry. (87d, 218a)

24. Melvin Phillips denies he is a member of the Oneida Indian Nation. His credential are recited in the answer at paragraph 24. (281a)(88a) (218a)

25. Denied This is a traditional tribe and he is the appointed head. (88a) (219a)(179a)

26a. We agree with the statement: "The United States considers these groups to be part of one Oneida Nation" They are both tribes and part of one Oneida Nation but govern themselves separately. (89a, 219a, 220a) They are not part of the Oneida Indian Nation.

26b. We admit there are common members but deny that the land has been transferred or that the tribes are merged or dissolved by congress. (89a, 219a, 220a) There is no allegation that the Orchard Party has been dissolved by Congress.

27a. Denied. There are members of the Orchard Party. There are members of both parties. (89a, 220 a)

27b. The Orchard Party is a state indian tribe who receives no federal benefits and therefore is not listed in the federal registry. (89a, 220a)

28. The land claim decisions did not dissolve the Orchard Party, merge the Orchard Party into the Oneida Indian Nation without their consent or take its land without their consent. The No Precedent clause limits the land claim to itself and its settlement with no effect outside the

lawsuit. (89a, 220 a) and precludes merger and taking the land.

The courts put the Oneida Nation of New York in charge of the landclaim over the objection of the Orchard Party. The Orchard Party was not a party to the settlement. Then the courts bound the Orchard Party to the settlement even though the Orchard Party was not a party.

ORCHARD PARTY AND FEDERAL RECOGNITION

The Oneidas have not lost their federal recognition since 1842 when they were recognized in the 1842 Treaty of (244a) Creek and the federally filed map at 111a. Thereafter they remained on their reservation and are still there today. (214a) There is no congressional dissolution.

They have been federally recognized ever since1842 (11a, 85a paragraph 17). The BIA register of Indian Tribes does not record state tribes who receive no benefit. (See the preamble to the register)

There is no allegation that the Orchard Party has been dissolved by congress.

THE CURRENT POLITICAL STRUCTURE OF THE ONEIDA NATION

Because the nation fractured in various pieces from 1805 to 1842 the "Oneida tribe" currently consists of two sub parts: the Orchard Party and the Oneida Indian Nation of New York.

The BIA classifies the Orchard Party/Marble Hill and the Oneida Indian Nation as two equal but politically separate sub tribes of the original Oneida Nation. (See complaint admission at 86a p 21) This is

how the special Treaty for Oneidas residing in New York is structured. The federal government treated each individual tribe as a separate government because there was no central government of the tribe. But The newly formed Oneida Indian Nation is continually claiming to be the former fractured the Oneida Nation of old, which confuses a lot of people including the two lower courts. The Wisconsin Oneidas have renamed themselves the Oneida Nation. (see Federal Indian Register).

The history of the Orchard Party is contained in an affidavit of Melvin Phillips at 6:08-cv-00660, Docket 40-4 dated 11/19/08 and also 6:08-cv-006600 Document 40-12).

The Orchard Party has not been dissolved by Congress.

The Oneida Indian Nation has a separate reservation on the Boylan Parcel and the Marble Hill Oneidas/Orchard Party have their own reservation on the 19.6 acres which are the subject of this suit. Also they have separate clerks and heads of their tribes and governments. (86a-87a P 21)

The Orchard Party are the descendants of the original signors of the Treaty of Buffalo Creek.(244a) They are the only Oneidas to continuously occupy their historical lands. (211a) The Oneida Indian Nation did not even exist in 1842.

THE ORIGINAL ONEIDA NATION

The original Oneida Nation fractured into several tribes (parties) based on religion and federal relocation policies between 1805 and 1842. The two relevant ones are the Oneida Nation of New York and the Orchard Party. (87a, 217a p 20, 86a p 20 and 21)

THE FALSE ALLEGATION THAT THIS WAS THE LAND OF THE ONEIDA INDIAN NATION IN THE PAST

The Oneida Indian Nation alleges that they have controlled this land from 1842 (83a to 86a paragraphs 1-17) This is a blatant lie. The map at 111a clearly shows that this was Orchard Party Land in 1842, 150 years before the Oneida Indian Nation of New York existed. At that time the Oneida Nation was divided by religious and federal relocation policies into five bands: the Thames in Canada, the Wisconsins, the First Christian, the Second Christian and the Orchard Party. (see the decisions in the Oneida Landclaim and the supporting records) There was no central Oneida government. Each tribe had its own separate government, but all were part of the Oneida Nation. (224a-227a)

In 1842 the ancient Oneida Nation in New York (not the recent Oneida Indian Nation) consisted of three tribes the First and Second Christians and the Orchard Party. (See the Special Provisions for Oneidas residing in the State of NewYork and 225a supra)

The Orchard Party had the land on Marble Hill (86a p 20) The Christians were in the valley on the 32 Acre Boylan Parcel. (86a p 20). But all were tribes or parties of the greater but fractured Oneida Nation of old. The ancient Oneida Nation is the "nation" in paragraph 1-17 of the complaint not the newly formed Oneida Indian Nation as alleged in paragraph 7 of the complaint.

The Oneida Nation is like a name on a door with numerous groups behind it.

The recently formed Oneida Indian Nation claims it is the ancient Oneida Nation in these papers. (83a to 86a paragraphs 1-17) The Wisconsin Oneidas are doing the same, renaming themselves the Oneida Nation.. (See Federal Indian Registry)

The Oneida Indian Nation of New York now the Oneida Indian Nation was formed circa 1977. The legal entity Oneida Indian Nation did not exist until relatively recently.

A history of the Oneidas by the BIA is in the record of 6:08-cv-00660 in an affidavit of Melvin Phillips at 6:08-cv-00660 Docket 40-4 dated 11/19/08 and also 6:08-cv-006600 Document 40-12 which contains the BIA history of the Oneidas.

This misrepresentation permeates the pleadings. For example 86a Paragraph 21 states that there were two nation settlements, one on Marble Hill and one on the 32 acre Boylan parcel. This is correct as to the ancient Oneida Nation. The statement is incorrect as to the Oneida Indian Nation of New York who did not exist at the time when the Boylan Parcel was originally occupied by the Christian parties.

Another example exists at paragraph 88a Melvin Phillips admits he belongs to the greater Oneida Nation. He has never admitted and will never admit that he belongs to the Oneida Indian Nation. He denies it.

The Oneida Indian Nation of New York is part of the greater Oneida Nation just like the Orchard Party. The Oneida Indian Nation of New York is attempting bolster its case with a lie claiming to be the ancient Oneida Nation in the pleadings at paragraphs 7-23 pages 83a-86a.

There are two "nations" the original Oneida Nation of old which included the Wisconsins and the Thames, the Orchard and Christian parties. The second is the Oneida Indian Nation of New York now the Oneida Indian Nation. The Oneida Indian Nation of New York uses the term "nation" for both themselves and the ancient Oneidas ignoring its own formation date circa 1977 over 150 years after the Oneida Nation was fractured.

This situation and the misrepresentation caused no end of confusion in the lower courts on the facts. As they treated the Oneida Indian Nation as the owner of this land from time immemorial.

This map at 111a clearly states that: the 19.7 acres are Orchard Party Land, that this 19.7 acres is federally recognized as Orchard Party Land and the Plaintiff admit this. (111a, 85a paragraph 17) The land is wholly located within the historic Orchard Party Reservation. (111a)

TREATY OF 1842

My client demands that this be included:

4. The 1842 Treaty

Pursuant to the Buffalo Creek treaty Article 13 special provision the State of New York made a treaty with the Orchard Party Oneidas on June 26, 1842. Trust deed Exhibit 2 The 1842 Treaty provided for New York to Purchase the majority of the remaining lands occupied by the Orchard Party Oneidas, including Appellants direct ancestors in what is today the Town of Vernon, Oneida County, New York Trust deed. Exhibit 9. The lands are identified as Lot 1, 2, 4 on that exhibit. The 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 land in New York.

Please note that New York State did not buy the reservation from the Oneida Nation but the party the Orchard Party. The Orchard Party was considered the owner and controller. Not the Oneida Nation, not the Oneida Indian Nation. The Orchard Party owned this parcel as of 1842 and has not lost it in the Treaty of 2013 or by merger.

REASONS FOR GRANTING CERTIORARI

SUPREME COURT IS THE ONLY PLACE FOR A FINAL RESOLUTION

This is the First time the 2013 Oneida Settlement agreement is before the United States Supreme Court and rulings on the document are needed. The United States Supreme Court is the only forum that can finally resolve the following issues:

1. define the fractured government of the Oneida Nation
2. give a final interpretation of the 2013 Oneida Land claim settlement

The 2013 Land claim settlement deals with the Orchard Party land without them being represented or a party to the proceeding or consenting the treatment of their land.

The scope of the 2013 Oneida Land claim Settlement Agreement and its effect on non parties are at issue in this case and the expansive rulings of the Lower Courts affect at least the entire Orchard Party reservation and the people living thereon and their land titles.

The Orchard Party was not a party to the 2013 Land claim. (151a) The courts wanted one representative not multiple "squabbling" sub tribes. (see unpublished Port court opinion in Appendix 250a) Eventually the Oneida Indian Nation of New York prevailed and the other tribes were precluded from participating. The Orchard Party did not contest the settlement because they were not involved . They did want not to bring a land claim.

Now years later the Oneida Indian Nation is reinterpreting the agreement to affect all the individually owned parcels on the Orchard Party reservation by giving the Oneida Nation control of the area.

The interpretation of the 2013 land claim agreement needs to be restricted to its terms. An expansive ruling will create havoc in the region.

The Supreme Court is the only forum available for resolving the fractured structure of the Oneida Nation and determining the rights among the tribes including the issue of merger of the tribes to finally resolve the tribal structure.

The Orchard Hill Party denied the facts alleging merger. The Orchard Party denied the allegation that the tribes were merged. (Supra in concise Statement of Facts)

THE ONEIDA NATION IS LYING

The Plaintiff admits the map at 111a shows the federally recognized reservation Orchard Party Reservation and that it is federally recognized. (85a) The Oneida Indian Nation was formed in 1977 (83a) but the Oneida Indian Nation claims to own this parcel from time memorial. (83-86a paragraphs 9-18)

The plaintiff contradicts themself and their own case. How can they own land that was federally recognized as the Orchard Party from 1842 when the Oneida Indian Nation was formed in 1977?

The Oneida Indian Nation is marketing name confusion between the 1977 Oneida Indian Nation and the ancient unified Oneida Nation.

Nor is Melvin Phillips a nation member. (83a, 213a, 214a) Said Plaintiff denied being a nation member. (213a, 214a)

FAILURE TO FOLLOW THE NORMAL COURSE OF EVENTS

Virgil v. Town of Gates, 455 Fed. Appx. 36, 2012 U.S. App. LEXIS 1236, 2012 WL 29273 states:

> We review a judgment under Fed. R. Civ. P. 12(c) *de novo*, accepting the complaint's factual allegations as true and drawing all reasonable inferences in the plaintiff's favor. *See Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010). To survive a Fed R. Civ. P. 12(c) motion, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); in short, it [*38] must plead facts sufficient to allow a court to draw the "reasonable inference that the defendant is liable for the misconduct alleged," *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). Where referenced documents are integral to the complaint, those documents are appropriately considered together with the pleadings in deciding a Fed R. Civ. P. 12(c)

motion. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002).

Normally in litigation and on a Rule 12(6) a motion on the pleadings::

1. the allegations of the non moving party are considered admitted and true

   We review de novo a judgment under Fed. R. Civ. P. 12(c), accepting the complaint's factual allegations as true and drawing all reasonable inferences in the plaintiff's [**6] favor. *Kirkendall v. Halliburton, Inc.*, 707 F.3d 173, 178-79 (2d Cir. 2013). *Ezra v. Bristol-Myers Squibb Co.*, 784 Fed. Appx. 48

2. Admissions against interest in the movants pleadings are considered
3. Questions of Fact mandate denial of the motion
4. The claim must be plausible.
5. Discovery is granted

Absolutely none of this happened. As stated herein Defendant has a plausible case.

DENIALS OF DEFENDANTS NOT CREDITED

The Defendant denied everything in particular any allegations of merger. See 86a-90a of the appendix or paragraphs 19-28 of the complaint and 217a-220a of the answer, supra

ADMISSION OF PLAINTIFF IGNORED

The map at 111a is not mentioned anywhere and it establishes the legitimacy of the Plaintiffs federal recognition as does the Treaty of Buffalo Creek. 244a

The remaining issue is: has the Orchard Party lost its federal recognition?

QUESTIONS OF FACT IGNORED

The record is replete with obvious questions of fact. Such as:

1. the construction of the 2013 Oneida Settlement Agreement as to the Orchard Party, the text of the document and the "No Precedent" clause
2. Does the construction of the Oneida Indian Nation of the 2013 Settlement Agreement affect other parcels on the reservation who were not a party to the settlement?
3. Is the Oneida Indian Nation lying about controlling the parcel since time immemorial when the parcel was created in 1842 130 years before the Oneida Nation was formed?
4. who owned and controlled this land since 1842
5. the merger of the tribes

The Oneida Indian Nation is claiming the terms of the settlement agreement give the land to the Oneida Indian Nation. The Defendant Orchard Party is claiming that the No Precedence clause limits the effect of the agreement and leaves all other rights unaffected. Can the settlement agreement transfer the rights of the Marble Hill Oneidas without their consent?

There is complete disagreement on whether the tribes have merged.

NEEDED DISCOVERY NOT DONE

Normally when there are questions of fact on jurisdiction or major issues in a case there is

discovery the information is assembled and a decision reached. In this case there was a substantial deviation from that practice in resolving the case on the pleadings without the BIA and New York State records.

This case should not be decided in a factual vacuum , the documents of the BIA and the State of New York would clarify and resolve this situation. Before a 180 year old tribe loses it land and the titles on Orchard reservation are clouded the work should be done and proper processes observed.

Presently the status quo of the last 180 years has been upset by this decision.

CONCLUSION AND REQUESTS FOR RELIEF

The case should be reversed and remanded to the district court for discovery and other proceedings.

A ruling is needed on interpreting the 2013 Oneida Land claim Settlement. The Supreme Court is the only court that can finally resolve the matter. Also, this is the only court that can finally settle the Oneida tribal structure. Also, a state compact without congressional approval cannot transfer federally recognized Indian land like the Orchard Party reservation out of trust without the consent of the Orchard Party.

The lower court proceedings ignored all the standard rules of Civil Procedure and issued judgment on the pleadings based on little more than a lawyer's write up of the case.

Further the complete failure to credit the denials of the Defendants, the failure to consider the damaging admissions of the Plaintiffs, ignoring the numerous questions of fact and other matters merits reversal,

remand and discovery and a considered opinion based on the facts not allegations written by lawyers in their offices.

Dated May 28, 2021

Respectfully submitted,

Woodruff L. Carroll
Counsel of Record
Woodruff Lee Carroll P.C.
334 Nottingham Road
Syracuse, New York 13210
(315) 474-5356
carrollcarroll@carrolloffice.com

Attorney for Petitioner

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FINAL JUDGMENT BEING APPEALED

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of November, two thousand twenty.

Before: José A Cabranes,
Raymond J. Lohier, Jr.,
Steven J. Menashi,
Circuit Judges.

Docket No. 19-2737

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.

JUDGMENT

The appeal in the above captioned case from a judgment of the United States District Court for the Northern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the November 15, 2018 decision and order and the July 31, 2019 final judgment of the district court are AFFIRMED.

For the Court:
/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe
Clerk of Court

[STAMP]

Appendix B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OPINION

AUGUST TERM 2019
No. 19-2737-cv

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

ARGUED: JUNE 24, 2020
DECIDED: NOVEMBER 24, 2020

Before: CABRANES, LOHIER, and MENASHI,
Circuit Judges.

Defendants-Counter Claimants-Appellants Melvin L. Phillips, Sr. and the Melvin L. Phillips, Sr./Orchard Party Trust appeal from a July 31, 2019 judgment entered in the United States District Court for the Northern District of New York (Glenn T. Suddaby, *Chief Judge*) principally granting the motion of Plaintiff-Counter Defendant-Appellee Oneida Indian Nation of New York ("the Nation") for judgment on the pleadings for its claims asserting a tribal right to possession of land under the Indian Commerce Clause, federal treaties and statutes, and federal common law. Phillips also appeals the District Court's decision and order dated November 15, 2018 granting the Nation's motion to dismiss Phillips's counterclaim. For the reasons set forth below, the November 15, 2018 decision and order and the July 31, 2019 final judgment of the District Court is **AFFIRMED**.

Judge Menashi concurs in part and concurs in the judgment in a separate opinion.

MICHAEL R. SMITH (David A. Reiser, *on the brief*), Washington, DC, *for Plaintiff-Counter Defendant-Appellee, Oneida Indian Nation.*

JOSEPH R. MEMBRINO, Cooperstown, NY, (Claudia L. Tenney, Clinton, NY *on the brief*), *for Defendants-Counter Claimants-Appellants, Melvin L. Phillips, Sr. and the Melvin L. Phillips, Sr./Orchard Party Trust.*

JOSÉ A. CABRANES, *Circuit Judge*:

The principal question presented in this matter concerns the tribal right to possession of land under the Indian Commerce Clause of the U.S. Constitution,[1] federal treaties and statutes, and federal common law.

Defendants-Counter Claimants-Appellants Melvin L. Phillips, Sr. and the Melvin L. Phillips, Sr./ Orchard Party Trust (together, "Phillips") appeal from a July 31, 2019 judgment entered in the United States District Court for the Northern District of New York (Glenn T. Suddaby, *Chief Judge*) principally granting the motion of Plaintiff-Counter Defendant-Appellee Oneida Indian Nation of New York ("the Nation") for judgment on the pleadings on its claims for declaratory and injunctive relief. Phillips also appeals the District

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[1] U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power . . . [t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes . . . ").

Court's decision and order dated November 15, 2018 granting the Nation's motion to dismiss Phillips's counterclaim.

On appeal, Phillips argues that the District Court erred by granting: (1) the Nation's motion for judgment on the pleadings; and the Nation's motion to dismiss Phillips's counterclaim.

We hold that: (1) the District Court correctly granted the Nation's motion for judgment on the pleadings because title was not properly transferred to Phillips, and Phillips's defenses do not raise any issues of material fact that would preclude the requested declaratory and injunctive relief sought by the Nation; and (2) the District Court did not err by declining to apply an immovable property exception to tribal sovereign immunity in dismissing Phillips's counterclaim.

Accordingly, we **AFFIRM** the November 15, 2018 decision and order and the July 31, 2019 final judgment of the District Court.

I. BACKGROUND

We draw the facts, which are undisputed unless specifically noted, from the District Court's decisions and orders dated November 15, 2018 and July 31, 2019[2] and from the record before us.

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[2] *Oneida Indian Nation v. Phillips*, 397 F. Supp. 3d 223 (N.D.N.Y. 2019); *Oneida Indian Nation v. Phillips*, 360 F. Supp. 3d 122 (N.D.N.Y. 2018).

A. Factual Background

This suit arises from a disputed tract of 19.6 acres of land in the Town of Vernon in Oneida County, New York, over which both the Nation and Phillips assert ownership ("the 19.6 Acre Parcel"). Before contact with Europeans, the Oneida Indian Nation owned and occupied over six million acres of land in the territory that would later become New York State.[3] Under the United States Constitution, Indian relations were reserved exclusively to the federal government.[4] Throughout the 1780s and 1790s, the United States entered into several treaties with the Nation confirming the Nation's right of possession of their lands until the United States purchased those lands.[5] These treaties were incorporated into federal law by the Nonintercourse Act of 1790, subsequently codified at 25

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[3] *See Oneida Indian Nation of N.Y. State v. Oneida Cnty., N.Y.*, 414 U.S. 661, 663-64 (1974) ("*Oneida I*").

[4] *See* Note 1, *ante; Worcester v. State of Ga.*, 31 U.S. 515, 519 (1832) (explaining that "that the whole power of regulating the intercourse with [the Indian nations], was vested in the United States"); *see also Oneida County, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 234-35 (1985) ("*Oneida II*") ("From the first Indian claims presented, this Court recognized the aboriginal rights of the Indians to their lands."); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (noting the "unquestioned right" of Indians to their lands); Felix S. Cohen, 1 Cohen's Handbook of Federal Indian Law § 5.01 (2019) (explaining that the Indian Commerce Clause is the basis for laws requiring federal approval for land sales by Indian tribes). Under federal common law, the Indian tribes own their land as common property in what is referred to as "Indian title" or "aboriginal title." *See id.* § 15.04(2). Tribal land may also be held by "recognized title," *i.e.*, that the title is recognized by a federal statute or treaty. *See id.* § 15.04(3).

[5] *See Oneida I*, 414 U.S. at 664.

U.S.C. § 177, which prohibited the conveyance of Indian lands without the consent of the United States.[6] In 1794, by signing the Treaty of Canandaigua, the United States recognized approximately 300,000 acres of the Nation's land as "their reservation[]."[7] The 19.6 Acre Parcel disputed in this case was located within that reservation as of 1794. The State of New York has never attempted to obtain the 19.6 Acre Parcel. The United States has not withdrawn the 19.6 Acre Parcel from the Nation's reservation.[8]

In 1838, the United States and various New York State Indian tribes, including the Nation, entered into the Treaty of Buffalo Creek, an agreement which "contemplated the eventual removal of all remaining Native Americans in New York to reservation lands in Kansas."[9]

On June 25, 1842, New York State entered into a treaty with the Nation (the "1842 Treaty") to purchase a portion of the Nation's land, paying certain

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[6] *See id.; Oneida II*, 470 U.S. at 245-46.

[7] *Oneida II*, 470 U.S. at 231 n.1 ("The Treaty of Canandaigua of 1794 provided: 'The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them ... in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.'" (quoting 7 Stat. 45)).

[8] *See Oneida Indian Nation v. Madison Cnty.*, 665 F.3d 408, 443 (2d Cir. 2011) ("It remains the law of this Circuit that the [the Nation's] reservation was not disestablished.").

[9] *Id.* at 416; *see generally* Act of Jan. 15, 1838, 7 Stat. 550.

members of the Nation described in the treaty as "the Orchard Party of the Oneida Indians residing in the town of Vernon county of Oneida."[10] Prior to entering into the 1842 Treaty, New York State surveyed part of the reservation, by which it divided the land in question into four numbered lots.[11] The 19.6 Acre Parcel is entirely within Lot 3 (referred to as the Marble Hill tract). The 1842 Treaty did not convey Lot 3 to New York State, but rather, listed the names of members of the Nation who intended to continue living within Lot 3.[12]

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[10] App'x 21 (A Treaty made June 25, 1842 with the Orchard Party of the Oneida Indians). We observe that the 1842 Treaty appears to have been entered into by New York State notwithstanding "Congress' clear policy that no person or entity should purchase Indian land without the acquiescence of the Federal Government" under the Nonintercourse Act. *Oneida II*, 470 U.S. at 232; *see also* Cohen, Handbook of Federal Indian Law § 15.06 (citing the Nonintercourse Act and explaining that only the United States can extinguish Indian title; thus, "[a] seller or buyer of tribal land must show clear authority in federal law to allow a transfer of the interest from the tribe"). Nonetheless, the validity of the 1842 Treaty with New York State under federal law is irrelevant here because this matter concerns land—the 19.6 Acre Parcel—that was categorically *not* conveyed under the 1842 Treaty. *See* App'x 11 (Complaint, ¶¶ 15-17); see also Note 12, post.

[11] *See* App'x 37 (depicting the surveyed territory and the four lots).

[12] *See* App'x 27 (reciting the names of members of the Nation). The United States recognizes that the 19.6 Acre Parcel was not conveyed as part of the 1842 Treaty. *See* App'x 38 (Bureau of Land Management map, filed by the United States in Oneida land claim litigation, depicting the land within the Oneida reservation that New York State sought to obtain).

In 2013, a comprehensive settlement agreement in a civil lawsuit in the Northern District of New York, to which the United States was a party, was reached between the State of New York, Madison County, Oneida County, and the Nation to resolve all legal disputes regarding land, taxation, and governance.[13] This agreement provided that the land designated as Lot 3 of the 1842 Treaty: (1) was excluded from the sale in the 1842 Treaty; (2) is "Nation Land" located within the Oneida reservation; (3) is subject to the Nation's assertion of "sovereignty" and "rights under federal law"; and (4) is not subject to state or local taxation or regulation.[14] This settlement was approved by the United States District Court for the Northern District of New York (Lawrence E. Kahn, *Judge*), which incorporated it into a memorandum decision and order dated March 4, 2014 and under which it thereafter retained enforcement jurisdiction.[15]

The Nation's land surrounding the 19.6 Acre Parcel is called "the Orchard" or "Marble Hill."[16] The United States has recognized that there is one Oneida Indian Nation in New York State, and some of its members live in Marble Hill.

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[13] *See generally New York v. Jewell*, 2014 WL 841764, at *1-2 (N.D.N.Y. 2014); *see also* App'x 39-58 (Settlement Agreement by the Oneida Nation, the State of New York, the County of Madison, and the County of Oneida). Sally Jewell, Secretary of the United States Department of the Interior, was the named defendant in that action and the Nation participated as an intervenor-defendant.

[14] *See* App'x 40-41, 49-50, 52 (Settlement Agreement).

[15] *See Jewell*, 2014 WL 841764, at *12.

[16] App'x 13 (Complaint, ¶ 19).

Although all parties concede that Phillips is a member of the Nation, Phillips has on several occasions asserted that the Orchard Party or Marble Hill Oneidas are a separate tribe from the Nation, and he has claimed to represent that separate tribe. On September 1, 2015, Phillips recorded a quitclaim deed with a trust declaration titled "Melvin L. Phillips, Sr./Orchard Party Trust" (the "Orchard Party Trust" or "trust"), naming himself both as grantor of the 19.6 Acre Parcel and as sole trustee of the trust.[17] The declaration states that Phillips "hereby transfers and conveys to the Trustee [*i.e.*, Phillips] (by deed recorded in the Oneida County Clerk's Office) certain real property as more particularly and specifically described on the attached Schedule A...."[18] Schedule A of the trust instrument describes four parcels of land.[19] "Parcel IV" comprises the 19.6 Acre Parcel in question and the access road/driveway leading to it from Marble Road.[20] The trust documents state that the 19.6 Acre Parcel is composed of "tribal lands belonging to the Oneida Nation/Orchard Hill Party," that Phillips is a "spokesman" and "representative" of the Orchard

17 App'x 60 (quitclaim deed), 103 (trust declaration) (capitalization omitted). The trust declaration does not name a grantee, but it appears that Phillips intended himself, as trustee, to serve as such.

18 *Id.* at 103 (trust declaration); *see also id.* at 62-64 (Schedule A).

19 *Id.* Parcels I, II and III are not in dispute nor the subject of this lawsuit.

20 App'x 63-64 (Schedule A).

Party, and that the land was "under the stewardship of Melvin L. Phillips, Sr."[21]

B. Procedural History

The Nation filed this action in the United States District Court for the Northern District of New York on September 18, 2017, asserting, *inter alia*, its possessory rights over the 19.6 Acre Parcel identified in the trust deed and seeking: (1) declaratory relief stating that neither Phillips nor the Orchard Party Trust "owns or has any property interest in the 19.6 acres" and that the trust instrument and quitclaim deed Phillips recorded "are invalid and void so far as they concern the [19.6 Acre Parcel];" and (2) an injunction prohibiting Phillips and the trust from claiming the 19.6 Acre Parcel or clouding its title.[22] Phillips filed an answer and a counterclaim, which the Nation moved to dismiss under Rule 12(b)(6).[23] Invoking the District Court's supplemental jurisdiction, Phillips's counterclaim requested (1) a declaration stating that the Nation does not have a property interest in the 19.6 Acre Parcel and that the quitclaim deed and trust are valid with respect to the 19.6 Acre Parcel; and (2) that the Nation be enjoined from claiming the 19.6 Acre Parcel or clouding its title.[24]

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[21] *Id.* at 64 (Schedule A), 103 (trust declaration) (capitalization omitted).

[22] App'x 19; *see also Phillips*, 360 F. Supp. 3d at 125.

[23] *See Phillips*, 360 F. Supp. 3d at 125; *see also* App'x 112 (Phillips's Answer and Counterclaim), 6 (District Court docket, Doc. 24, Nation's Motion to Dismiss).

[24] *See Phillips*, 360 F. Supp. 3d at 125.

The parties agreed that: (1) the 19.6 Acre Parcel was within the lands recognized by the United States in the 1794 Treaty of Canandaigua as comprising the Nation's reservation; (2) the 19.6 Acre Parcel was never conveyed to New York State; and (3) the 1842 Treaty with New York State reserved the 19.6 Acre Parcel and certain other parcels from cession and declared that members of the Nation would continue to occupy those parcels "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."[25] Accordingly, the dispute between the parties was limited to whether, after the 1842 Treaty with New York State, the tribal land rights over the 19.6 Acre Parcel belonged to the Nation, or to the Orchard Party, the purportedly separate tribe that Phillips claimed to represent.

On November 15, 2018, the District Court granted the Nation's motion to dismiss Phillips's counterclaim pursuant to Rule 12(b)(6).[26] In so

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25 *See* Appellee's Br. at 15; App'x 23.

26 *See generally Phillips*, 360 F. Supp. 3d at 132-34. In setting forth the legal grounds and reasoning upon which it based its decisions granting both of the Nation's two motions here on appeal, the District Court stated that it granted the motions "for each of the numerous alternative reasons stated in [the Nation's] memoranda of law," accompanied by the District Court's own "analysis, which is intended to supplement but not supplant [the Nation's] arguments." *Id.* at 132; *see also Phillips*, 397 F. Supp. 3d at 230 (granting judgment on the pleadings "for each of the alternative reasons stated in [the Nation's] memoranda of law."). We have previously counseled (in other contexts) that district courts should articulate their own independent analysis and reasoning that support their rulings.

ruling, the District Court rejected Phillips's argument that the 19.6 Acre Parcel belonged to the Orchard Party.[27] The District Court noted in its decision that: (1) Phillips had conceded that the 19.6 Acre Parcel belonged to the Nation as of 1794; (2) Phillips did not allege a cession of the 19.6 Acre Parcel; and (3) the United States had "treated the Oneidas as a unified nation" in New York State, thereby foreclosing any "argument that the Court should consider [the] Orchard Party Oneida as a separate tribe from [the Oneida Nation], with independent tribal rights to the 19.6 acres."[28] The District Court also determined that Phillips's counterclaim was barred by the Nation's tribal sovereign immunity.[29]

The Nation subsequently filed a motion for judgment on the pleadings pursuant to Rule 12(c), which the District Court granted on July 31, 2019.[30] In granting judgment for the Nation, the District Court concluded that there were no

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See, e.g., Jackson v. Fed. Exp., 766 F.3d 189, 198 (2d Cir. 2014) ("In all cases in which summary judgment is granted, the district court must provide an explanation sufficient to allow appellate review."); *Rudenko v. Costello*, 286 F.3d 51, 65 (2d Cir. 2002) (remarking, in the context of habeas corpus, that "[w]hether the district court's ultimate decision turns on factual determinations or on a choice between competing legal principles or on the manner in which the legal principles are applied to the facts, the district court must provide an indication of its rationale that is sufficient to permit meaningful appellate review.").

27 *See Phillips*, 360 F. Supp. 3d at 132-34.

28 *Id.* at 133.

29 *See id.*; *see also* Note 36, *post*.

30 *See Phillips*, 397 F. Supp. 3d at 225, 229-34.

disputed issues of material fact because Phillips conceded that the 19.6 Acre Parcel was located within the Nation's reservation as recognized by the 1794 Treaty of Canandaigua, and the parties' rights could be determined based solely upon the relevant statutes and treaties. The District Court rejected Phillips's contention that the 1838 Treaty of Buffalo Creek between the Nation and the United States extinguished the Nation's land in New York State, and held that the 1838 Treaty "by its plain language...does not cede [the Nation's] right to the [19.6 Acre Parcel]" and does not "recognize any proprietary interest of the Orchard Party" in the 19.6 Acre Parcel.[31] The District Court also reiterated its conclusions in its earlier decision that the United States recognizes "the Oneidas as a single unified Nation," and that the Orchard Party is not "a separate tribe from [the Nation]."[32] The judgment entered by the District Court declared: (1) that the 19.6 Acre Parcel belongs to neither Phillips nor the trust; (2) that the quitclaim deed and trust are void as to the 19.6 Acre Parcel; and (3) that Phillips and the trust were enjoined from thereafter claiming to own the 19.6 Acre Parcel.[33]

This timely appeal followed.

II. DISCUSSION

We review *de novo* a district court's grant of judgment on the pleadings pursuant to Rule 12(c),

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31 *See id.* at 231-32.

32 *Id.* at 231.

33 *See id.* at 234.

accepting the complaint's factual allegations as true and drawing all reasonable inferences in favor of the non-moving party.[34] "To survive a Rule 12(c) motion, the complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face."[35] Applying this same standard, we review *de novo* a district court's order granting a motion to dismiss counterclaims under Rule 12(b)(6).[36]

A. Judgment on the Pleadings

1. *The District Court's Order Granting the Nation's Motion*

On appeal Phillips contends that he owns the 19.6 Acre Parcel individually, rather than as a representative of the Orchard Party. This position flatly contradicts his prior assertions in the Orchard Party Trust, the quitclaim deed, and the answer and counterclaim before the District Court, in which he stated that he was merely a "steward" or "trustee" of the 19.6 Acre Parcel, which "belong[ed] to the Oneida Nation/Orchard Hill

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[34] *See Kirkendall v. Halliburton, Inc.*, 707 F.3d 173, 178 (2d Cir. 2013). Rule 12(c) provides that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings."

[35] *Kirkendall*, 707 F.3d at 178-79 (internal citation and quotation marks omitted).

[36] *See Menaker v. Hofstra Univ.*, 935 F.3d 20, 29-30 (2d Cir. 2019). The District Court also construed the Nation's motion to dismiss on grounds of tribal sovereign immunity as made pursuant to Federal Rule of Civil Procedure 12(b)(1). "On appeal from such a judgment, we review factual findings for clear error and legal conclusions *de novo*." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (internal quotation marks omitted).

Party."[37] Whether Phillips asserts individual ownership or ownership on behalf of the Orchard Party, however, we agree with the District Court that the dispute here can be resolved through analysis of the relevant treaties.

The parties agree that the Nation's reservation recognized in the 1794 Treaty of Canandaigua includes the entirety of the 19.6 Acre Parcel. We have repeatedly stated that the Nation's reservation has never been disestablished and, more specifically, that the 1838 Treaty of Buffalo Creek neither disestablished nor diminished it.[38] Phillips offers no valid reason for us to abandon or modify those conclusions. Phillips argues that Article 13 of the 1838 Treaty of Buffalo Creek reflects the transfer of the 19.6 Acre Parcel to his predecessors in interest (the Orchard Party Oneidas), but this argument is unavailing. By its plain terms, Article 13 does not effect *any* transfer

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[37] *See, e.g.*, App'x 64, 72 (attachment to deed), 103 (trust declaration), 119 (Answer, ¶ 24).

[38] *See, e.g.*, *Upstate Citizens for Equality v. Jewell*, 841 F.3d 556, 563 (2d Cir. 2016) ("[T]he Oneidas' original reservation [following the 1794 Treaty of Canandaigua] was never officially 'disestablished.'"); *Oneida Indian Nation*, 665 F.3d at 443 (noting that the Oneida's reservation was not disestablished by the 1838 Treaty of Buffalo Creek); *Oneida Indian Nation of N.Y. v. Madison Cnty., Oneida Cnty., N.Y.*, 605 F.3d 149, 157 n.6 (2d Cir. 2010) ("Our prior holding on this question—that the Oneidas' reservation was not disestablished, therefore remains the controlling law of this circuit." (internal citation and quotation marks omitted)); *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 161 (2d Cir. 2003) ("Nothing in [the Treaty of Buffalo Creek] provides 'substantial and compelling' evidence of Congress's intention to diminish or disestablish the Oneidas' New York reservation.").

of land—much less a transfer of the 19.6 Acre Parcel to the Orchard Party or to Phillips's ancestors. Article 13 provides as follows:

> SPECIAL PROVISIONS FOR
> THE ONEIDAS RESIDING IN
> THE STATE OF NEW YORK
>
> ARTICLE 13. The United States will pay the sum of four thousand dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in 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.[39]

This language clearly does not purport to cede any reservation land. Article 13 *does* contemplate future sales of land by members of the Nation who left New York. But Article 13 does not further recognize or bestow on members of the Nation (whether as individuals or subgroups) any right to sell land or exercise any other prerogatives of ownership.[40] Furthermore, Article 13 is entirely

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[39] 397 F. Supp. at 231 (quoting the 1838 Treaty of Buffalo Creek).

[40] Indeed, it is unclear whether Article 13 would authorize individual members of the Nation who left New York to complete land sales to New York State without the consent of

silent regarding any proprietary rights of members of the Nation—like Phillips's predecessors in interest—who did *not* leave New York. Therefore the District Court correctly held "as a matter of law, that the 1838 Treaty of Buffalo Creek did not recognize any proprietary interest of the Orchard Party Oneidas in the Property—as a 'faction' of [the Nation] or otherwise—to arrange for the purchase of the Property with the Governor of the State of New York."[41]

Nor does the later 1842 Treaty with New York State support Phillips's claim to the 19.6 Acre Parcel; indeed, that treaty tends to undermine Phillips's arguments. The 1842 Treaty does not purport to change the ownership status of the

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the Nation and the United States. *See Wilson v. Omaha Indian 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."); *see also Solem v. Bartlett*, 465 U.S. 463, 470, *reh'g denied* 466 U.S. 948 (1984) ("[O]nly Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire plot retains its reservation status until Congress explicitly indicates otherwise.") (citing *United States v. Celestine*, 215 U.S. 278 (1909)).

[41] *Id.* at 232. Moreover, the 1838 Treaty demonstrates that the United States treated the Oneidas as one nation. *See* App'x 132 (Article 2 of the treaty lists the following Tribes residing in New York State: "Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns"); *see also Oneida Indian Nation of N.Y. v. New York*, 194 F. Supp. 2d 104, 119 n.8 (N.D.N.Y. 2002) (observing the "United States' post–1805 treatment of the Oneidas as a unified nation" as depicted in the 1838 Treaty of Buffalo Creek).

tribal land not ceded to New York State. Since, as is undisputed, the unceded land—the Nation's reservation—includes the entire 19.6 Acre Parcel, the 1842 Treaty could not have transferred the 19.6 Acre Parcel to Phillips's ancestors. Moreover, the 1842 Treaty with New York State expressly provides that the unceded land, including the 19.6 Acre Parcel, was "to be had, held, enjoyed and occupied by [members of the Nation] *collectively* in the same manner and with the same right, title and interest therein as appertained to them."[42] This language suggests that until at least 1842, the 19.6 Acre Parcel was owned collectively, and not by Phillips's ancestors as private individuals, capable of transferring the land to Phillips by a chain of inheritance or bequest.[43] The District Court therefore also correctly concluded that title in the 19.6 Acre Parcel was not transferred to Phillips or his ancestors under the 1842 Treaty with New York State.[44]

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[42] *See* App'x 23 (1842 Treaty with New York State) (emphasis added).

[43] *See* Note 40, *ante*.

[44] Phillips initially maintained in the District Court that the 19.6 Acre Parcel belonged to an Orchard Party tribe of the Oneidas separate from the Nation. This position contradicts the language of the treaties and historical events. The 1838 Treaty, for example, demonstrates that the United States treated the Oneidas as one nation. *See* Note 41, *ante*. Phillips ultimately disclaimed the "separate-tribe" theory in the proceedings below and has now abandoned it on appeal. *See Phillips*, 397 F. Supp. 3d at 233 ("[Phillips] now agree[s] the Orchard Party is not a separate faction."); Appellants' Br. at 26 ("[This appeal] is not about Phillips' tribal membership or identity, or any claim by Phillips to possess tribal sovereignty or identity separate from [the Nation].").

2. *The District Court's Rejection of Phillips's Affirmative Defenses*

Phillips contends that even if the 1838 Buffalo Creek Treaty and the 1842 Treaty with New York State did not transfer title in the 19.6 Acre Parcel to his ancestors, he is still entitled to relief pursuant to *City of Sherrill v. Oneida Indian Nation*.[45] In *Sherrill*, the Supreme Court applied a federal common law equitable defense to a claim of tribal ownership for lands that the Nation had reacquired 200 years after an allegedly unauthorized sale to New York State, and over which long chains of private landowners had held putative title.[46]

Phillips's invocation of *Sherrill* is unavailing because he cannot satisfy "the *Sherrill* equitable defense" factors.[47] First, the undisputed facts demonstrate that there is no "longstanding, distinctly non-Indian character of the [disputed land] and its inhabitants,"[48] given that the 19.6 Acre Parcel has been occupied or used by members of the Nation, including Phillips, for over 200 years. Second, there has been no "regulatory authority constantly exercised by New York State

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[45] 544 U.S. 197 (2005).

[46] *Id.*; *see also Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163, 165-66 (2d Cir. 2014) (recognizing "the *Sherrill* equitable defense" and enumerating relevant factors, including whether the relief sought by the tribe would be "disruptive," whether there had been a "long lapse of time, during which the [tribe] did not seek to revive [its] sovereign control through equitable relief in court," and whether there would be "dramatic changes in the character of the properties").

[47] *Stockbridge-Munsee*, 756 F.3d at 166 (referring to "the *Sherrill* equitable defense").

[48] *Sherrill*, 544 U.S. at 202.

and its counties and towns" over the 19.6 Acre Parcel,[49] as it has not been subject to State or local taxation. Third, there has been no "long delay in seeking judicial relief against" Phillips or his ancestors.[50] Indeed, none publicly claimed title until 2015, when Phillips filed his quitclaim deed, and the Nation filed this suit just two years later.

Phillips raises several other equitable defenses that he claims would defeat the Nation's title to the 19.6 Acre Parcel, none of which succeed. He argues that the Nation's claims are barred by release[51] and by accord and satisfaction.[52] But even assuming equitable defenses beyond those described in *Sherrill* were available here, neither Phillips's counterclaim nor his answer to the Nation's complaint plausibly alleges that either release or accord and satisfaction exist.

Phillips also claims as a defense that the Nation abandoned any rights it may have the 19.6 Acre Parcel. It seems Phillips's theory is that the 1838 Buffalo Creek Treaty constituted the abandonment or discharge of the Nation's claim to the 19.6 Acre

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49 *Id.*

50 *Id.*

51 "A release is a provision that intends to present abandonment of a known right or claim." *McMahan & Co. v. Bass*, 250 A.D.2d 460, 461 (1st Dep't 1998).

52 "Under New York law, an accord and satisfaction is the resolution of a disputed, unliquidated claim through a new contract 'discharging all or part of [the parties'] obligations under the original contract,' and constitutes a complete defense to a claim for breach of contract." *Carnrite v. Granada Hosp. Grp., Inc.*, 175 F.R.D. 439, 449 (W.D.N.Y. 1997) (quoting *Conboy, McKay, Bachman & Kendall v. Armstrong*, 110 A.D.2d 1042, 1042 (4th Dep't 1985)).

Parcel,[53] but that interpretation of the 1838 Treaty is incorrect, as explained above. Further, Phillips's abandonment defense is inconsistent with his own allegations, for Phillips alleges that the members of the Orchard Party have continuously occupied the land and, as Phillips now apparently concedes, the Orchard Party is part of the Nation. Finally, Phillips's position also runs counter to the law of this Circuit, according to which treaty-based or "recognized" Indian title are not lost simply because a tribe ceases to occupy a particular tract of land.[54] For the same reasons, Phillips's defense of acquiescence or estoppel fails.

Phillips contends that the Nation failed to join "necessary individuals" by not adding the federal, state, and county governments to the suit, who he maintains are all "indispensable parties[.]"[55]

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53 *See* Appellants' Br. at 39-40.

54 *See, e.g., Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 270 (2d Cir. 2005) (noting with approval the district court's conclusion that the "1794 Treaty of Canandaigua conferred recognized title to the Cayugas concerning the land at issue" and that "proof of the plaintiffs' physical abandonment of the property at issue is irrelevant in a claim for land based upon reserved title to Indian land, for such title can only be extinguished by an act of Congress."(quoting *Cayuga Indian Nation of New York v. Cuomo*, 758 F. Supp. 107, 118 (N.D.N.Y. 1991)).

55 Under Rule 19(a), a party is required to be joined if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest

Fed. R. Civ. P. 19(a)(1).

Phillips, however, does not offer any plausible reason for why any one of these governmental parties is required to be joined, or plausibly suggest an arguable interest in their participation as parties in this litigation.

In sum: the District Court correctly concluded that Phillips does not raise any viable affirmative defenses that would preclude judgment on the pleadings in favor of the Nation. And because the question of title is resolved by the interpretation of the relevant treaties, as discussed above, we likewise reject Phillips's meritless assertions that the Nation's complaint fails to state a claim upon which relief can be granted and that there are material facts in dispute that would preclude judgment for the Nation as a matter of law.

B. Dismissal of Phillips's Counterclaim

The District Court granted the Nation's motion to dismiss Phillips's counterclaim on several alternative grounds, noting the "settled" precedent in this Circuit concerning tribal sovereign immunity.[56]

On appeal Phillips argues that the District Court erred in concluding that the Nation had sovereign immunity from suit. It is well settled that "courts must dismiss[] any suit against a tribe absent congressional authorization (or waiver) ... and the Supreme Court (like this Court) has thought it improper suddenly to start carving out exceptions to that immunity, opting instead to defer to the plenary power of Congress to define and otherwise abrogate tribal sovereign immunity

56 *See* Note 36, *ante*.

from suit."[57] In arguing that the District Court erred, Phillips relies on *Upper Skagit Indian Tribe v. Lundgren*, in which the Supreme Court described an immovable property exception to sovereign immunity.[58] But *Upper Skagit* does not suggest, much less compel, a different result here. As we recently explained, in that case the Supreme Court expressly declined to decide whether the immovable property exception applied to *tribal* sovereign immunity, instead leaving that question for the Washington State Supreme Court to consider "in the first instance."[59] Moreover, even if the exception applied to tribal sovereign immunity generally, it would not apply here, where it is undisputed that the Nation did not purchase the 19.6 Acre Parcel in "the character of a private individual" buying lands in another sovereign's territory.[60] Therefore, to the extent that the District Court rested its decision to dismiss

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[57] *Cayuga Indian Nation of N.Y. v. Seneca Cnty., N.Y.*, 761 F.3d 218, 220 (2d Cir. 2014) (citation and quotation marks omitted) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014)).

[58] *See* 138 S. Ct. 1649, 1653-54 (2018) (involving a dispute over land that an Indian tribe had purchased on the open market, which had previously been (but was no longer) part of that tribe's reservation).

[59] *Cayuga Indian Nation of New York v. Seneca Cnty., N.Y.*, F.3d_, 2020 WL 6253332, at *4 (2d Cir. 2020); *see also Upper Skagit*, 138 S. Ct. at 1654 ("Although we have discretion to affirm on any ground supported by the law and the record that will not expand the relief granted below, ... in this case we think restraint is the best use of discretion. Determining the limits on the sovereign immunity held by Indian tribes is a grave question " (internal citation omitted)).

[60] *Upper Skagit*, 138 S. Ct. at 1654.

Phillips's counterclaim on the basis of tribal sovereign immunity, we cannot conclude the District Court erred by not applying the immovable property exception.[61]

On appeal Phillips does not challenge the grounds upon which the District Court granted the Nation's motion to dismiss Phillips's counterclaim pursuant to Rule 12(b)(6) for failure to plausibly state a claim for which relief can be granted. But, we note as a matter of logic that Phillips cannot prevail on his counterclaim, which purports to seek relief mirroring the relief sought by the Nation, where we conclude that the Nation was correctly entitled to judgment on the pleadings.[62]

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[61] Insofar as the parties make further arguments on appeal regarding tribal sovereign immunity, we do not further address, nor express any view about, them.

[62] *See* Part II.A, *ante*. We further note that Phillips's counterclaim, to which the Nation raised, *inter alia*, tribal sovereign immunity as a basis for dismissal, falls within supplemental jurisdiction. A federal court has authority to exercise supplemental jurisdiction under 28 U.S.C. § 1367 over claims not within federal jurisdiction only if there is a related claim that properly invokes the court's subject matter jurisdiction. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164–65 (1997); *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358, 362 (2d Cir. 2000); *see also Cushing v. Moore*, 970 F.2d 1103, 1106 (2d Cir. 1992) (explaining that "[s]upplemental jurisdiction could be exercised only if some other, related claim provides a proper basis for federal jurisdiction"). Here, it is undisputed that the Nation's claim against Phillips, which asserts a tribal right to possession of the 19.6 Acre Parcel and which is wholly independent of state law, arises under federal law. *See Oneida I*, 414 U.S. at 666. Phillips's counterclaim, which seeks relief mirroring that sought by the Nation, thus arises out of a common nucleus of operative fact, falling squarely within our supplemental jurisdiction. *Int'l Coll. of Surgeons*, 522 U.S. at 164–65.

As a final matter: our concurring colleague argues that we improperly affirm the District Court's dismissal of Phillips's counterclaim. In so doing, our concurring colleague appears to equate tribal sovereign immunity and subject matter jurisdiction.

As we have emphasized here, tribes possess the common-law immunity traditionally enjoyed by sovereign powers.[63] The Supreme Court has held that sovereign immunity is jurisdictional in nature.[64] We think that tribal sovereign immunity, however, is not synonymous with subject matter jurisdiction for several reasons. Tribal sovereign immunity may be waived in certain circumstances and is subject to the plenary power of Congress.[65] Lack of subject matter jurisdiction, on the other hand, may not be waived or forfeited.[66] Second, tribal sovereign immunity operates essentially as a party's possible defense to a cause of action.[67] In contrast, subject

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[63] *See* Note 57, *ante*; *see also Bay Mills Indian Cmty.*, 572 U.S. at 788; *Turner v. United States*, 248 U.S. 354, 357–58 (1919).

[64] *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994).

[65] *See Bay Mills Indian Cmty.*, 572 U.S. at 788–89; *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978).

[66] *See Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012); *New York v. Shinnecock Indian Nation*, 686 F.3d 133, 138 (2d Cir. 2012) ("Jurisdiction cannot be created by the consent of the parties.").

[67] *See Okla. Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989) (noting that although "[t]ribal immunity may provide a federal defense to [the plaintiff's] claims[,] ... it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law").

matter jurisdiction is "fundamentally preliminary" and an "absolute stricture[]" on the court.[68] Finally, a waiver of sovereign immunity cannot, on its own, extend a court's subject matter jurisdiction.[69] We observe that there appears to be a divergence of opinion as to the precise nature of tribal sovereign immunity, but that there is no need to address, much less resolve, it here.[70]

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[68] *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979); *see also, e.g., Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006).

[69] *See, e.g., Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 401–02 (3d Cir. 2012) ("To confer subject matter jurisdiction in an action against a sovereign, in addition to a waiver of sovereign immunity, there must be statutory authority vesting a district court with subject matter jurisdiction." (quoting *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007)); *Arford v. United States*, 934 F.2d 229, 231 (9th Cir. 1991) (explaining that in order to maintain an action against the United States, there must be both "statutory authority granting subject matter jurisdiction" and "a waiver of sovereign immunity"); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986).

[70] *Compare Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 515 n. 19 (1982) (explaining sovereign immunity is not "jurisdictional in the sense that it must be raised and decided by this Court on its own motion"); *Pistor v. Garcia*, 791 F.3d 1104, 1110–11 (9th Cir. 2015) (stating "[t]he issue of tribal sovereign immunity is [quasi-]jurisdictional," and explaining "[s]overeign immunity's 'quasi-jurisdictional ... nature,' by contrast, means that '[i]t may be forfeited where the [sovereign] fails to assert it and therefore may be viewed as an affirmative defense'" (internal citations omitted)); *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 487 F.3d 1129, 1131 n.4 (8th Cir. 2007) (explaining that, "insofar as *Hagen* adverts to the topic of subject matter jurisdiction at all, it observes that we had previously stated that sovereign immunity is jurisdictional in nature but is not of the same character as subject matter jurisdiction" (citing *Hagen v. Sisseton-Wahpeton Cmty. Coll.*,

We thus affirm the District Court's order dated November 15, 2018 granting the Nation's motion to dismiss Phillips's counterclaim.

III. CONCLUSION

To summarize, we hold as follows:

(1) The District Court correctly granted the Nation's motion for judgment on the pleadings because title was not properly transferred to Phillips, and Phillips's defenses do not raise any disputes of material fact that would preclude the requested declaratory and injunctive relief sought by the Nation;

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205 F.3d 1043 (8th Cir. 2000) and *In re Prairie Island Dakota Sioux*, 21 F.3d 302 (8th Cir. 1994)); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 28 (1st Cir. 2000) ("[A]lthough tribal sovereign immunity is jurisdictional in nature, consideration of that issue always must await resolution of the antecedent issue of federal subject-matter jurisdiction."), *with Edelman v. Jordan*, 415 U.S. 651, 677–78 (1974) (noting that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court"); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011) ("We have held that tribal sovereign immunity is a threshold jurisdictional question." (citing Hagen, 205 F.3d at 1044)); *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1287 (11th Cir. 2015) ("We have an obligation to make sure we have jurisdiction to hear this action, which requires us to first consider whether the defendants enjoy tribal sovereign immunity from Alabama's claims." (citing *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1034 (11th Cir. 2001)).

(2) The District Court correctly granted the Nation's motion to dismiss Phillips's counterclaim.

For the foregoing reasons, we **AFFIRM** the November 15, 2018 decision and order and the July 31, 2019 final judgment of the District Court.

CONCURRENCE OF JUDGE MENASHI

MENASHI, *Circuit Judge*, concurring in part and concurring in the judgment:

I concur in Part II.A.1. of the court's opinion, in which the court holds that neither the Treaty of Buffalo Creek nor the 1842 Treaty with New York State transferred title to the 19.6 Acre Parcel from the Oneida Indian Nation to the Orchard Party or to Melvin Phillips's ancestors. I write separately because the court makes three errors in the remainder of its opinion.

First, the court concludes that the district court did not err in dismissing Phillips's counterclaim on the ground of tribal sovereign immunity. *Ante* at 22-24. I agree that no "immovable property exception" to tribal sovereign immunity applies in this case. *Id.* at 23. The district court nevertheless erred, however, because the Nation waived its tribal sovereign immunity for Phillips's counterclaim seeking the same relief as the Nation sought in its suit.

Second, the court includes extensive dicta questioning our precedents that hold tribal sovereign immunity to be a limit on our subject-matter jurisdiction. *Id.* at 24-26. The court speculates that tribal sovereign immunity should perhaps be reconceptualized as belonging to some category of jurisdiction that limits a court's power to act but is "not synonymous with subject matter jurisdiction." *Id.* at 25. I believe these dicta are misguided.

Third, the court correctly concludes that Phillips cannot establish a *Sherrill* equitable defense but then "assum[es]," while leaving the question open,

that "equitable defenses beyond those described in *Sherrill* [a]re available." *Id.* at 20. I would conclude that such defenses are not available.

Despite these disagreements, I concur in the court's judgment because Phillips's counterclaim fails on the merits, because the court's dicta about sovereign immunity are unrelated to its judgment, and because Phillips does not establish a *Sherrill* equitable defense.

I

The court's opinion concludes that the district court did not err in dismissing Phillips's counterclaim as barred by tribal sovereign immunity. *Id.* at 22-23. Although I agree with the court that the district court did not err in declining to apply an immovable property exception to tribal sovereign immunity in this case, I would hold that the Nation waived its sovereign immunity for Phillips's limited counterclaim, which seeks the same relief in his favor that the Nation seeks for the 19.6 Acre Parcel.

The Supreme Court held in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), that a tribe does not waive its sovereign immunity from counterclaims simply by bringing suit. Thus, the mere fact that a tribe has brought suit does not waive its immunity for all counterclaims.

Many courts have recognized, however, that a tribe *does* waive its immunity for counterclaims that arise out of the same transaction and would defeat or reduce the tribe's requested relief. This

"recoupment" principle is well established in the context of both tribal sovereign immunity and federal sovereign immunity. The Tenth Circuit has explained the scope of the rule, which applies to the United States and "equally applies to Indian tribes":

> [W]hen the sovereign sues it waives immunity as to claims of the defendant which assert matters in recoupment—arising out of the same transaction or occurrence which is the subject matter of the government's suit, and to the extent of defeating the government's claim but not to the extent of a judgment against the government which is affirmative in the sense of involving relief different in kind or nature to that sought by the government or in the sense of exceeding the amount of the government's claims; but the sovereign does not waive immunity as to claims which do not meet the "same transaction or occurrence test" nor to claims of a different form or nature than that sought by it as plaintiff nor to claims exceeding in amount that sought by it as plaintiff.

Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1344 (10th Cir. 1982) (quoting *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967)). Phillips's request for title in this case is the same type of relief and in the same degree as what the Nation sought for the same parcel of land, and therefore the counterclaim sounds in recoupment.

The Tenth Circuit later confirmed that the recoupment doctrine survived *Oklahoma Tax*

because the counterclaims there "were not recoupment claims," and thus *Oklahoma Tax* "says nothing about the applicability of the recoupment doctrine as a waiver of tribal sovereign immunity when the defendant's counterclaims do sound in recoupment." *Berrey v. Asarco Inc.*, 439 F.3d 636, 644 n.5 (10th Cir. 2006); *see also id.* at 646 (explaining that "[b]ecause Defendants' counterclaims arise from the same transaction or occurrence as the Tribe's claims and seek relief of the same kind or nature, but not in excess of the amount sought by the Tribe, they are claims in recoupment," and therefore the tribe had waived immunity as to those claims).

After *Oklahoma Tax*, other circuits have recognized similar waivers of tribal sovereign immunity to adjudicate claims that arise out of the same transaction and seek relief that is a mirror image of, or would defeat or undercut, the tribe's requested relief. For example, in a case that cites *Oklahoma Tax*, the Eighth Circuit held that tribal sovereign immunity did not bar the defendants' counterclaims regarding the same disputed piece of land because "[w]hen the Tribe filed this suit, it consented to and assumed the risk of the court determining that the Tribe did not have title to the disputed tracts[,]" and "[b]y requesting equitable relief, the Tribe consented to the district court exercising its equitable discretion to resolve the status of the disputed lands." *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995); *see also Rosebud Sioux Tribe v. Val-U Const. Co. of S.D.*, 50 F.3d 560, 562 (8th Cir. 1995) ("When a tribe brings a lawsuit, it does not waive immunity for counterclaims, *except for matters asserted in*

recoupment.") (emphasis added) (internal citation omitted) (citing *Oklahoma Tax*, 498 U.S. at 509).

In *Quinault Indian Nation v. Pearson for Estate of Comenout*, the Ninth Circuit held that "counterclaims to recoup damages arising from the same transaction or occurrence as a tribe's claims do not violate the tribe's sovereign immunity," 868 F.3d 1093, 1099 (9th Cir. 2017), even though—based on the authority of *Oklahoma Tax*—it also recognized that tribal sovereign immunity generally extends to counterclaims and "even extends to compulsory counterclaims *in excess of the original claims*—despite the fact that compulsory counterclaims by definition arise out of the same transaction or occurrence," *id.* at 1097 (emphasis added).

Although this court has not addressed this issue in the specific context of tribal sovereign immunity, our precedent dictates that the same rule applies here. This court has held that when the United States sues, it necessarily "waives immunity as to claims of the defendant which assert matters in recoupment"—meaning the defendant may counterclaim against the sovereign, but the counterclaim must arise out of the same underlying dispute as the sovereign's claim, must be limited to the same type of relief sought by the sovereign, and cannot exceed the potential recovery by the sovereign. *United States v. Forma*, 42 F.3d 759, 765 (2d Cir. 1994) (quoting *Frederick*, 386 F.2d at 488). The recognition of this rule for the sovereign immunity of the United States is significant because "[t]ribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States." *Miner*

Elec., Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007, 1011 (10th Cir. 2007); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) ("Indian tribes enjoy the same immunity from suit enjoyed by sovereign powers and are 'subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.'").[1] Our precedent therefore provides that the recoupment rule applies in the context of tribal sovereign immunity.[2]

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[1] *See also United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940) ("[T]he suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign."); *Spurr v. Pope*, 936 F.3d 478, 484 (6th Cir. 2019) ("[T]ribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States.") (quoting *Miner*, 505 F.3d at 1011); *Quinault*, 868 F.3d at 1100 ("[A] tribe's sovereign immunity is generally coextensive with that of the United States."); *Evans v. McKay*, 869 F.2d 1341, 1345 (9th Cir. 1989) ("The common law immunity afforded Indian tribes is coextensive with that of the United States and is similarly subject to the plenary control of Congress."); *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 773 (D.C. Cir. 1986) ("An Indian tribe's immunity is co-extensive with the United States' immunity."); *Namekagon Dev. Co. v. Bois Forte Rsrv. Hous. Auth.*, 517 F.2d 508, 510 (8th Cir. 1975) ("Indian tribes have always been considered to have an immunity from suit similar to that enjoyed by the federal government.").

[2] Moreover, at least one district court in our circuit has applied the recoupment rule to a tribe. *Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 260 F. Supp. 3d 290, 299 (W.D.N.Y. 2017) ("[W]here an Indian tribe seeks a declaration that a particular fact is true, e.g., that its reservation still exists, it necessarily waives its sovereign immunity as to a counterclaim seeking the exact opposite declaration.").

Absent the recoupment rule, tribes could never truly lose a case because courts would lack jurisdiction to enter a decision in favor of the defendant on a counterclaim arising from the same transaction underlying the tribe's claim. The court could say at most that the tribe did not prevail on its own claim, but the court could not say the defendant prevailed on its counterclaim for the same relief. *See Rupp*, 45 F.3d at 1245 ("We will not transmogrify the doctrine of tribal immunity into one which dictates that the tribe never loses a lawsuit. When the Tribe filed this suit, it consented to and assumed the risk of the court determining that the Tribe did not have title to the disputed tracts.") (internal citation omitted).

Applying the recoupment rule here, the Nation's action in bringing this suit effected a limited waiver of its sovereign immunity for Phillips's counterclaim, which—as the court acknowledges—"seek[s] relief mirroring the relief sought by the Nation" for the same piece of land. *Ante* at 24.[3]

[3] Comparing the Nation's requests for relief with Phillips's requests demonstrates that both parties sought the same relief for the same parcel:

(a) The Nation: "Declar[e] that neither the trust nor Phillips, as an individual or otherwise, owns or has any property interest in the 19.6 acres." App'x 19. Phillips: "Declar[e] that [the Nation] does not own nor has any property interest in the 19.6 acres." App'x 128.

(b) The Nation: "Declar[e] that the trust document, the quitclaim deed and all related documents filed by Phillips in the Oneida County land records are invalid and void so far as they concern the 19.6 acres." App'x 19. Phillips: "Declar[e] that the trust document, the quitclaim deed and all related documents filed by Melvin L. Phillips, Sr. on behalf of the Orchard Party Oneida in the Oneida County land records are valid so far as they concern the 19.6 acres." App'x 128.

Because the court has jurisdiction over Phillips's counterclaim pursuant to the recoupment rule, the district court should not have dismissed it for lack of jurisdiction. I nevertheless would affirm the dismissal because, as the court correctly explains in Part II.A.1. of its opinion, the Nation is entitled to judgment on its claim regarding ownership of the 19.6 Acre Parcel and therefore Phillips cannot state a claim for relief.

II

After deciding that tribal sovereign immunity bars jurisdiction over Phillips's counterclaim—and affirming the district court's dismissal of that claim under Rule 12(b)(1)—the court engages in an extended disquisition on "the precise nature of tribal sovereign immunity." *Ante* at 26. The court

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(c) The Nation: "Enjoin[] Phillips and the trust (i) not to claim the 19.6 acres for themselves, any beneficiary of the trust or any other person or entity, (ii) not to assert that Phillips, the trust, or any trust beneficiary owns or has a property interest in the 19.6 acres, and (iii) not to create or cause to be created, or filed or cause to be filed, in land records any document asserting that Phillips, the trust, any trust beneficiary or any other person or entity owns or has a property interest in the 19.6 acres." App'x 19. Phillips: "Enjoin[] [the Nation] (i) not to claim the 19.6 acres for itself, (ii) not to assert that [the Nation] owns or has a property interest in the 19.6 acres, and (iii) not to create or cause to be created, or file or cause to be filed, in land records any document asserting that [the Nation] owns or has a property interest in the 19.6 acres." App'x 128-29.

(d) The Nation: "Grant[] such other relief as the Nation may be entitled to at law or in equity." App'x 19. Phillips: "Grant[] such other relief as the Orchard Party Trust may be entitled to at law or in equity." App'x 129.

ruminates inconclusively about the extent to which tribal sovereign immunity should be considered jurisdictional, suggesting that it falls into a jurisdictional category that is "not synonymous with subject matter jurisdiction." *Id.* at 25. The court acknowledges that "there is no need to address" this issue, and the court admittedly does not "resolve" it, so the discussion is plainly dicta. *Id.* at 26; *see also United States v. U.S. Gypsum Co.*, 333 U.S. 364, 411 (1948) (Frankfurter, J., concurring) ("[T]he Court confessedly deals with an issue that 'need not be decided to dispose of this case.' Deliberate dicta, I had supposed, should be deliberately avoided.").

Nevertheless, the discussion conflicts with our precedent and is erroneous, as far as it goes. As we have said on numerous occasions, tribal sovereign immunity deprives a court of subject-matter jurisdiction over a lawsuit, and we routinely affirm decisions of district courts to dismiss for lack of subject-matter jurisdiction on the ground of tribal sovereign immunity. *See Chayoon*, 355 F.3d at 142-43 ("We affirm the district court's dismissal for lack of subject matter jurisdiction because [the defendant tribal officials] are immune from this suit ... Indian tribes enjoy the same immunity from suit enjoyed by sovereign powers ... and neither abrogation nor waiver has occurred in this case."); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84-85, 88 (2d Cir. 2001) (affirming the district court's dismissal of claims against a tribal agency "for lack of subject matter jurisdiction" because "an Indian tribe enjoys sovereign immunity from suit" absent congressional abrogation or waiver); *Laake v. Turning Stone Resort Casino*, 740 F.

App'x 744, 745 (2d Cir. 2018) (holding that "the district court properly concluded that it lacked subject matter jurisdiction over the complaint against Turning Stone [because] Indian tribes have sovereign immunity from suit" absent congressional abrogation or waiver); *Tassone v. Foxwoods Resort Casino*, 519 F. App'x 27, 28 (2d Cir. 2013) ("Tribal immunity also applies to entities, such as [defendant] Foxwoods Resort Casino, that are arms, agencies or subdivisions of the tribe. ... [T]he district court properly held that it lacked subject matter jurisdiction due to Defendants' sovereign immunity."); *see also Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 885 (2d Cir. 1996) (Cabranes, J.) (noting that "[t]he exercise of subject matter jurisdiction" depends in part on "whether [a federal statute] constitutes a waiver of tribal sovereign immunity").

We have even affirmed a district court's dismissal for lack of subject-matter jurisdiction on the ground of tribal sovereign immunity while taking care to note that an alternative ground on which the district court relied—abstention under the tribal exhaustion rule—was *not* a matter of subject-matter jurisdiction. *See Garcia*, 268 F.3d at 80 ("[T]he district court erred by treating abstention on this ground as a matter of subject matter jurisdiction."); *id.* at 84-85, 88 (proceeding to affirm the district court's dismissal "for lack of subject matter jurisdiction" on tribal sovereign immunity grounds).

In support of its view, the court relies on one Supreme Court case from a period, 40 years ago, in which the Supreme Court doubted that state sovereign immunity was a jurisdictional issue. *See*

Patsy v. Bd. of Regents of State of Fla., 457 U.S. 496, 515 n. 19 (1982) ("[W]e have never held that [state sovereign immunity] is jurisdictional in the sense that it must be raised and decided by this Court on its own motion."); *id.* at 519 (Powell, J., dissenting) ("The Court holds that the limitations on federal judicial power embodied in the Eleventh Amendment and in the doctrine of sovereign immunity are not jurisdictional."). The Court has since rejected those doubts in favor of the view that state sovereign immunity is jurisdictional. *See Alden v. Maine*, 527 U.S. 706, 730 (1999) ("[T]he constitutional principle of sovereign immunity does pose a bar to federal jurisdiction over suits against nonconsenting States."); *see also Allen v. Cooper*, 140 S. Ct. 994, 1002 (2020) (noting "the limits sovereign immunity places upon federal jurisdiction") (internal quotation marks and alteration omitted); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1496 (2019) (noting that, "[c]onsistent with [its] understanding of state sovereign immunity, [the Supreme] Court has held that the Constitution bars suits against nonconsenting States in a wide range of cases"); *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253-54 (2011) (noting that "we have understood the Eleventh Amendment to confirm the structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article III's jurisdictional grant," and therefore "absent waiver or valid abrogation, federal courts may not entertain a private person's suit against a State"); *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 766, 769 (2002) (noting that "[s]overeign immunity does not merely constitute a defense to monetary liability or even to all types of

liability" but "provides an immunity from suit" the intrusion on which is "contrary to the[] constitutional design"); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64 (1996) (noting that it had been "well established" by 1989 "that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III" and that the Court's decisions were "clear that the Eleventh Amendment reflects 'the fundamental principle of sovereign immunity that limits the grant of judicial authority in Art. III'") (alteration omitted) (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 97-98 (1984)).

The "sovereign immunity" of "the Federal Government" also "is jurisdictional in nature." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *see also United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) ("Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity.").

Our court has repeatedly recognized that state sovereign immunity limits our subject-matter jurisdiction. *See McGinty v. New York*, 251 F.3d 84, 90 (2d Cir. 2001) ("Whether a federal court has subject matter jurisdiction is a question that may be raised at any time by the court *sua sponte*. Thus, the district court properly considered whether ... defendants had sovereign immunity that deprived it of subject matter jurisdiction.") (internal quotation marks, alteration, and citation omitted); *Close v. New York*, 125 F.3d 31, 38-39 (2d Cir. 1997) ("[U]nless New York waived its immunity, the district court lacked subject matter jurisdiction because [of] ... New York's sovereign

immunity."); *Atl. Healthcare Benefits Tr. v. Googins*, 2 F.3d 1, 4 (2d Cir. 1993) ("Although the parties do not address the Eleventh Amendment in their briefs, we raise it sua sponte because it affects our subject matter jurisdiction."); *All. of Am. Insurers v. Cuomo*, 854 F.2d 591, 605 (2d Cir. 1988) ("[T]he Eleventh Amendment precludes the District Court from asserting subject matter jurisdiction over plaintiffs' state law claim."); *see also Bleichert v. N.Y. State Educ. Dep't*, 793 F. App'x 32, 34 (2d Cir. 2019) ("[T[he Eleventh Amendment precludes an individual from bringing a claim against a state or state agency under the ADEA, and federal courts do not have subject matter jurisdiction over such claims."); *Madden v. Vt. Sup. Ct.*, 236 F. App'x 717, 718 (2d Cir. 2007) ("The Eleventh Amendment precludes Madden from bringing suit against the state or state agencies, because it deprives the federal courts of subject matter jurisdiction over any action asserted by an individual against a state regardless of the nature of the relief sought.").[4]

[4] The Supreme Court in 1998 said that it had "not decided" but would "mak[e] the assumption that Eleventh Amendment immunity is a matter of subject-matter jurisdiction." *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 391 (1998). Based on this comment, some panels have suggested that the jurisdictional status of state sovereign immunity is an open question. *See, e.g., Carver v. Nassau Cty. Interim Fin. Auth.*, 730 F.3d 150, 156 (2d Cir. 2013). But our court—along with other circuits—*has* decided this issue, and only the en banc court may revise those precedents. "While the Supreme Court has left this question open, our court has repeatedly referred to the Eleventh Amendment's restriction in terms of subject matter jurisdiction [O]ur earlier circuit precedent continues to bind us." *United States v. Texas Tech Univ.*, 171 F.3d 279, 285 n.9 (5th Cir. 1999);

Our court has also said that the federal government's sovereign immunity limits our subject-matter jurisdiction. *See United States v. Bond*, 762 F.3d 255, 263 (2d Cir. 2014) ("[W]hen it comes to sovereign immunity ... express abrogation is a prerequisite to subject-matter jurisdiction."); *Dotson v. Griesa*, 398 F.3d 156, 177 (2d Cir. 2005) ("Because a finding of sovereign immunity would deprive this court of subject matter jurisdiction, we address that question first."); *Adeleke v. United States*, 355 F.3d 144, 147 (2d Cir. 2004) (holding that the plaintiff's "equitable claim for money damages should have been dismissed for lack of subject matter jurisdiction because sovereign immunity bars a federal court from ordering the United States" to provide that remedy.); *Forma*, 42 F.3d at 763 (noting that the "failure to satisfy the[] prerequisites" of the statute providing the federal government's consent to "a refund suit would normally deprive a district court of subject matter jurisdiction over any such refund action").[5]

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see also *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1212 (10th Cir. 2019) ("Once effectively asserted, Eleventh Amendment immunity constitutes a bar to the exercise of federal subject matter jurisdiction.") (alterations omitted); *Seaborn v. Florida Dep't of Corrs.*, 143 F.3d 1405, 1407 (11th Cir. 1998) ("An assertion of Eleventh Amendment immunity essentially challenges a court's subject matter jurisdiction.").

[5] Other circuits agree. *See e.g.*, *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 734 (5th Cir. 2019) ("Sovereign immunity deprives the court of subject matter jurisdiction."); *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1151 (10th Cir. 2015) ("The defense of sovereign immunity is jurisdictional in nature, depriving courts of subject-matter jurisdiction where applicable."); *Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 395 (3d Cir. 2012) ("Without a waiver of sovereign immunity, a court is without subject matter jurisdiction over

As noted above, tribal sovereign immunity is coextensive with federal sovereign immunity.[6] Like our court, other circuits have recognized that tribal sovereign immunity—like other forms of sovereign immunity—deprives a court of subject-matter jurisdiction. *See Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007) ("Tribal sovereign immunity is a matter of subject matter jurisdiction."); *Victor v. Grand Casino–Coushatta*, 359 F.3d 782, 783 n.3 (5th Cir. 2004) (noting that "the question of tribal immunity" is a "matter[] of subject matter jurisdiction"); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1292 (11th Cir. 2001) ("[T]he Tribe's sovereign immunity deprives the district court of subject matter jurisdiction over [the] complaint.").

In its opinion today, the court observes that tribal sovereign immunity functionally serves as a defense to a cause of action and that a tribe may waive its sovereign immunity. But these aspects of tribal sovereign immunity do not suggest that tribal sovereign immunity is something other than a limit on a court's subject-matter jurisdiction. Whenever a defendant challenges a court's subject-matter jurisdiction, the defendant's invocation of the jurisdictional limitation functionally serves as a defense to the plaintiff's cause of action. If a plaintiff were to bring a state-law claim in federal court against a non-diverse party, the defendant would likely invoke jurisdiction as a defense. But

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claims against federal agencies or officials in their official capacities."); *United States v. Land, Shelby Cty.*, 45 F.3d 397, 398 n.2 (11th Cir. 1995) ("Sovereign immunity of the United States is an issue of subject matter jurisdiction.").

[6] *See supra* note 1 and accompanying text.

that does not mean that federal-question and diversity jurisdiction are "not synonymous with subject matter jurisdiction." *Ante* at 25.

That a tribe may waive its immunity and thereby consent to be sued does not mean that its immunity does not limit the court's subject-matter jurisdiction. "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." The Federalist No. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (emphasis added); *see also Alden*, 527 U.S. at 712 ("[T]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject *nonconsenting* States to private suits.") (emphasis added). A waiver of sovereign immunity—that is, the sovereign's consent—has long been understood to be a precondition to the exercise of subject-matter jurisdiction. *See Poodry*, 85 F.3d at 885; *see also Meyer*, 510 U.S. at 475 ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); *United States v. Lee*, 106 U.S. 196, 204 (1882) ("[T]he United States cannot be lawfully sued without its consent in any case."); *United States v. Clarke*, 33 U.S. (8. Pet.) 436, 443 (1834) ("As the United States are not suable of common right, the party who institutes a suit against them must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction."). This feature of sovereign immunity does not warrant reconsideration of its jurisdictional status.

Nothing inherent in the nature of subject-matter jurisdiction precludes it from depending on a defendant's choice. The Foreign Sovereign

Immunities Act expressly provides that a foreign state may waive its sovereign immunity and thereby allow a court to exercise subject-matter jurisdiction over the suit against it. *See* 28 U.S.C. § 1605(a)(1) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... in which the foreign state has waived its immunity either explicitly or by implication."); *see also id.* § 1330(a) (conditioning a court's "original jurisdiction" over "any nonjury civil action against a foreign state" on "the foreign state ... not [being] entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement"); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 489 (1983) (confirming that § 1330(a) governs a court's "exercise [of] subject matter jurisdiction"). Jurisdictional limitations do not generally depend on a party's consent, but there is no principled reason why such rules cannot.[7]

The cases the court cites for a contrary argument stand for the unremarkable proposition that the absence of a claim of tribal immunity, like the presence of such a claim, does not in and of itself

[7] In a similar way, Congress has conditioned a federal court's exercise of removal jurisdiction on the unanimous consent of all defendants. *See* 28 U.S.C. § 1441(a) (allowing defendants to remove "any civil action brought in a State court of which the district courts of the United States have original jurisdiction ... to [a] district court of the United States"); *id.* § 1446(b)(2)(A) ("When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action."). Thus, whether a federal court may exercise removal jurisdiction depends on the consent of each defendant.

create subject-matter jurisdiction. *See Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989) ("The possible existence of a tribal immunity defense, then, did not convert Oklahoma tax claims into federal questions, and there was no independent basis for original federal jurisdiction to support removal."). But that does not mean a tribe's proper assertion of its immunity does not deprive a court of subject-matter jurisdiction. The defendant's lack of immunity to suit is a necessary but not sufficient condition for the exercise of subject-matter jurisdiction. Because the court's discussion of this point is dicta and is erroneous, I do not join it.

III

The court's opinion "assum[es]" that "equitable defenses beyond those described in *Sherrill* [a]re available." *Ante* at 20. I would hold that the *Sherrill* equitable defense is the only equitable defense available against a tribal claim to land that was allegedly transferred or abandoned long ago. Phillips's other equitable defenses are therefore barred as a matter of law.

In *City of Sherrill v. Oneida Indian Nation of N.Y.*, the Supreme Court devised a federal common-law equitable defense to a tribe's claim of ownership to lands that it had allegedly sold without authorization two centuries earlier. 544 U.S. 197 (2005). The Court said this equitable defense considers whether there is a "longstanding, distinctly non-Indian character of the [disputed land] and its inhabitants," whether there has been "regulatory authority constantly exercised by [the

state] and its counties and towns," and whether there was a "long delay in seeking judicial relief against" the current holder or prior holders. *Id.* at 202.

This court has subsequently labeled this defense "the *Sherrill* equitable defense," *Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163, 166 (2d Cir. 2014), and has held that in such cases we should "consider[] only factors equivalent to those addressed in *Sherrill*," which itself "did not involve the application of a traditional laches defense so much as an equitable defense that drew upon laches and other equitable doctrines but that derived from general principles of 'federal Indian law and federal equity practice,'" *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 128 (2d Cir. 2010) (quoting *Sherrill*, 544 U.S. at 213). Our analysis indicates that "the *Sherrill* equitable defense" is a *sui generis* defense that displaces traditional equitable defenses, *Stockbridge-Munsee*, 756 F.3d at 166, including those defenses based on state law, *see Oneida Indian Nation*, 617 F.3d at 128 (noting that the *Sherrill* equitable defense is not satisfied simply because "the elements of a traditional laches defense [are] met").

Moreover, recognition of additional equitable defenses in the context of tribal claims to ancient lands would contravene the Nonintercourse Act, which provides that any conveyance of tribal land is of no "validity in law or equity" unless made pursuant to a "treaty or convention" with the United States. 25 U.S.C. § 177; *see also Oneida Indian Nation of N.Y. State v. Oneida County*, 414 U.S. 661, 670 (1974) ("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.").

The court's opinion correctly concludes that Phillips cannot satisfy the *Sherrill* equitable defense factors here. Rather than reach the merits of his other equitable defenses, I would hold that *Sherrill* bars those other defenses as a matter of law.

* * *

The court errs in holding that tribal sovereign immunity bars Phillips's counterclaim, in suggesting that tribal sovereign immunity does not affect a court's subject-matter jurisdiction, and in considering affirmative defenses beyond the *Sherrill* equitable defense. But Phillips's counterclaim fails on the merits, the court's dicta about the nature of sovereign immunity are irrelevant to the disposition of this case, and Phillips cannot establish the *Sherrill* equitable defense. Accordingly, I concur in the court's judgment.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECOND CIRCUIT ORDER
DENYING REHEARING

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of December, two thousand twenty.

Docket No: 19-2737

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.

ORDER

Appellants, Melvin L. Phillips, Sr., individually and as trustee, and Melvin L. Phillips, Sr./Orchard Party Trust, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe
Clerk of Court

[STAMP]

Appendix D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

DECISION OF THE NORTHERN DISTRICT OF NEW YORK

5:17-CV-1035
(GTS/ATB)

ONEIDA INDIAN NATION,

Plaintiff,

—v.—

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

Defendants.

APPEARANCES:	OF COUNSEL:
ONEIDA INDIAN NATION Co-Counsel for Plaintiff 5218 Patrick Road Verona, New York 13478	MEGHAN MURPHY BEAKMAN, ESQ.
ZUCKERMAN SPAEDER LLP Co-Counsel for Plaintiff 1800 M Street, N.W., Suite 1000 Washington, DC 20036-5802	MICHAEL R. SMITH, ESQ.
ARNOLD & PORTER KAYE SCHOLER LLP Counsel for Defendants 250 West 55th Street New York, New York 10019	ERIC NEVINS WHITNEY, ESQ. GLENN J. POGUST, ESQ.

GLENN T. SUDDABY, Chief United States District Judge

DECISION and ORDER

Currently before the Court, in this real property action filed by the Oneida Indian Nation ("Plaintiff") against Melvin L. Phillips, Sr., individually and as Trustee ("Defendant Phillips"), and Melvin L. Phillips, Sr./Orchard Party Trust ("Defendant Trust") (collectively "Defendants"), is Plaintiff's motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). (Dkt. No. 32.) For the reasons set forth below, Plaintiff's motion is granted.

I. RELEVANT BACKGROUND

A. Procedural History

On November 15, 2018, the Court issued a Decision and Order that summarized Plaintiff's claims and dismissed Defendants' counterclaim. (Dkt. No. 30.) Familiarity with Plaintiff's Complaint, Defendants' Answer, and the Court's Decision and Order of November 15, 2018, is assumed in this Decision and Order, which is intended primarily for the review of the parties.

On June 11, 2019, the Court issued a Text Order denying Defendants' motion (Dkt. No. 39) to strike section "C" of Plaintiff's reply memorandum of law (Dkt. No. 38), but granting Defendants' alternative request for leave to file a sur-reply, which they have done. (Dkt. Nos. 41, 42.)

B. Parties' Briefing on Plaintiff's Motion for Judgment on the Pleadings

1. Plaintiff's Memorandum of Law-in-Chief

Generally, in support of its motion for judgment on the pleadings, Plaintiff argues that, for the same reason that the Court dismissed Defendants' counterclaim, Plaintiff is entitled to judgment as a matter of law in the form of declaratory and injunctive relief to quiet title to the 19.6 acre tract (the "Property"), which has a cloud on its title caused by Defendant Phillips' recordation of a quitclaim deed that he manufactured. (Dkt. No. 32, Attach. 1 [Pl.'s Mem. of Law].) More specifically, Plaintiff argues that, in its Decision and Order of November 15, 2018, the Court accepted Plaintiff's argument that the Property is part of the Oneida Nation's

reservation based on unextinguished Indian title, and rejected Defendants' claim to the Property. (*Id.*) Plaintiff further argues that its right to the Property was acknowledged in the 1794 Treaty of Canandaigua, its right is federally protected, it has never alienated the Property with federal approval or otherwise, and therefore, Defendants have no claim to the Property on behalf of Orchard Party, who, in any event, are members of the Oneida Nation and thus lack independent tribal rights to the Property. (*Id.*)

2. Defendants' Opposition Memorandum of Law

Generally, in opposition to Plaintiff's motion, Defendants assert the following three arguments. (Dkt. No. 37 [Defs.' Opp'n Mem. of Law].)[1]

First, Defendants argue that the standard for dismissing a counterclaim for failure to state a claim is significantly different than the standard for granting a motion for judgment on the pleadings. (*Id.*) More specifically, Defendants argue that granting the motion to dismiss the counterclaim for failure to state a claim required Plaintiff to demonstrate only that Defendants had not alleged facts plausibly suggesting a claim for relief–pursuant to *Iqbal* and *Twombly*–whereas, granting Plaintiff's motion for judgment on the pleadings requires a showing that (a) there exists no issue of material fact, (b) the Answer fails to meet the minimal

[1] The Court notes that, on the cover page of their motion, Defendants state "ORAL ARGUMENT REQUESTED." (Dkt. No. 37, at 1 [emphasis removed].) However, Defendants' request was not supported by a showing of cause for such oral argument.

requirements of notice pleadings pursuant to Fed. R. Civ. P. 8(b), or (c) the disputed factual issues raised in the Answer are immaterial or too implausible to ever be supported by discovery. (*Id.*) Defendants argue that their counterclaim alleged that they were affirmatively entitled to relief, whereas their denials and affirmative defenses contained in the Answer dispute that Plaintiff is entitled to relief and raise issues of material fact, which bar Plaintiff's motion for judgment on the pleadings. (*Id.*) Moreover, Defendants argue that they assert arguments "sounding in real property law regarding successors-in-interest, possession, and abandonment" that have not been addressed by Plaintiff. (*Id.*) Finally, Defendants argue that, if there is even a chance that they will be able to offer facts supporting their defenses and undermining Plaintiff's claims at trial, they are entitled to seek discovery; and therefore Plaintiff's motion for judgment on the pleadings must be denied. (*Id.*)

Second, Defendants argue that the Court's Decision and Order of November 15, 2018, determined that Defendants' counterclaim failed to allege facts plausibly suggesting entitlement to relief but it did not make any findings of fact or conclusions of law in the case. (*Id.*) More specifically, Defendants argue that the Court's Decision and Order of November 15, 2018, did not find that Plaintiff had affirmatively proven any facts or imply that Defendants will never be able to offer evidence supporting their defense. (*Id.*) Defendants argue that disputed issues of fact remain to be resolved at trial including the validity and interpretation of the deed documents that Defendant Phillips executed. (*Id.*) As a result, Defendants argue that this case should

proceed on the normal path to trial, where Plaintiff can attempt to carry the burden to prove its claims. (*Id.*)

Third, Defendants argue that numerous disputes of fact preclude judgment on the pleadings. (*Id.*) More specifically, Defendants argue as follows: (a) Plaintiff fails to frame its arguments in the context of the higher burden required for a motion for judgment on the pleadings, which makes it difficult for Defendants to meaningfully respond; (b) disputed issues of fact exist regarding whether the Property (i) was ceded or abandoned by Plaintiff, (ii) was ever possessed by Plaintiff, and (iii) was possessed by Plaintiff within ten years before commencement of this action; and (c) disputed issues of fact exist regarding Defendants' rights to the land at issue pursuant to real property law which does not require tribal sovereignty. (*Id.*)

3. Plaintiff's Reply Memorandum of Law

Generally, in reply to Defendants' opposition, Plaintiff asserts the following three arguments. (Dkt. No. 38 [Pl.'s Reply Mem. of Law].)

First, Plaintiff asserts that it agrees with Defendants that the standard for granting judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) is that "the disputed factual issues raised by the Answer are either immaterial or too implausible to ever be supported by discovery" or that there remain no material issues of fact. (*Id.*)

Second, Plaintiff argues that Defendants' admissions and the controlling law entitle Plaintiff to judgment as a matter of law because there are no factual disputes that could alter the outcome. (*Id.*) More specifically,

Plaintiff argues that Defendants admit the following facts: (a) the Property was part of the original Oneida reservation acknowledged at the 1794 Treaty of Canandaigua; (b) the Property was never conveyed to New York State, with or without federal approval, (c) Indian title can be extinguished only with federal consent; and (d) the Orchard Party Oneidas could not acquire Indian title to Plaintiff's land because there was no federal consent to do so and tribal members do not acquire rights in tribal land by living on it. (*Id.*) In addition, Plaintiff argues that (a) the Court has already dismissed, as a matter of law, Defendants' claim to the Property, which is the defense that their Answer attempts to establish, and (b) based on the Answer, it is not plausible that there are facts which, if proven, could establish Defendant's ownership defense. (*Id.*) Furthermore, Plaintiff argues that the discovery Defendants seek does not concern any material fact for the following reasons: (a) the 1794 Treaty of Canandaigua clearly states that the Property is reserved to the Oneida and is Oneida property; (b) no transfer of the Property is alleged; (c) Defendants' concession that they are members of the Oneida Nation establishes that Oneida Nation members have continuously lived on the Property, and thus the Oneida Nation has not abandoned it, and tribal members do not acquire tribal land by living on it; and (d) the 1838 Treaty of Buffalo Creek was made with the Oneidas, not the Orchard Party Oneidas. (*Id.*)

Third, Plaintiff argues that Defendants' affirmative defenses fail as a matter of law, and therefore discovery is not necessary. (*Id.*) More specifically, Plaintiff argues as follows: (a) the Eleventh Amendment limits federal jurisdiction over states and is irrelevant here;

(b) Defendants did not join any other party to their counterclaim, which mirrored Plaintiff's claim, and there is nothing to indicate that any other party claims ownership of the Property; (c) there is no applicable federal statute of limitations for tribal enforcement of federally protected land rights; (d) the doctrines of collateral estoppel and res judicata depend on a particular judgment and the Answer and Defendants' opposition memorandum of law fail to identify any; (e) release and accord and satisfaction are inapplicable here because only a federal statute or treaty can affect tribal land rights; (f) Defendants fail to identify an act of Congress that could affect Plaintiff's right to judgment and discovery is not needed to exchange public statutes or treaties; (g) with respect to the defense of laches, (i) Defendants do not assert prejudice from the timing of this lawsuit, which was filed two years after they filed the trust and deed papers, and (ii) Defendants cannot invoke "laches" as the term was used in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), which referred to the disruptive effect of disturbing title to land occupied for generations by non-Indians in reliance on the validity of 200-year-old state land transactions because (1) Defendants assert rights based only on occupancy by members of the Oneida Nation on tribal land, and (2) Defendant Phillips had to manufacture and file a quitclaim deed in the county records because no prior title or chain of titles to the Property existed; (h) Defendants do not provide any reason that it would be impossible for the Court to quiet title to the Property, and Plaintiff does not seek to evict anyone; (i) tribal claims to preserve federal protection of tribal lands are justiciable; (j) Defendants answered Plaintiff's Complaint, rather than moving

to dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6), and in their Answer, Defendants admitted that the Property was within the Oneida Nation's reservation pursuant to the 1794 Treaty of Canandaigua and was not thereafter conveyed to New York State; (k) as a matter of law, Plaintiff cannot be said to have acquiesced in Defendants' filing of the deed and trust because (i) Defendants conceded that there is no claim that Orchard Party is a separate tribe from the Oneida Nation, (ii) tribal members do not acquire rights to tribal land by living on it, (iii) Plaintiff brought this lawsuit two years after Defendants filed the challenged deed and trust, and (iv) Plaintiff's interest in land protected by a federal treaty cannot be extinguished without federal approval; and (l) abandonment is not applicable here where Defendants admit that generations of Orchard Party Oneida descendants have continuously occupied the Property, and the Orchard Party Oneidas are part of, and not broken away from, the Oneida Nation. (*Id.*)

4. Defendants' Sur-Reply Memorandum of Law

Generally, in their sur-reply, Defendants assert the following two arguments. (Dkt. No. 42 [Defs.' Sur-Reply Mem. of Law].)

First, Defendants argue that Plaintiff has failed to carry its burden to show that Defendants' affirmative defenses fail as a matter of law. (*Id.*) More specifically, Defendants argue that Plaintiff has improperly attempted to shift the burden of persuasion to Defendants by arguing that Defendants have failed to "explain" or "sustain" their affirmative defenses, although the burden is on the moving party to

establish its entitlement to judgment as a matter of law. (*Id.*) In addition, Defendants argue that their affirmative defenses bar Plaintiff's motion for the following reasons: (a) they properly and timely raised the defense of failure to join an indispensable party identifying the United States, State of New York, Oneida County, and Town of Vernon as indispensable parties; (b) as a basis for the defenses of release and accord and satisfaction, Defendants identified the 1838 Treaty of Buffalo Creek, which extinguished Plaintiff's rights to the Property and recognized Defendants' proprietary interest in the land; (c) they appropriately raised as an affirmative defense in their Answer, failure to state a claim and Plaintiff carries the burden–but failed to rebut–this invulnerable defense; (d) they raised the defense of acquiescence and estoppel, which is not dependent on any claim of independent sovereignty by the Orchard Party but instead relates to the Property rights that were conveyed by Plaintiff to the Orchard Party in the 1838 Treaty of Buffalo Creek; and (e) they raised the defense of abandonment and (i) the Court's dismissal of Defendant's counterclaim did not imply a determination that Defendants can prove no set of facts to support of this defense, and (ii) Plaintiff's theory that Defendants' occupation of the Property supports Plaintiff's continuity of occupation fails to consider discontinuities between the historical Oneida tribe and the modern Oneida Indian Nation. (*Id.*)

Second, Defendants argue that 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. (*Id.*) More specifically, Defendants argue that issues of material fact exist in the following regards: (a) Plaintiff abandoned the

Property, which is evinced by discontinuities between the historical Oneida tribe and the modern day Oneida Indian Nation; and (b) Defendants obtained the Property through the 1838 Treaty of Buffalo Creek Treaty (in which the United States recognized that the Orchard Party had a proprietary interest in the Property and authorized Orchard Party chiefs to make arrangements with New York for the purchase of their lands) and through the 1842 Treaty with New York State (in which the Orchard Party chiefs sold several parcels of land surrounding the Property but made arrangements to remain on the Property). (*Id.*)

II. GOVERNING LEGAL STANDARDS

A. Legal Standard Governing Motion for Judgment on the Pleadings

Rule 12(c) of the Federal Rules of Civil Procedure "permits the entry of judgment as a matter of law on the basis of the pleadings alone." *Barber v. RLI Ins. Co.*, 06-CV-0630, 2008 WL 5423106, at *2 (N.D.N.Y. Dec. 24, 2008) (Scullin, J.) (citing *Jackson v. Immediate Credit Recovery, Inc.*, 05-CV-5697, 2006 WL 343180, at *4 [E.D.N.Y. Nov. 28, 2006]).

"The standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion for failure to state a claim." *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001) (collecting cases). "However, when 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*, 12-CV-10312, 2013 WL 8366052, at *1 (E.D. Mich. Nov. 21, 2013) (citing

Kule-Rubin v. Bahari Grp. Ltd., 11-CV-2424, 2012 WL 691324, at *3 [S.D.N.Y. Mar. 5, 2012] [explaining that "plaintiff is entitled to judgment on the pleadings where the defendant's answer fails to deny the elements constituting a cause of action"]); *see also Gen. Conference Corp. of the Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989) ("A plaintiff is not entitled to judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat recovery. Similarly, if the defendant raises an affirmative defense in his answer it will usually bar judgment on the pleadings."); *Hamilton v. Yates*, 10-CV-1925, 2014 WL 4660814, at *1 (E.D. Cal. Sept. 17, 2014) ("A plaintiff may bring the motion if the answer fails to controvert material facts alleged in the complaint.").

In considering "plaintiff's Rule 12(c) motion for a judgment on the pleadings, the Court must draw all reasonable inferences in favor of the non-moving party. Therefore, the plaintiff is entitled to judgment on the pleadings only if it has established that there remains no material issue of fact to be resolved and that it is entitled to judgment as a matter of law." *United States v. Lankford*, 98-CV-0407, 1998 WL 641350, at *1 (N.D.N.Y. Sept. 10, 1998) (McAvoy, C.J.) (citing *Shechter v. Comptroller of the City of New York*, 79 F.3d 265, 270 [2d Cir. 1996]; *Juster Assocs. v. City of Rutland*, 901 F.2d 266, 269 [2d Cir. 1990]); *see also Kertesz v. General Video Corp.*, 09-CV-1648, 2010 WL 11506390, at *2 (S.D.N.Y. Mar. 31, 2010) (citing *Rivera v. Schweiker*, 717 F.2d 719, 722 [2d Cir. 1983]) ("A motion for judgment on the pleadings under Fed. R. Civ. P. 12[c] is designed to provide a means of disposing cases when the material

facts are not in dispute. A Rule 12[c] motion will not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law."); *Barber*, 2008 WL 5423106, at *2 (holding that the court must draw all inferences in favor of the non-moving party and only grant a motion for judgment on the pleadings if the movant establishes that "no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law").

Much like a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), the Court may consider any document annexed to it as an exhibit. *Lankford*, 1998 WL 641350, at *1 (citing Fed. R. Civ. P. 10[c]; *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 69 [2d Cir. 1996], *cert. denied* 519 U.S. 1007 [1996]); *see also Barber*, 2008 WL 5423106, at *2 ("Pleadings include attached exhibits and documents incorporated by reference.").

B. Legal Standards Governing Plaintiff's Claims

Because the parties to this action have demonstrated, in their memoranda of law, an accurate understanding of the relevant points of law contained in the legal standards governing Plaintiff's claims and Defendants' affirmative defenses in this action, the Court will not recite, in their entirety, those legal standards in this Decision and Order, which (again) is intended primarily for the review of the parties. (*See generally* Dkt. No. 32, Attach. 1 [Pl.'s Mem. of Law]; Dkt. No. 37 [Defs.' Opp'n Mem. of Law]; Dkt. No. 38 [Pl.'s Reply Mem. of Law]; Dkt. No. 42 [Defs.' Sur-Reply Mem. of Law].)

III. ANALYSIS

After carefully considering the matter, the Court grants Plaintiff's motion to for judgment on the pleadings for each of the alternative reasons stated in Plaintiff's memoranda of law. (Dkt. No. 32, Attach. 1 [Pl.'s Mem. of Law]; Dkt. No. 38 [Pl.'s Reply Mem. of Law].) To those reasons, the Court adds the following analysis, which is intended to supplement but not supplant Plaintiff's reasons.

This is a rare case that does not involve issues of material fact between the parties, but rather the interpretation of statutes and post-1794 treaties. (*See, e.g.*, Dkt. No. 17, at ¶ 60 [Defs.' Answer, admitting that "[t]he property at issue in this case was part of the original Oneida reservation" pursuant to the 1794 Treaty of Canandaigua].) Based on those statutes and treaties, the Court finds that there is no issue of material fact that the Property is still part of the Oneida Indian reservation. *See, e.g., Upstate Citizens for Equality v. Jewell*, 841 F.3d 556, 562 (2d Cir. 2016) ("[T]he Oneidas' original reservation [following the 1794 Treaty of Canandaigua] was never officially 'disestablished.'"); *Oneida Indian Nation v. Madison Cty.*, 665 F.3d 408, 443 (2d Cir. 2011) ("It remains the law of this Circuit that "the Oneidas' reservation was not disestablished").

In support of their argument that the 1838 Treaty of Buffalo Creek "reserved" for them the Property, Defendants rely on a provision that provides as follows:

> ARTICLE 4. Perpetual peace and friendship shall exist between the United States and the New York Indians; and the United States hereby guaranty to protect and defend

> them in the peaceable possession and enjoyment of their new homes, and hereby secure to them, in said country, 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 them by patent under this treaty shall never be included in any State or Territory of this Union. The said Indians shall also be entitled, in all respects, to the same political and civil rights and privileges, that are granted and secured by the United States to any of the several tribes of emigrant Indians settled in the Indian Territory.

(Dkt. No. 17, at ¶¶ 16, 17, 64 [Defs.' Answer, citing Article 4]; Dkt. No. 17, Attach. 1, at 3 [Ex. to Defs.' Answer, attaching Article 4].) However, this Court has specifically held that after 1805–and, in particular, in the 1838 Treaty of Buffalo Creek–the United States treated the Oneidas as a single unified nation. *See Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104, 119 & n.8 (N.D.N.Y. 2002) (Kahn, J.) ("[T]he United States government, in ... [the 1838 Treaty of Buffalo Creek] with the Oneidas, treated the Oneidas as one nation.") (citing Treaty of Buffalo Creek, Jan. 15, 1838, U.S.-New York Indians, art. 2, 7 Stat. 550). This fact fatally undermines Defendants' allegation that the Court should consider Orchard Party Oneida as a separate tribe from Plaintiff, with independent tribal rights to the Property.

The other provision of the 1838 Treaty of Buffalo Creek that Defendants rely on (to support their argu-

ment that the Property was granted to them) provides as follows:

> SPECIAL PROVISIONS FOR
> THE ONEIDAS RESIDING IN
> THE STATE OF NEW YORK
>
> ARTICLE 13. The United States will pay the sum of four thousand dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in 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.

(Dkt. No. 17, at ¶¶ 1, 8, 24, 25, 61 [Defs.' Answer, citing Article 13]; Dkt. No. 17, Attach. 1, at 5 [Ex. to Defs.' Answer, attaching Article 13].) However, by its plain language, this provision does not cede Plaintiff's right to the Property. As a result, the federal government did not, and could not, give its consent to such a transaction, as is required for the transfer of Indian land. (*Id.*) *See also* 1 Stat. 330, § 8; *Cherokee Nation v. Georgia*, 30 U.S. 1, 32 (1831) ("[T]he Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government."); *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S.

226, 231-32 (1985) (noting that the Nonintercourse Act provided that "'no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution ... [and] in the presence, and with the approbation of the commissioner or commissioners of the United States' appointed to supervise such transactions"); *Oneida Indian Nation of N.Y. State v. Oneida Cty., New York*, 414 U.S. 661, 678 (1974) (holding that the Nonintercourse Act "put in statutory form what was or came to be the accepted rule–that the extinguishment of Indian title required the consent of the United States"). As a result, the Court must find, as a matter of law, that the 1838 Treaty of Buffalo Creek did not recognize any proprietary interest of the Orchard Party Oneidas in the Property–as a "faction" of Plaintiff or otherwise–to arrange for the purchase of the Property with the Governor of the State of New York.

In sum, because the 1838 Treaty of Buffalo Creek did not grant Orchard Party Oneidas any rights in the Property, the 1842 Treaty with New York State could not, and did not, reflect a proper agreement between the Governor of New York State and the Orchard Party Oneidas for the purchase of the Property.

Furthermore, while affirmative defenses usually bar judgment on the pleadings, Defendants' defenses do not raise any issues of material fact that, if true, would bar the recovery sought by Plaintiff in its motion. *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]).

More specifically, Defendant assert the following fourteen affirmative defenses in their 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 Plaintiff of any rights it may have to Orchard Party Trust lands; (13) the failure to state a claim upon which relief can be granted; and (14) the doctrine of acquiescence and estoppel. (Dk. No. 17, at ¶¶ 40-53 [Defs.' Answer].)

In their motion papers, Defendants do not specifically address, and thus abandon (for purposes of this motion), their reliance on their First, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Affirmative Defenses. (*See generally* Dkt. No. 37, at 14-16, 23-25 [attaching pages "8" through "10," and pages "17" through "19," of Defs.' Opp'n Mem. of Law, mentioning only "abandon[ment]"]; Dkt. No. 42, at 6-12 [attaching pages "2" through "8" of Defs' Sur-Reply Mem. of Law].)[2] In any event, for the reasons

[2] *Cf. Plahutnik v. Daikin Am., Inc.*, 10-CV-1071, 2012 WL 6108236, at *5 (S.D.N.Y. Dec. 6, 2012) ("Arguments not made in opposition to a motion for summary judgment are deemed abandoned."); *Jain v. McGraw-Hill Cos., Inc.*, 827 F. Supp. 2d 272, 280 (S.D.N.Y. 2011) (holding that the plaintiff abandoned six claims when her brief failed to respond to the

set forth in Plaintiff's reply memorandum of law, the Court finds that these eight affirmative defenses do not bar the relief requested in Plaintiff's motion. (Dkt. No. 38, at 8-12 [attaching pages "6" through "10" of Pl.'s Reply Mem. of Law].)

The Court reaches the same conclusion with regard to the six affirmative defenses on which Defendants do specifically rely in their memoranda of law: their Second, Sixth, Seventh, Twelfth, Thirteenth and Fourteenth Affirmative Defenses. (Dkt. No. 37, at 24 [attaching page "18" of Defs.' Opp'n Mem. of Law, mentioning "abandon[ment]"]; Dkt. No. 38, at 8-12 [attaching pages "6" through "10" of Pl.'s Reply Mem. of Law]; Dkt. No. 42, at 6-12 [attaching pages "2" through "8" of Defs.' Sur-Reply Mem. of Law].)

With regard to Defendants' Second Affirmative Defense (failure to join all indispensable parties), neither the Complaint nor Answer has 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. *See* Fed. R. Civ. P. 19(a)(1) (explaining that, for a person to be joined as a required party, either the person must "claim[] an interest related to the subject of the action" or the person must be necessary for the court to "accord complete relief"). Indeed, in their Answer, Defendants admit that "the State never obtained the 19.6 acres at issue in this case." (Dkt. No. 17, at ¶ 12 [Defs.' Answer].) For all of

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defendants' arguments on those claims); *Lipton v. Cty. of Orange, N.Y.*, 315 F.Supp.2d 434, 446 (S.D.N.Y. 2004) ("[A court] may, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed.").

these reasons, the Court finds that this affirmative defense cannot bar the relief requested in Plaintiff's motion.

With regard to Defendants' Sixth and Seventh Affirmative Defenses (release and accord and satisfaction), "[u]nder New York law, an accord and satisfaction is the resolution of a disputed, unliquidated claim through a new contract 'discharging all of part of [the parties'] obligations under the original contract,' and constitutes a complete defense to a claim for breach of contract." *Carnrite v. Granada Hosp. Grp., Inc.*, 175 F.R.D. 439, 449 (W.D.N.Y. 1997) (quoting *Conboy, McKay, Bachman & Kendall v. Armstrong*, 110 A.D.2d 1042, 1042 [N.Y. App. Div. 4th Dep't 1985]). Moreover, "[a] release is a provision that intends to present abandonment of a known right or claim." *McMahan & Co. v. Bass*, 250 A.D.2d 460, 461 (N.Y. App. Div. 1st Dep't 1998). Here, neither the Complaint nor Answer has (even when viewed in context) plausibly alleged that such release or accord and satisfaction exist. Moreover, only a federal statute or treaty can affect tribal land rights. *See* 25 U.S.C. § 177 ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."); *Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 670 (1974) ("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."). For all of these reasons, the Court finds that this affirmative defense cannot bar the relief requested in Plaintiff's motion.

With regard to Defendants' Twelfth Affirmative Defense (abandonment), "an individual tribal member has no alienable or inheritable interest in the communal holding," and "no tribal member can claim a federal right against the tribe to any specific part of the tribal property." 1 *Cohen's Handbook of Federal Indian Law* § 15.02 (2019). Defendants agree that members of the Oneida Indian Nation have resided on and possessed the Property since time immemorial. (Dkt. No. 17, at ¶ 55 [Defs.' Answer].) Moreover, Defendants now agree the Orchard Party is not a separate faction. (Dkt. No. 37, at 25 [attaching page "19" of Defs.' Opp'n Mem. of Law].) Finally, as stated in the preceding paragraph, only a federal statute or treaty can affect tribal land rights. For all of these reasons, the Court finds that this affirmative defense cannot bar the relief requested in Plaintiff's motion.

With regard to Defendants' Thirteenth Affirmative Defense (of failure to state a claim), the Court finds that Plaintiff's Complaint states a claim upon which relief can be granted for all of the reasons stated in the Court's Decision and Order of November 15, 2018, and in this Decision and Order. For this reason, the Court finds that this affirmative defense cannot bar the relief requested in Plaintiff's motion.

Finally, with regard to Plaintiff's Fourteenth Affirmative Defense (acquiescence and estoppel), neither the Complaint nor Answer has (even when viewed in context) plausibly alleged that such acquiescence or estoppel occurred. Tribal members cannot acquire a proprietary interest in tribal land merely by living on it. 1 *Cohen's Handbook of Federal Indian Law* § 15.02 (2019). Moreover, as stated earlier, only a federal statute or treaty can affect tribal land rights.

For all of these reasons, the Court finds that this affirmative defense cannot bar the relief requested in Plaintiff's motion.

ACCORDINGLY, it is

ORDERED that Plaintiff's motion for judgment on the pleadings (Dkt. No. 32) is **GRANTED**; and it is further

DECLARED that neither Defendant Trust nor Defendant Phillips, as an individual or otherwise, does not own, or have any property interest in, the Property; and it is further

DECLARED that the trust document, quitclaim deed and all related documents filed by Defendant Phillips in the Oneida County land records are invalid and void to the extent they concern the Property; and it is further

ORDERED that Defendants are **PERMANENTLY ENJOINED** from doing the following:

(a) claiming the Property for themselves, any beneficiary of Defendant Trust, or any other person or entity;

(b) asserting that they or any beneficiary of Defendant Trust owns or has a property interest in the Property; and

(c) creating or causing to be created, or filing or causing to be filed, in land records any document asserting that they, any beneficiary of Defendant Trust, or any other person or entity owns or has a property interest in the Property.

Dated: July 31, 2019
Syracuse, NY

/s/ Glenn T. Suddaby
Hon. Glenn T. Suddaby
Chief U.S. District Judge

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

JUDGMENT IN A CIVIL CASE

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

ONEIDA INDIAN NATION

—v.—

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

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, that Plaintiff's motion for judgment on the pleadings (Dkt. No. 32) is GRANTED; and it is further DECLARED that neither Defendant Trust nor Defendant Phillips, as an individual or otherwise, does not own, or have any property interest in, the Property; and it is further DECLARED that the trust document, quitclaim deed and all related documents filed by

Defendant Phillips in the Oneida County land records are invalid and void to the extent they concern the Property; and it is further ORDERED that Defendants are PERMANENTLY ENJOINED from doing the following: (a) claiming the Property for themselves, any beneficiary of Defendant Trust, or any other person or entity; (b) asserting that they or any beneficiary of Defendant Trust owns or has a property interest in the Property; and (c) creating or causing to be created, or filing or causing to be filed, in land records any document asserting that they, any beneficiary of Defendant Trust, or any other person or entity owns or has a property interest in the Property. This action is CLOSED pursuant to the Decision and Order issued by the Honorable Glenn T. Suddaby on July 31, 2019. *See* Dkt. No. 43.

DATED: July 31, 2019

/s/ John Domurad
Clerk of Court

[SEAL]

/s/ Shelly Muller
Courtroom Deputy Clerk

Appendix F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL

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

ONEIDA INDIAN NATION,

Plaintiff,

—v.—

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

Defendants.

NOTICE IS HEREBY GIVEN that **MELVIN L. PHILLIPS, SR.**, and **MELVIN L. PHILLIPS, SR. / ORCHARD PARTY TRUST**, Defendants in the above-named case, hereby appeal to the United States Court of Appeals for the Second Circuit from the Final Judgment (Dkt. 44) entered in this action on July 31, 2019, and all prior orders adverse to Defendant, including but not limited to the Order granting Plaintiff's Motion to Dismiss

Defendants' Counterclaim (Dkt. 30) dated November 15, 2018, the Order Denying in Part Defendants' Motion to Strike (insofar as it denied relief sought by Defendants) (Dkt. 41) dated June 11, 2019, and the Order granting Plaintiff's Motion for Judgment on the Pleadings (Dkt. 43) dated July 31, 2019.

Dated: August 29, 2019

/s/ Claudia L. Tenney
Claudia L. Tenney
(Bar Roll 602210)

28 Robinson Road
Clinton, New York 13323
(315) 794-7788
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2019, I electronically filed the Notice of Appearance with the United States Court District Court for the Northern District of New York by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

Oneida Indian Nation

/s/ Claudia L. Tenney
Claudia L. Tenney

Appendix G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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

ONEIDA INDIAN NATION
1 Territory Road
Oneida, NY 13421,

Plaintiff,

—v.—

MELVIN L. PHILLIPS, SR.,
individually and as trustee,
4675 Marble Road
Oneida, NY 13421

and

MELVIN L. PHILLIPS, SR./
ORCHARD PARTY TRUST
c/o Trustee Melvin L. Phillips
4675 Marble Road
Oneida, NY 13421,

Defendants.

COMPLAINT

1. Plaintiff Oneida Indian Nation ("the Nation") sues to quiet title to 19.6 acres of Oneida reservation land that Defendant Melvin L. Phillips, Sr., a Nation member, has unlawfully claimed for a trust he created for his and his family's benefit.

2. The Nation never alienated the 19.6 acres, which it is entitled to possess by virtue of aboriginal possession, confirmed by federal treaty. Neither Phillips nor any other person has ever had a deed to or ownership of the land. Consequently, Oneida County property records have never contained a recorded deed or other ownership document with respect to the land.

3. Phillips set out to manufacture a deed to falsely evidence ownership that he did not have. He created and filed a quitclaim deed purporting to quitclaim his "rights" in the 19.6 acres (a) from himself (b) to himself as trustee of the trust he had created. This "conveyance" was a sham and a fraud.

4. Phillips has tried to defend his conduct by falsely claiming that the 19.6 acres belongs to a breakaway Oneida tribe (Marble Hill Oneida or Orchard Party) and that he is the tribal head holding the land for his tribe. The United States and this Court have rejected Phillips' false claims that there is a separate Oneida tribe that he leads. Moreover, under the trust Phillips created, Phillips actually holds the 19.6 acres for his and his family's *personal* benefit.

Jurisdiction and Venue

5. 28 U.S.C. §§ 1331 & 1362 establish subject matter jurisdiction. The Nation is an Indian tribe with a governing body duly recognized by the Secretary of the Interior. This action and the matter in controversy arise under the Constitution (Indian Commerce Clause and Supremacy Clause), a statute (Nonintercourse Act), the treaties (Treaty of Canandaigua) and the common law of the United States – which protect the Nation's right to possess the 19.6 acres.

6. This district is an appropriate venue pursuant to 28 U.S.C. § 1391(b)(1)-(2). All defendants reside in it and are New York residents. The events giving rise to the Nation's claim occurred in this district. The property that is the subject of this action is situated in this district.

Parties

7. The Nation is a federally recognized tribe. 82 Fed. Reg. 4915 (Jan. 17, 2017) (recognizing the Oneida Nation of New York, now known as the Oneida Indian Nation).

8. Phillips is a Nation member and is sued individually and as the self-appointed trustee of the Melvin L. Phillips, Sr./Orchard Party Trust, which also is a defendant.

Facts

A. The 19.6 Acres of Land the Nation Seeks to Protect

9. Prior to European contact, the Oneida Nation possessed vast aboriginal lands to which it held

Indian title (also called aboriginal title), which is a tribal right of possession. The nature of that title is described in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 & 670 (1974), and in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-36 (1985).

10. Under the Constitution, Indian relations, including with respect to tribal lands, became the province of federal law. *County of Oneida v. Oneida Indian Nation*, 470 U.S. at 234. Beginning in 1790, the United States adopted versions of the Nonintercourse Act, codified today at 25 U.S.C. § 177, which requires federal approval of transfers of tribal land. *Id.* at 231-32.

11. In 1794, the United States recognized about 300,000 acres of Oneida Nation aboriginal lands as the Oneida reservation. Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794); *County of Oneida v. Oneida Indian Nation*, 470 U.S. at 231. The 19.6 acres of land at issue in this action are part of that Oneida reservation. The land is located on Marble Road, somewhat south of Indiantown Road, within the Town of Vernon in Oneida County. The land, with an incorrect acreage designation, is reflected on the Town's tax rolls as parcel 332.000-1-16.

12. After 1794, the State of New York attempted to obtain most of the Oneida reservation, but the State never attempted to obtain the 19.6 acres. The Nation never conveyed the land, and so the Oneida County property records contain no deed for this land.

13. The United States has not extinguished the Indian title to or interrupted the Nation's possession of the 19.6 acres. Nor has the United States withdrawn

the land from the Oneida reservation. *See Oneida Indian Nation v. Madison County*, 665 F.3d 408, 443-44 (2d Cir. 2011) (Oneida reservation not disestablished).

B. June 25, 1842 Treaty with the State of New York

14. By a June 25, 1842 treaty, the State of New York obtained a part of the Oneida reservation, paying certain Oneida members described as "the Orchard Party of the Oneida Indians residing in the town of Vernon county of Oneida." The treaty is attached to this complaint as Exhibit A. (The validity of the 1842 treaty under federal law is disputed but is of no relevance in this action, which concerns land that was not sold in that treaty.)

15. Before making the treaty, the State of New York surveyed a part of the reservation. The survey map, attached to this complaint as Exhibit B, depicts lots numbered as 1, 2, 3, and 4, and also depicts some surrounding land.

16. The 19.6 acres that are the subject of this action are wholly within Lot 3. The treaty did not attempt to convey away Lot 3, instead listing the names of Oneida who intended to continue to live on Lot 3.

17. The United States recognizes the 19.6 acres as a part of the reservation that was not conveyed in the June 25, 1842 treaty. Attached as Exhibit C to this complaint is a Bureau of Land Management map, filed by the United States in Oneida land claim litigation, depicting the land within the reservation that the State sought to obtain. The June 25, 1842 treaty transaction is depicted as number 27. The white rectangle within number 27 represents Lot 3,

depicting it as not sold under the treaty's terms. The 19.6 acres are within the white space that represents Lot 3.

18. A comprehensive 2013 settlement agreement made by the State of New York, Madison County, Oneida County, and the Nation provides that Lot 3 – referred to in the agreement as the "Marble Hill tract" – was reserved from the 1842 sale, is "Nation Land" located within the Oneida reservation, is subject to Nation governance, and is not subject to state or local taxation or regulation. *See* Settlement Agreement (attached to this complaint as Exhibit D), at §§ II.G, II.L, V.E.2 & VI.C.1. New York law provides that the settlement agreement's terms prevail over any inconsistent state law or regulation. N.Y. Indian Law § 16. This Court approved the settlement, incorporated it into a judgment, and retained enforcement jurisdiction. *New York v. Jewell*, 2014 U.S. Dist. Lexis 27042 (N.D.N.Y. 2014).

C. The Nation's Members Living in the Vicinity of the 19.6 Acres on Marble Hill

19. The land in the vicinity of the 19.6 acres became known as the Orchard or as Marble Hill. Nation members always have lived in the Marble Hill area.

20. Nearby Nation land also remained in Nation possession and came to be known as the Windfall or the thirty-two acres. It was protected from foreclosure by the United States in *United States v. Boylan*, 256 F. 468 (N.D.N.Y. 1919), *aff'd*, 265 F. 165 (2d Cir. 1920).

21. Historically, state and federal documents have described the two Nation settlements, one in the

vicinity of Marble Hill and another in the vicinity of the thirty-two acres.

22. The Nation's Marble Hill members in good standing receive Nation services and benefits (including health benefits and quarterly payments) and participate in Nation government. Phillips' nephew is in the Nation's government – a member of the Nation's Council. The Nation has used its own governmental funds, as well as funds obtained by it through a federal grant, to provide water lines to its Marble Hill members.

23. The United States recognizes one Oneida Indian Nation in New York, which includes members who reside in the vicinity of Marble Hill.

a. In 1936, the Secretary of the Interior conducted a vote of Nation members to determine whether the Nation wished to reorganize under the federal Indian Reorganization Act, including in that vote the Nation's members residing in the vicinity of Marble Hill.

b. In a February 25, 1976 letter from William Seneca, the Acting Eastern Area Director of the Bureau of Indian Affairs, noted that the Nation has two clerks, one located at Marble Hill and another at the thirty-two acres.

c. In making decisions in the 1980s and 1990s concerning federal recognition of Nation leadership, the Department of the Interior took votes of and received statements of support from all Nation members, including those residing in the vicinity of Marble Hill.

d. The Department of the Interior publishes a list of federally recognized tribes, and no Marble Hill/Orchard Party tribe is on the list. 82 Fed. Reg. 4915 (Jan. 17, 2017).

24. Phillips has admitted membership in the Oneida Indian Nation. In 1993, he signed a statement asking the Department of the Interior to recognize Ray Halbritter as Nation Representative, asserting: "I am an enrolled member of the Oneida Indian Nation of New York." Phillips also filed suit claiming to represent the Nation and to have been deprived of his rights *as a member of the Nation. Shenandoah v. Dep't of the Interior*, 159 F.3d 708 (2d Cir. 1998).

D. Prior Rejections of Phillips' Erroneous Claim to Head a Separate Marble Hill Oneida Tribe

25. When it has suited him, Phillips also has asserted (a) that the Marble Hill Oneidas are a separate tribe and (b) that he represents it. Both assertions are untrue.

26. The Department of the Interior has rejected Phillips' assertions:

a. Assistant Secretary of the Interior for Indian Affairs Ada Deer wrote in an August 22, 1994 letter to Keith M. J. Reitz: "The Department does not recognize subgroups of these tribes, such as the Oneida living at Marble Hill ... as separate tribal entities. The United States considers these groups to be part of one Oneida Nation."

b. In 2013, the Department of the Interior rejected the argument that Marble Hill

Oneidas are a separate tribe and reaffirmed that the Oneida Indian Nation is "a single tribe" that includes its Marble Hill members. Amendment to the May 20, 2008 Record of Decision, at 25-26 n.171 (Dec. 23, 2013) (regarding grant of Nation trust land request).

27. The Department of Justice has rejected Phillips' assertions:

a. "[T]he members of the Marble Hill are all members of the New York Oneida Nation. ..." U.S. Memorandum of Law in Opposition to Marble Hill Oneida Indians' Motion to Intervene, Doc. 343, No. 5:74-cv-00187 (N.D.N.Y. Feb. 15, 2002).

b. "Mr. Phillips alleges that he is the leader of an independent tribe of Oneida Indians called the Marble Hill Oneidas. ... However, the Marble Hill Oneidas are not a federally-recognized tribe. ..." U.S. Reply in Support of Motion for Partial Dism., Doc. 52, No. 6:08-cv-00660 (N.D.N.Y. 2009).

28. This Court has rejected Phillips' assertions:

a. *Oneida Indian Nation v. County of Oneida*, 5:70-cv-00035, June 17, 1979 Order at 4 (N.D.N.Y) (denying Marble Hill Oneida intervention in Oneida land claim litigation because they complained of "internal problems of governance" and were not separate tribe); *see Oneida Indian Nation v. Clark*, 593 F. Supp. 257, 259 (N.D.N.Y. 1984) (noting that a Marble Hill Oneida leader signed sworn statement declaring that the

Marble Hill Oneidas "have always been a part of the Oneida Nation").

b. *Oneida Indian Nation v. New York*, 194 F. Supp.2d 104, 115 (N.D.N.Y. 2002) (ruling that Marble Hill Oneidas were not an indispensable party in Oneida land claim litigation because "[t]he Marble Hill Oneidas are official members of the Oneida Indian Nation of New York" and "are fully represented by the tribe of which they are a member").

c. *Oneida Indian Nation v. State of New York*, 5:74-cv-00187 (LEK/DRH), Doc. 388, May 22, 2002 Order at 2-3 (N.D.N.Y) (denying intervention in land claim case because, "[w]hile Marble Hill Oneidas claim to be a tribal community separate from the New York Oneida, it is clear from their affidavits that they are in fact part of the New York Oneida Nation," and concluding "that the Marble Hill Oneida's claim to a tribal status independent of the New York Oneida is simply not reliable"), *aff'd*, *Marble Hill Oneida Indians v. Oneida Indian Nation*, No. 02-6171, 2003 U.S. App. Lexis 6841 (April 8, 2003) (ruling that Marble Hill Oneidas were represented by the Nation held not to be an abuse of discretion).

E. Phillips' Trust and Recorded Quitclaim Deed

29. Phillips signed a September 1, 2015 trust instrument, titled "Melvin L. Phillips, Sr./Orchard Party Trust Declaration." In the trust declaration,

attached to this complaint as Exhibit E, Phillips named himself as grantor of the 19.6 acres and as sole trustee of the trust.

30. The trust declaration recites that Phillips "hereby conveys to the Trustee [meaning Phillips himself] (by deed recorded in the Oneida County Clerk's Office) certain real property as more particularly and specifically described on the attached Schedule A ..." (Bracketed text added; parenthetical text original). The deed and all exhibits to the deed, which include Schedule A and Phillips' trust declaration, are attached to this complaint as Exhibit E.

31. Schedule A describes the four parcels. The parcel listed in Schedule A as "Parcel IV" is the 19.6 acres and the access road/driveway that leads to it from Marble Road (hereafter collectively "the 19.6 acres"). That land is highlighted in yellow on a map attached by Phillips to his deed and labeled as Exhibit 9 by Phillips (included within Exhibit E to this complaint). On the map, the 19.6 acre-parcel is labeled as Lot 3 and is shown to contain 19.6 acres.

32. Although Phillips' quitclaim deed purports to be a conveyance of interests in the 19.6 acres from "Melvin L. Phillips, Sr." to the trust, Phillips does not claim ownership of the land. Instead, Phillips falsely asserts in the papers filed with the deed that the 19.6 acres are "tribal lands belonging to the Oneida Nation/Orchard Hill Party," that he is the leader of that tribe, and that the lands were "under the stewardship of Melvin L. Phillips, Sr."

33. The "dispositive provisions" in paragraph 4 of the trust declaration conflict, however, with Phillips' false assertions. The "dispositive provisions" effectively

give the 19.6 acres to Phillips and his children and take the land away from the Nation and its members, including those residing near Marble Hill, providing:

a. "For so long as Melvin L. Phillips, Sr. is living, he shall have the absolute and unfettered right to live upon[,] occupy, possess and use the lands...."

b. When Phillips dies, the 19.6 acres is then for the benefit of "his lineal descendants who live thereon or who use the lands" for a listed purpose – with Phillips' son Daniel Mark Phillips as the successor trustee, followed by "any other direct lineal descendant of Melvin L. Phillips, Sr."

c. Betraying an awareness that the trust could be declared invalid, Phillips also provided in paragraph 4 that he and one of his children or grandchildren may terminate the trust if "government action threatens ... to impair" the trust. In that event, Phillips may "distribute the corpus as he in his sole and absolute discretion deems proper and appropriate" – presumably permitting Phillips as trustee to deed the land to himself or his children.

Claim

34. The Nation has a right to possess the 19.6 acres, a right arising from and protected against infringement by federal treaty, statutory and common law, and by the Constitution.

35. The Nation never alienated the 19.6 acres to any person or entity.

36. Phillips has never possessed a beneficial or legal interest in the 19.6 acres.

37. Phillips did not have a right to convey the 19.6 acres to a trust, and the United States never approved that transaction as required by 25 U.S.C. § 177 and federal common law.

38. Phillips' execution and recording of the trust declaration, quitclaim deed and other documents in county land records was an unlawful attempt to obtain possess and control the 19.6 acres for his and his family's benefit.

39. Phillips' conduct has been and is in violation of federal law and of the Nation's federally protected possessory and other rights in the 19.6 acres and thus – like the trust, the quitclaim deed and the other documents filed in the county land records – that conduct has been and is unlawful and thus invalid and void.

Prayer for Relief

WHEREFORE, the Oneida Indian Nation prays for entry of judgment in its favor and against Melvin L. Phillips, individually and in his capacity as trustee, and against the Melvin L. Phillips, Sr./Orchard Party Trust:

a. Declaring that neither the trust nor Phillips, as an individual or otherwise, owns or has any property interest in the 19.6 acres;

b. Declaring that the trust document, the quitclaim deed and all related documents filed by Phillips in the Oneida County land records are invalid and void so far as they concern the 19.6 acres;

c. Enjoining Phillips and the trust (i) not to claim the 19.6 acres for themselves, any beneficiary of the trust or any other person or entity, (ii) not to assert that Phillips, the trust, or any trust beneficiary owns or has a property interest in the 19.6 acres, and (iii) not to create or cause to be created, or filed or cause to be filed, in land records any document asserting that Phillips, the trust, any trust beneficiary or any other person or entity owns or has a property interest in the 19.6 acres; and

d. Granting such other relief as the Nation may be entitled to at law or in equity.

Respectfully submitted,

/s/ Michael R. Smith
Michael R. Smith
ZUCKERMAN SPAEDER LLP
1800 M Street NW
Washington DC 20036
(202) 778-1800
msmith@zuckerman.com

and

/s/ Meghan Murphy Beakman
Meghan Murphy Beakman
ONEIDA INDIAN NATION
5218 Patrick Road
Verona, NY 13478
(315) 361-8687
mmbeakman@oneida-nation.org

Attorneys for Plaintiff Oneida Indian Nation

Dated: September 18, 2017

Appendix H

1842 TREATY OF ORCHARD PARTY WITH NEW YORK STATE

A Treaty made June 25, 1842 with the Orchard Party of the Oneida Indians. Not in Whipple Report. Typewritten copy prepared by Cravath. (ICC# 36).

A Treaty Between the Orchard Party of the Oneida Indians residing in the town of Vernon county of Oneida and State of New York constituting party of this first part and the people of the State of New York by their lawful agents the Commissioners of the Land Office being party of the second part Witnesseth as follows to wit:

Article 1. The above named party of the first part for and in consideration of the agreement hereinafter contained on the part of the party of the second part and the receipt of the sum of money hereinafter mentioned to be paid Do hereby grant, bargain, sell, cede and surrender to the people of the State of New York all the right, title, estate and interest in and to all that part of their reservation known and distinguished as Lots Number One, Two and Four containing in the aggregate one hundred fourteen 24/100 acres in Nathan Burchards Survey and located in the town of Vernon county of Oneida and State aforesaid, and the return of said survey, a map of the Lots so surveyed and a field book copies of which are hereafter to be filed in the offices of the Surveyor general and the Secretary shall be deemed the description of metes and bounds of the lands so ceded and surrendered to the people.

Article 2. The commissioners of the Land Office will cause the lands hereby ceded and subdivided to be sold as rapidly as will secure the best price for the same; and will cause a regular account of the expenses of such survey and of the expenses incurred in the negotiation, conclusion and execution of this treaty to be kept, and it is hereby stipulated and agreed the people of the said State will hold and retain the avails of all such sales in trust to be applied to the following purposes.

First. To the repayment of all advances made by the said people on account of the cession of said lands with interest thereon at the rate of six percent per annum.

Second. To the repayment of all expenses in the survey, description and partition of the lands which are the subject of this Treaty, and of all the expenses in the negotiation.

Third. To pay the residue of the said avails with all the interest thereon to the Chiefs, Headmen and Individuals of the said emigrating party whenever the people of the State shall receive such avails from the purchasers thereof.

Article 3. The said party of the first part do bargain and agree with the said party of the second part to leave and surrender the lands ceded by said Treaty immediately after the date thereof and those enrolled on the attested list annexed to the Treaty and marked B shall emigrate and leave the State of New York immediately on the receipt of the first payment.

Article 4. It is hereby stipulated and agreed that such of the Orchard Party as are enrolled on the

attested list marked B do hereby release quit claim and forever release 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, claim 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 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.

Article 5. The improvements upon all parts of the lands ceded by this treaty having been appraised and the value thereof estimated by Nathan Burchard in which appraisement the parties of the first part do all concur. And the said Nathan Burchard shall deliver such appraisement, together with the returns of said survey and the maps of the lots so surveyed and a field book thereof sworn and subscribed by him copies thereof to the Surveyor General and the Secretary of State which appraised value shall be paid to each and every individual respectively to which the appraised value of said improvements belong when they shall finally migrate out of this State, and the value of said improvements shall not be estimated in the amounts herein before agreed to be paid to any party or parties of the said Oneida Indians as their portion of the avails of the said ceded lands.

Article 6. It is hereby further stipulated and agreed by and between the respective parties to

this treaty that the whole number of souls enrolled on the attested list annexed hereto included in document marked B shall not be affected by any further variations by reason of births, deaths, or otherwise from what they now appear on the said attested list.

Article 7. It is hereby further stipulated and agreed that Nathan Burchard, Attorney for the Oneida Indians or Jacob Cornelius, one of the chiefs of the Orchard Party residing at Green Bay in the Territory of Wisconsin be and both or either of them are hereby authorized and empowered to alter or modify any article in this treaty provided the same be suggested by the Commissioners of the law office on the execution of this State and each alteration or modification shall forever be binding and obligating on the respective parties to this treaty.

Article 8. This treaty shall be executed in duplicate or a certificate copy thereof shall be made by the Secretary of the State if negotiated by the party of the first part with the advise and assistance of Nathan Burchard, Attorney as aforesaid and Jacob Cornelius, Chief of the Orchard Party as aforesaid, who will certifythat the same has been carefully explained and understood by them, the said Indians, such execution to take effect when the same shall also be executed by the Commissioners of the Land office of the State of New York, or a majority of them and when the same shall be approved by the governor of the said State to be signified by his approbation endorsed thereon.

In Testimony whereof the said Chiefs and Headmen and warriors of the party of the first

part have hereunto set their hands and seals in token of their consent to this treaty and the approbation of the whole tribe.

And the Commissioners of the Land office have also hereto subscribed their names and on behalf of the People of said State and by direction of the governor, they have caused the great seal of the State of New York to be hereto affixed. This done and executed in the year of our Lord one thousand eight hundred and forty two on the twenty fifth day of June in that year.

William Cornelius Chief his mark	Henry Christian his mark
Moses Cornelius his mark	James Christian his mark
William Johnson his mark	Mary Christian her mark
Susannah Cornelius her mark	Moses Day his mark
David Johnson his mark	Dolly Cornelius her mark
Baptiste Cornelius his mark	Abram Antone his mark

Henry Antone
his mark

Signed, Sealed by the Chiefs and Warriors of the Orchard Party of the Oneida Indians whose names are subscribed in our presence and we certify that the contents of this treaty were carefully explained to them and the other members of the said party in full council and where, [sic] fully understood by

them June 25, 1842, Nathan Burchard, Norton Gellemill, Emmon Dorenz.

S. Young Secretary of State
Geo. T. Barker Atty. Genl.
Nathaniel Jones Survey. Gen.
A.C. Flagg, Comptroller
} Comissioners of the Land Office

Signed by the commissioners of the Land Office in the presence of Arch. Campbell.

The foregoing Treaty is approved of and ratified this first day of July in the year of our Lord one thousand eight hundred and forty two and the great seal of the State is hereunto affixed.

William H. Seward (LS)

Examined and Compared with the Original by

Arch. Campbell
Dep. Sec. of State

Document A

Referred to in the foregoing treaty contains an accurate list of all those of the Orchard Party who intend to remain on Lot number three named in said Treaty known as the Home party of the Orchard Indians the names and members of the home party.

William Johnson Chief Elizabeth Johnson Hannah Johnson Jimmy Johnson Caty Johnson David Johnson	6
Margaret John Dolly John Thomas John Caty John Eve John	5 11 souls
Moses Day Susan Day Margret Day Sally Day Baptist Day	5 16 souls

Oneida County ss.

We hereby certify that documents A and B contain an accurate list of all those of the emigrating and home party of the Orchard Party of the Oneida Indians and that the same were made by us in full council with the consent and approbation of the whole of the Orchard Party of the Oneida Indians.

Moses Day
his mark

Moses Cornelius
his mark

Henry Cornelius
his mark

William Cornelius
his mark

William Johnson
his mark

David Johnson
his mark

In presence of Nathan Burchard
Jacob Cornelius
Joseph Cornelius

Document B

Referred to in the above treaty contains an accurate list of all those Indians who are of the Orchard Party who intend to emigrate pursuant to the above treaty.

The names of the Emigrants,

William Cornelius Electa Cornelius Moses Cornelius Elizabeth Cornelius Mary Cornelius Susannah Cornelius Solomon Cornelius Dolly Cornelius Joanne Cornelius Nelly Cornelius	10 souls
Mary Cornelius Henry Cornelius James Cornelius Mary Ann Cornelius Margaret Johnson Hannah Johnson Pete Johnson Jacob Johnson	8 souls
Dolly Cornelius Baptist Cornelius Elizabeth Cornelius Jenny Cornelius Nicholas Cornelius John Cornelius	6 souls
	24 souls

Examined and compared with the originals by

Arch. Campbell
Dep. Sec. of State

Copy of Original
1842 Treaty of Orchard Party
With New York State
on pages 104a to 110a
in 8.5 by 11 inch section

Appendix I

Copy of Original
1842 Map of Purchase from Orchard Party
on page 111a
in 8.5 by 11 inch section

Appendix J

Map of the Oneida Land Sales
on page 112a
in 8.5 by 11 inch section

Appendix K

SETTLEMENT AGREEMENT BY THE ONEIDA NATION THE STATE OF NEW YORK THE COUNTY OF MADISON & THE COUNTY OF ONEIDA

I. PREAMBLE

WHEREAS the Oneida Nation, the State of New York, Madison County and Oneida County are committed to protecting and promoting the environment, health, safety and welfare of all of their people, to protecting and strengthening the social fabric of Central New York, and to developing the entire regional economy;

WHEREAS long-standing disputes between the Oneida Nation and the State of New York, Madison County and Oneida County, have generated litigation in state and federal courts regarding property and other taxation, the status of Nation lands and transfer of such lands to the United States to be held in trust for the Oneida Nation;

WHEREAS the Oneida Nation, the State of New York, Madison County and Oneida County recognize that existing disputes and litigation are costly and disruptive and desire to foster intergovernmental cooperation and joint effort that will permit them and their peoples to move forward in a way that can improve lives in the whole of Central New York;

NOW, THEREFORE, the Oneida Nation, the State of New York, Madison County and Oneida County for themselves, related parties and agencies, and their successors in interest and assigns, do hereby resolve all outstanding disputes by entering into this Agreement.

II. GENERAL DEFINITIONS

The following definitions apply to terms used in this Agreement:

A. "Boylan tract" means the 32 acre (more or less) of state tax-exempt land held to be tribal land retained by the Oneida Nation in *Boylan v. United States*, 256 F.165 (2d Cir. 1920).

B. "Casino Gaming" means the types of gaming activities referenced in the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(7), as Class III gaming activity, except that Casino Gaming shall not include: (i) charitable gaming conducted pursuant to N.Y. Const. art. I, § 9, cl. 2; (ii) pari-mutuel wagering on horse racing conducted pursuant to N.Y. Const. art. I, § 9, cl. 1; or (iii) the state lottery conducted pursuant to N.Y. Const. art. 1,§ 9, cl. 1.The foregoing exception for the state lottery shall not include Video Lottery Gaming Devices or Gaming Devices. For the purposes of this Agreement, the use of the term Class III gaming activities refers to types of gaming activities, and it shall not matter whether or not such gaming activities are conducted by an Indian or an Indian tribe, within or outside of Indian

country or under IGRA or on some other basis.

C. **"Counties"** means Madison County and Oneida County collectively, or Oneida County or Madison County individually, as shall be determined by the usage of such terms in this agreement, and all officers and officials of each County and their respective successors in interest and assigns, both individually and collectively.

D. **"Effective Date"** means the date on which the United States District Court for the Northern District of New York enters an order in *State of New York, et al. v. Salazar*, et al., 6:08-cv-644 (LEK), approving this Agreement and dismissing that litigation as provided in Section VI(A)(1)(a) of this Agreement.

E. **"Gaming Device"** means Slot Machines, Video Lottery Gaming Devices and Instant Multi-Games.

F. **"Instant Multi-Game"** means the game and specifications referred to in the letter and attachment from the N.Y.S. Racing & Wagering Board Chairman to the Oneida Nation Representative dated November 23, 1994.

G. **"Marble Hill tract"** means the 104 acres (more or less) of state tax-exempt land retained by the Oneida Nation as Lots 2 and 3 in the June 25, 1842 Orchard Party treaty.

H. **"Master Settlement Agreement"** means the settlement agreement (and related documents) entered into November 23, 1998 by the State and leading United States tobacco product manufacturers.

I. **"Material Breach"** means a violation by the State, the Counties or the Nation of a provision in Sections III(A), IV, V or VI(A), (B) and (C)(1), (3), and (7), and VII(A).

J. **"Nation"** means the Oneida Nation of New York, a federally-recognized, sovereign Indian Nation, 77 Fed. Reg. 47,868, 47,870 (August 10, 2012), all officers of the Nation, all instrumentalities of the Nation, and their respective successors in interest and assigns, both individually and collectively.

K. **"Nation Compact"** means the gaming compact (including its appendices) entered into by the State on April 16, 1993 and approved by the United States Department of the Interior on June 4, 1993, which approval was published at 58 Fed. Reg. 33160 (June 15, 1993), as has been or may be amended from time to time ("Oneida compact," "compact" and "gaming compact").

L. **"Nation Land"** means land possessed by the Nation within the exterior boundaries of the Reservation and that (i) is the 32-acre (more or less) *Boylan* tract, (ii) is the 104-acre (more or less) Marble Hill tract, (iii) that is held in trust by the United States or any of its agencies for the benefit of the Nation or (iv) Reacquired Land that is within the Cap as defined in Section

VI(B)(4) of this Agreement. Reacquired Land that exceeds the Cap defined in Section VI(B)(4) of this Agreement is not Nation Land as that term is defined herein.

M. "Nation Payment" means the quarterly amount of money due under Section III(A) of this Agreement.

N. "Net Win" means the amounts wagered on Gaming Devices less the payout from Gaming Devices, but before expenses, to be calculated on a quarterly basis. As used in this definition of Net Win, the term "free play" refers to any dollar amounts that may be used by a player to play a Gaming Device without paying any other consideration. Free play used by the Nation in an amount not to exceed ten percent of the total quarterly net win from gaming devices shall be subtracted from the calculation of Net Win. In the event that the free play allowance for video lottery gaming in Section 1617-a of the Tax Law is increased, the free play allowance for the Nation shall be similarly increased.

O. "Parties" means the State, the Nation, and the Counties, as defined herein; each of them individually is a "Party."

P. "Reacquired Land" means all land possessed by the Nation, except that Reacquired Land does not include the 32-acre (more or less) *Boylan* tract, the 104-acre (more or less) *Marble Hill* tract, or excess federal land that has been or will be transferred to the Department of the

Interior pursuant to 40 U.S.C. § 523 to be held in trust for the Nation.

Q. "Reservation", as used in this Agreement, means the land within Madison and Oneida County acknowledged as the reservation of the Oneida Nation in Article II of the Treaty of Canandaigua, 7 Stat. 44 (1794), as depicted on the map attached as Exhibit I.

R. "Slot Machine" shall mean a video facsimile or slot machine which means any mechanical, electrical or other device, contrivance or machine, which upon insertion of a coin, currency, token or similar object therein, or upon payment of any consideration whatsoever, is available to play or operate, the play or operation of which, whether by reason of the skill of the operator or application of the element of chance or both, may deliver or entitle the person playing or operating the machine to receive cash or tokens to be exchanged for cash or to receive any merchandise or thing of value, whether the payoff is made automatically from the machine or in any other manner whatsoever, and where the outcome of each iteration of play or operation of the machine is determined at the time of play or operation, whether through the operation of an on-board random number generator in the machine itself or by a central determinant system which employs a random number generator. A video facsimile or slot machine that meets this definition of Slot Machine shall be considered a Slot Machine for purposes of this Compact, regardless of whether

it is connected to an on-line system, which system performs monitoring, accounting or other functions, or determines the outcome of play or operation or transmits the outcome of play or operation to the machine from a central determinant system.

S. **"State"** means the State of New York, the Governor of the State, all departments or agencies of the State, all authorities established under the authority of the State, and their respective successors in interest and assigns, both individually and collectively.

T. **"Video Lottery Gaming Devices"** shall mean individual player terminals, with touch-screen, button-controlled video screen or other electronic display devices, including but not limited to single or multi-stage displays, secondary electronically-controlled displays such as wheels, dice or other displays, which are connected to a central determinant system that delivers to each individual player terminal an outcome, determined in advance of each iteration of game play, from a finite, randomly created pool of outcomes and thereby allows multiple players to compete for such outcomes. The Video Lottery Gaming Devices shall not eject nor otherwise dispense coins or currency and may perform the following functions related to the game:

a. Accepts currency, other representative of value or a cashless activation card qualifying the player to participate in one or more games;

b. Provides players with the ability to choose, or have the video lottery gaming devices automatically choose for them, combinations of numbers, colors and/or symbols;

c. Electronically displays, if applicable, the game identifier and the player choices;

d. Prints and dispenses a redemption ticket, or otherwise provides a representation of the value of player winnings in a manner consistent with the technical standards of the Nation Compact, when the player activates the cash-out function;

e. Displays game information such as credit balance and other information as required or permitted in the technical standards of the Nation Compact;

f. Displays, for verification purposes only, the outcome of the game, but does not determine that outcome; and

g. Performs security functions necessary to maintain the integrity of the operation of the gaming device, as provided in the technical standards of the Nation Compact.

III. NATION PAYMENT

A. Amount. In consideration of all the undertakings by the State and Counties herein, the Nation agrees to pay to the State: (i) as the Nation Payment, twenty-five percent (25%) of any Net Win (as defined in Section II(N) of this Agreement) with respect to Gaming Devices operated by or on behalf of the Nation, and (ii) a one-time payment in the amount of eleven million dollars ($11,000,000.00).

B. Distribution of Nation Payment. Annually, the State shall make twenty-five percent (25%) of the Nation Payment available to the County of Oneida. Additionally, from the Nation Payment, during the term of this agreement, the State shall annually allocate (i) a sum of three and one-half million dollars ($3,500,000.00) to the County of Madison and (ii) for a period of nineteen and one-quarter years, a sum of two and one-half million dollars ($2,500,000.00) to the County of Oneida. Additionally, the State shall distribute the one-time eleven million dollar ($11,000,000.00) payment received by the State pursuant to Section III(A) to the County of Madison. The Counties' share of all these payments is in full satisfaction of all existing tax liens that they claim as against the Nation and in full satisfaction of tax revenues of any kind that the Counties will not receive from the Nation in the future under the terms of this Agreement or because of the trust status of Nation Land. The Nation shall have no liability to the Counties with respect to distribution of the Nation Payment to them. All disputes concerning the Nation Payment shall be matters to be resolved solely between the Nation and the State pursuant to the dispute resolution provisions of this Agreement. Notwithstanding any other provision of this Agreement, the State shall have the sole and exclusive right to enforce the Nation's payment obligations under Section III of this Agreement.

C. Timing. The Nation Payment shall be made quarterly, within thirty (30) days after the close of the quarter.

D. Commencement of payment. Within seven (7) days after the Effective Date, the Nation shall make the one-time payment of eleven million

dollars ($11,000,000.00) that is described in Section III(A) of this Agreement. The Nation shall commence payment of the Nation Payment as to Net Win for the quarter that begins on January 1, 2014, or, if the Effective Date is later than January 1, 2014, then as to so much of the quarter that remains after the Effective Date.

IV. GAMING EXCLUSIVITY

A. Geographic Scope of Exclusivity. Except as provided in Section IV(B) of this Agreement, the Nation shall have total exclusivity with respect to the installation and operation of Casino Gaming and Gaming Devices, by the State or any State authorized entity or person, within the following geographic area: Oneida County, Madison County, Onondaga County, Oswego County, Cayuga County, Cortland County, Chenango County, Otsego County, Herkimer County and Lewis County.

B. Gaming Activities Permitted By Others within Exclusivity Zone. The State shall not legalize, authorize or consent to or engage in, Casino Gaming or the installation or operation of any Gaming Device within the zone of exclusivity set forth in Section IV(A) of this Agreement, except for the following, which are exceptions to the exclusivity provided the Nation under this agreement: (a) charitable gaming conducted pursuant to N.Y. Const. art. I, § 9, cl. 2; (b) pari-mutuel wagering conducted pursuant to N.Y. Const., art. I, § 9, cl.1; (c) the lottery conducted pursuant to N.Y. Const., art I, § 9, cl. 1 (such lottery not to include Video Lottery Gaming Devices); and (d) at Vernon Downs, the type, nature and character of Video Lottery Gaming Devices, and pari-mutuel wagering

on horse racing, both live and simulcasting, that as of May 15, 2013, have been authorized and now exist at Vernon Downs. The Vernon Downs exception shall permit the holder of the of the video lottery gaming license and its harness racetrack license to be sold or transferred to another entity as authorized by the New York State Gaming Commission, but the Vernon Downs exception shall cease to be applicable if a licensee at Vernon Downs ends its corporate existence, relinquishes its video lottery gaming license or its harness racetrack license, has either license revoked, or voluntarily ceases race meetings, pari-mutuel betting or betting on Video Lottery Gaming Devices, other than for unavoidable reasons such as (but not limited to) acts of God and strikes. Other gaming in the exclusivity zone that is not expressly permitted in this paragraph but that that is unlawful and has not been authorized or consented to by the State, although not a permitted gaming activity under the terms of this Agreement, shall not constitute a breach by the State or the Counties of this Agreement or of its exclusivity terms in Section IV of this Agreement.

C. Gaming Activities By the Nation. The Nation shall continue to engage in Class III Gaming pursuant to the terms of the Nation Compact. To remove any uncertainty regarding the Nation compact, the previous amendments (including as to Instant Multi-Game), or the Nation's entitlement under the Nation compact to adopt games and specifications contained and approved in other tribal gaming compacts in New York (including Gaming Devices), all of the foregoing shall be deemed ratified and approved by the Legislature.

The gaming procedures and specifications that are contained in Exhibit H to this Agreement are approved. The Nation and the State shall in good faith endeavor to promptly undertake the ministerial changes necessary to conform the language of such most favored nation amendments to the existing gaming specifications, and also to reflect the gaming procedures and specifications referenced in the preceding sentence in this paragraph. The Nation Compact, its amendments and those amendments specified in Exhibit H to this Agreement shall be deemed ratified by the Legislature upon its approval of this Agreement. Notwithstanding any contrary term of this Agreement, this Agreement does not modify or eliminate the rights and duties of the Nation or the State under the Nation Compact, modify or eliminate any substantive term of the compact, or modify or eliminate the process for dispute resolution as to matters addressed by the Nation Compact.

V. RESOLUTION OF TAX DISPUTES

A. Imposition of Nation Tax on Sales of Goods and Services. As of the Effective Date, the Nation, pursuant to its governmental authority as an Indian nation to impose taxes upon sales of goods and services occurring on Nation Land, shall adopt and implement an ordinance imposing each of the following taxes and pricing standards, and allowing for the following exemptions, with respect to sales of goods and services on Nation Land. Nation Land shall be a "qualified reservation" for purposes of the Tax Law and Section V of this Agreement, which is a "tax agreement" for purposes of Tax Law §§ 284-e(5) and 471-e(5), as amended from time to time.

1. Equal Cigarette and Tobacco Products Taxes. To the extent that the State imposes or otherwise charges taxes on cigarettes and tobacco products possessed, transported, sold or conveyed throughout the State, including but not limited to taxes imposed pursuant to Article 20 of the State Tax Law, the Nation shall impose a Nation tax ("Nation Excise Tax") on cigarettes and tobacco products possessed, transported, sold or conveyed by any Seller on Nation Land to non-Indian purchasers that shall be no less than the amount of the State taxes on such cigarettes and tobacco products. The State shall notify the Nation of any change in the amount of State taxes on cigarettes and/or tobacco products. If the change results in an increase in the amount of State taxes on cigarettes and/or tobacco products, the Nation Excise Tax shall increase to an amount no less than the corresponding State tax within seven (7) days of such notice or the effective date of the change, whichever is later. If the change results in a decrease in, or elimination of, the State tax on cigarettes and/or tobacco products, the Nation Excise Tax may, at the Nation's discretion, decrease to an amount no less than the corresponding State tax.

2. Equal Fuel Taxes. To the extent that the State imposes or otherwise charges taxes on motor fuel and highway diesel motor fuel imported, possessed, transported, sold or conveyed throughout the State, including but not limited to taxes imposed pursuant to Articles 12-a and 13-a of the State Tax Law, the Nation shall impose a Nation tax ("Nation Fuel Tax") on motor fuel and highway diesel motor fuel imported, possessed, transported,

sold or conveyed by any Seller on Nation Land to non-Indian purchasers that shall be no less than the amount of the State taxes on such fuels. The State shall notify the Nation of any change in the amount of State taxes on motor fuel and/or highway diesel motor fuel. If the change results in an increase in the amount of State taxes on motor fuel and/or highway diesel motor fuel, the Nation Fuel Tax shall increase to an amount no less than the corresponding State tax within seven (7) days of such notice or the effective date of the change, whichever is later. If the change results in a decrease in, or elimination of, the State tax on motor fuel and/or highway diesel motor fuel, the Nation Fuel Tax may, at the Nation's discretion, decrease to an amount no less than the corresponding State tax.

3. Equal Sales Tax, Use Tax and Occupancy Tax.

a. To the extent that the State, the Counties, or the cities or school districts located within the Counties, impose, charge or otherwise require collection and remittance of a sales tax, use tax or occupancy tax, including but not limited to any taxes authorized by Articles 28 and 29 of the State Tax Law and any hotel or bed taxes, the Nation shall impose a corresponding sales tax, use tax or occupancy tax ("Nation Sales Tax," "Nation Use Tax" and "Nation Occupancy Tax"), on the same terms and subject to the same definitions and exemptions as such State and/or local tax, on the sale of goods, services or occupancy by a seller to non-Indians. The Nation Sales Tax rate, the Nation Use Tax rate and the Nation Occupancy Tax rate shall be no less than the combined State and local sales tax rate, combined State and local

use tax rate or combined State and local occupancy tax rate in effect for the jurisdiction in which the Nation Lands where the sales or conveyances occur is located.

b. Upon any future increase in the rate of State sales tax, use tax or occupancy tax, or an increase in the rate of local sales tax, use tax or occupancy tax imposed by the Counties, or the cities or school districts located within the Counties, the Nation Sales Tax, Nation Use Tax or Nation Occupancy Tax shall increase to an amount no less than the new combined rates of sales tax, use tax or occupancy tax imposed by State, the Counties, or cities or school districts located within the Counties. Upon any future decrease in such rates, or elimination of the State or local sales tax, use tax or occupancy tax, the Nation Sales Tax, Nation Use Tax or Nation Occupancy Tax may, at the Nation's discretion, decrease to an amount no less than the combined rates of sales tax, use tax or occupancy tax imposed by State, the Counties, or the cities or school districts located within the Counties.

c. Upon any future change in the base of the sales tax, use tax, or occupancy tax imposed by the State, the Counties, or the cities or school districts located within the Counties that results in additional goods, services or occupancy becoming subject to such taxes, the Nation Sales Tax, Nation Use Tax, or Nation Occupancy Tax, as applicable, shall be amended to conform to the base of the sales tax, use tax, or occupancy tax imposed by the State, the Counties, and the cities or school districts located within the Counties. Upon a future change in the base of the sales tax, use tax,

or occupancy tax imposed by the State, the Counties, or the cities or school districts located within the Counties that results in a decrease in such base, whether by creating an exemption or otherwise, theNation Sales Tax, Nation Use Tax or Nation Occupancy Tax may, at the Nation's discretion, be amended to conform to the base of the sales tax, use tax, or occupancy tax imposed by the State, the Counties, or the cities or school districts located within the Counties.

d. The State shall notify the Nation of a change in the rate or base of the sales taxes, use taxes or occupancy taxes imposed by the State, the Counties or the cities or school districts located within the Counties, to the extent such taxes are administered by the State. The Counties, the cities or the school districts located within the counties, respectively, shall notify the Nation of a change in the rate or base of any sales tax, use tax or occupancy tax, to the extent such taxes are administered by the Counties or such cities and school districts, respectively. If the change results in an increase in rate or in additional goods, services or occupancy becoming subject to such taxes, the Nation Sales Tax, Nation Use Tax or Nation Occupancy Tax shall be amended to conform to such change as provided herein within seven (7) days of such notice or the effective date of the change, whichever is later.

4. Equal Minimum Pricing Standards for Cigarettes. To the extent that the State mandates minimum prices for the possession, transportation, sale or conveyance of cigarettes throughout the State, the Nation shall impose minimum prices ("Nation Minimum Prices") for

the possession, transportation, sale or conveyance of those same cigarettes sold by any Seller on Nation Lands to non-Indian purchasers. The Nation Minimum Prices on these products shall be calculated in the same manner as the corresponding State minimum prices are calculated. For the purpose of establishing the basic cost of cigarettes and the applicable minimum prices of Native American manufactured cigarettes, the minimum price of any cigarettes directly manufactured by the Nation or by another Native American manufacturer shall be calculated in the same manner as the corresponding State minimum prices are calculated. The basic cost of cigarettes directly manufactured by the Nation or by another Native American nation, tribe or individual, for the purposes of establishing applicable minimum prices, shall be 60% of the average manufacturers' list price, before trade or rebates, of the top three brands by market share.

5. Nation Tax Stamp for Cigarettes. The Nation shall affix a Nation cigarette tax stamp on all cigarettes, including cigarettes that the Nation may exclude from the Nation Excise Tax, Nation Sales Tax, Nation Use Tax and Nation Minimum Price requirements under Section V(A)(6) of this Agreement, which shall constitute the Nation's certification that the cigarettes comply with the requirements of this Agreement, including but not limited to the requirements governing imposition of Nation taxes and minimum pricing. The Nation may receive unstamped cigarettes directly from federally licensed manufacturers without going through a New York State licensed cigarette stamping agent.

6. Exemption for Sales to Native Americans. Notwithstanding any other provision of this Agreement, the Nation is authorized to exclude from the Nation Excise Tax, Nation Fuel Tax, Nation Sales Tax, Nation Use Tax, Nation Occupancy Tax and Nation Minimum Price requirements any retail sale on Nation lands, other than sales made via the internet, by the Nation, or by any entity owned directly or indirectly by the Nation, to any Native American or the immediate family of any Native American member living in the same household, provided, however, that any sale of cigarettes bearing the Nation Tax Stamp that occurs on other than Nation Lands shall be subject to State excise taxes pursuant to Article 20 of the State Tax Law unless there is proof that Nation Excise Taxes have been paid. This provision does not prevent a member of a New York Indian nation or tribe from presenting his or her membership card to vendors off-reservation for purchase of goods and services, other than cigarettes, tobacco products, motor fuel and highway diesel motor fuel, exempt from New York taxes as long as the goods and services will be delivered to his or her residence on the reservation.

7. Exemption for Nation-Manufactured Products. The Nation may exclude from the Nation Sales Tax and Nation Use Tax any possession, transportation, sale or conveyance of products, other than cigarettes and tobacco products, manufactured on Nation Lands by the Nation or any entity owned, chartered, incorporated or controlled, directly or indirectly, by the Nation, including but not limited to traditional Native American crafts.

8. Material Tax Law Changes. In the event there is a change to the State Tax Law or any article thereof that materially affects the terms or operation of this Agreement, such as the enactment of new, or the amendment of existing, transaction, sales, excise or similar taxes, and other than a modification of the rate or base of any tax as provided in Section V(A)(1)-(3) of this Agreement, the State and the Nation shall modify this Agreement accordingly.

9. Master Settlement Agreement. The Nation shall report to the State, on forms substantially similar to those contained in Exhibit J, its purchases of all cigarettes for the express and limited purpose of ensuring appropriate third-party compliance with the requirements of the Master Settlement Agreement, as amended and interpreted.

B. Use of Nation Excise, Sales, Use and Occupancy Tax Revenues. The Nation shall use revenues from the Nation Excise Tax, Nation Fuel Tax, Nation Sales Tax, Nation Use Tax and Nation Occupancy Tax exclusively for the provision of the same types of governmental programs and services, and to the discharge by the Nation of the same types of governmental obligations, for which state or local governments use revenues from their tax collections. The Nation shall retain exclusive discretion in determining the specific types of governmental programs and services for which revenues shall be expended. Nothing in this Agreement shall affect any obligation of the State or any other government to provide programs and services required under any treaty or law, or to discriminate or to

permit any discrimination against the Nation or its members with respect to such obligations.

C. Assurances.

1. The State and the Counties shall undertake reasonable efforts to fulfill their obligations and restrictions under this section.

2. The collection of the Nation Excise Tax, Nation Fuel Tax, Nation Sales Tax or Nation Use Tax pursuant to this Agreement shall be in full satisfaction of any taxes on the sales or provision of goods and services on Nation Land. The State and the Counties shall not take any action to collect unpaid sales or use taxes on the sale of goods or services, other than motor fuel or highway diesel motor fuel sold to a carrier subject to article 21-a of the State Tax Law, that are subject to Nation Fuel Tax, Nation Sales Tax or Nation Use Tax pursuant to this Agreement. The State and the Counties shall not take any action to collect unpaid state excise taxes on the sale of cigarettes and tobacco products for which Nation Excise Tax has been paid.

3. The State and the Counties shall not take any action to impose any direct or indirect tax, assessment, charge or fee on any gaming facility or gaming-related activity conducted by the Nation, except as provided in this Agreement and in the Nation Compact.

4. The Nation shall contract for an independent third party acceptable to the State to assess and report to the State regarding the Nation's compliance with the tax provisions of this Agreement within six months of the effective date

of the Agreement and once per year thereafter. If such a report indicates that the Nation, or any entity owned directly or indirectly by the Nation, has substantially failed to comply with the provisions of Sections V(A)(1), V(A)(4), V(A)(5) and/or V(A)(6) of this Agreement, then such provisions shall be void and Articles 20 and 20-A of the State Tax Law shall apply to all sales of cigarettes on Nation lands that occur more than seven (7) days after the State has notified the Nation of such finding of substantial failure to comply, provided, however, that where such report indicates that such substantial failure to comply is solely attributable to the conduct of one or more individuals acting independently on Nation lands, the Nation shall be afforded thirty (30) days to cure such non-compliance after the State has notified the Nation of such finding of substantial failure to comply.

5. For purposes of the State Alcoholic Beverage Control Law, the State shall deem the Nation to be operating with a certificate of authority, as provided in article 28 of the State Tax Law, when it is collecting Nation Sales Tax and Nation Use Tax as required by this Agreement.

D. Most Favored Nation. In the event the State enters into an agreement with any other Indian nation or tribe relating to any importation, possession, transportation, purchase, sale or conveyance of any cigarettes, tobacco products, motor fuel or highway diesel motor fuel among or between any other Indian nation(s) (Other Relevant Agreement), the following provisions shall apply:

1. The State shall provide a copy of the Other Relevant Agreement to the Nation within five (5) days after its execution.

2. The Nation may, at its option and upon notice to the State, adopt the provision of the Other Relevant Agreement relating to any importation, possession, transportation, purchase, sale or conveyance of any cigarettes, tobacco products, motor fuel or highway diesel motor fuel among or between any other Indian nation(s).

3. As of the date of notice from the Nation to the State, the provision adopted pursuant to this Section shall be incorporated into this Agreement, and shall amend or replace any existing provision of this Agreement relating to any importation, possession, transportation, purchase, sale or conveyance of cigarettes, tobacco products, motor fuel or highway diesel motor fuel among or between any other Indian nation(s).

E. Nation Land Not Taxable.

1. Without regard to whether land has been (or has not been) and is now (or is not now) exempt from property taxation or otherwise non-taxable, Nation Land shall be non-taxable, and the Nation shall not be liable to the State or any municipal subdivision of the State for any past, present or future property tax payment with regard to Nation Land, and no bill for such tax shall be issued, all of the foregoing subject to the limitation (Cap) in Section VI(B)(4) on the designation of Reacquired Land to 25,370 acres. For the avoidance of any doubt, Reacquired Land that is in excess of the Cap defined in Section VI(B)(4) shall be subject to State and local taxation.

2. The Nation shall not assert or seek any other state property tax exemption for Reacquired Land exceeding the Cap in Section VI(B)(4) on the designation of Reacquired Land to 25,370 acres, except with respect to Nation Land that is listed on tax assessment rolls as exempt on the Effective Date. The parcels of Nation Land so listed on tax assessment rolls are in Madison County and are identified as follows: tax parcel identification number 75.-1-4.15 (2.80 acres) (695-cemetery), and tax parcel identification number 75.-1.4.16 (5.69 acres) (695-cemetery). The Nation reserves and asserts federal immunity to property taxation and all other rights under federal law with regard to the 32 acre *Boylan* tract, the 104-acre *Marble Hill* tract, and also to lands held in trust by the United States for the Nation's benefit under 40 U.S.C. § 523 or, as to Reacquired Land held in trust, within the Cap provided in Section VI(B)(4) of this Agreement.

3. Any tax lien or tax sale based upon any failure of the Nation to pay any property tax, penalty, interest or assessment that has been asserted against the Nation or Nation land shall be withdrawn or terminated, and shall be deemed void *ab initio*. The State and Counties hereby release and waive all claims for payment of any such property tax, penalty, interest or assessment.

4. As to any judicial or administrative proceeding, the State and Counties hereby release any claim that the Reservation was disestablished.

5. The State hereby stipulates that the Reservation was not disestablished and that the

Reservation is reservation land for purposes of state and federal statutes.

6. Notwithstanding Sections V(E)(1) and V(E)(4) of this Agreement, the Nation shall make to the Counties a payment in an amount equal to the amount of property tax that would be due from any non-Indian owner with respect to any parcel of Reacquired Land within the Cap provided in Section VI(B)(4) of this Agreement that is acquired by the Nation after the Effective Date of this Agreement and until such time as the particular land is transferred to the United States in trust for the Nation. With respect to Nation Land, the Nation's payment shall be based on the assessed value of the parcel prior to the transaction in which it was acquired by the Nation.

F. Compliance with Agreement Deemed Compliance with Applicable State Law. The Nation's compliance with the terms of this Agreement shall be deemed in compliance with State law related to the payment and collection of taxes. No state agency or licensing entity, including but not limited to the State Liquor Authority, shall deny a license or fail to give an approval on the ground that gaming on Nation land or under the Oneida Nation gaming compact may be unlawful or on any ground related to the payment or collection of taxes in conformity with this Agreement.

VI. RESOLUTION OF LAND DISPUTES

A. Settlement of Existing Litigation.

1. Trust Litigation.

a. The State, the New York Attorney General, the Counties and the Nation, together with all of the federal defendants (including but not limited to the United States of America, the United States Department of the Interior and its Secretary Sally Jewell, the Bureau of Indian Affairs of the Department of the Interior, and the United States General Services Administration and its Acting Administrator Dan Tangherlini) shall enter into a stipulation incorporating the terms of this Agreement and adopting the same in furtherance of the objectives of this Agreement, in substantially the form of Exhibit B, dismissing *State of New York v. Salazar*, No. 08-cv-644-LEK (N.D.N.Y.), with prejudice. This Agreement shall be submitted to the United States District Court for the Northern District of New York for the issuance by that Court of an order incorporating the terms of this Agreement, approving the same and retaining jurisdiction to enforce any violations hereof, or disputes hereunder, that are not subject to arbitration under a provision of this Agreement.

b. The State and Counties will not directly or indirectly fund any challenge to the Secretary of the Interior's May 20, 2008 decision to accept Nation Land into trust pursuant to 25 U.S.C. § 465, to any supplemental decision on any matter remanded by a court in connection with any challenge to that decision, or to any challenge to a transfer of excess land pursuant to 40 U.S.C. § 523.

2. Federal Tax Foreclosure Litigation.

a. By no later than seven (7) days after the Effective Date, the Counties shall withdraw the petition for a writ of certiorari that they filed in the United States Supreme Court in *Madison and Oneida Counties v. Oneida Indian Nation,* No. 12-604. By that same date and in that same case, the State shall withdraw the amicus brief that it filed on behalf of the Counties.

b. The Counties shall stipulate to the entry of final judgments in *Oneida Indian Nation v. Madison County*, No. 00-cv-506 (N.D.N.Y), and *Oneida Indian Nation v. Oneida County*, No. 05-cv-945 (N.D.N.Y.) in substantially the form of Exhibits C and D.

3. State Tax Litigation.

a. Madison County shall file a stipulation of dismissal in the pending in rem action seeking to foreclose on Nation Land, *In the Matter of Foreclosure of Tax Liens by Action In Rem Pursuant to Article 11 of the Real Property Tax Law by Madison County*, Index No. 03-999 (Madison County Supreme Court).

b. Oneida County and Madison County shall take all steps necessary to undo all acts taken to foreclose on Nation Land or to enforce property taxation with respect to such land.

c. Madison County and Oneida County shall not file any further action to foreclose on Nation Land or take any administrative or other step or action to enforce property taxation with respect to such land; provided, however, that

Madison County and Oneida County shall have the right to file an action to foreclose upon those lands covered in Section V(E)(6) of this Agreement for which the Nation fails to make the payments in the amounts permitted and required by that Section.

d. The Counties shall stipulate to the dismissal of the hybrid tax grievance/declaratory judgment actions regarding state statutory property tax exemptions and other issues that were filed by the Nation in Madison and Oneida Counties, respectively, in substantially the form of Exhibits E and F. The State and Counties will not assist or fund, directly or indirectly, any further litigation of the hybrid tax grievance/declaratory judgment actions.

4. Litigation against State Comptroller, Madison County Attorney and Law Firms.

As of the Effective Date of this Agreement, the Nation shall discontinue directly or indirectly funding any aspect of the litigation entitled *Mahler and Garrow v. Campanie, the Kiley Law Firm PC, Campanie & Wayland Smith, PLLC and Thomas P. DiNapoli, Comptroller of the State of New York* (Supreme Court, Albany County, index number 2502-11, on appeal to the Appellate Division, Third Department), and the Nation shall use its best efforts to encourage the plaintiffs to discontinue that action.

B. Future Trust Applications.

1. The Nation, at its option, may submit an application to the United States Department of the Interior requesting that the Department accept

the transfer into trust status of some or all of the approximately 4,000 acres of existing Nation Land that was not accepted in the May 20, 2008 Record of Decision for a transfer to the United States to be held in trust (see Exhibit A). The State and Counties represent and warrant that they support the Nation's application for transfer of such land to the United States to be held in trust and release and waive any right they may have to administratively or judicially oppose or challenge the transfer into trust of any such land on any grounds.

2. If the Nation acquires additional Nation Land, subject to the Cap limitation in Section VI(B)(4) of this Agreement, the State and Counties shall not oppose, in any administrative or judicial proceeding or otherwise, the Nation's application to place the land in trust pursuant to 25 U.S.C. § 465, and they release and waive any right they may have to administratively or judicially oppose or challenge the transfer into trust of any such land on any grounds. Further, the State and Counties shall not oppose any transfer of excess federal land within the Reservation to the Department of the Interior to be held in trust for the Nation pursuant to 40 U.S.C. § 523.

3. The State and Counties shall not assist or fund, directly or indirectly, any administrative or judicial opposition or challenge to the Nation's application to transfer Nation Land, subject to the Cap limitation in Section VI(B)(4) of this Agreement, into trust pursuant to 25 U.S.C. § 465, or to any transfer of excess federal land within the Reservation to the Department of the Interior to be held in trust pursuant to 40 U.S.C. § 523.

4. The Nation shall not designate more than 25,370 acres of Reacquired Land as Nation Land, of which: (i) 13,004 acres shall be the existing land owned by the Nation that was accepted to be held in trust by the United States under the May 20, 2008 Record of Decision of the U.S. Department of Interior, (ii) 4,366 acres shall be the existing land owned by the Nation and for which the Nation applied for trust status on April 4, 2005, but which was not accepted into trust under the May 20, 2008 Record of Decision (see Exhibit A), and (iii) up to 7,000 additional acres shall be in Oneida County and up to 1,000 additional acres shall be in Madison County.

5. For the avoidance of any doubt, the Nation shall not submit an application to have Reacquired Lands taken into trust, above the 25,370 acres specified in Section VI(B)(4).

C. Governmental Coordination.

1. The Nation shall not assert sovereignty with respect to any land other than Nation Land.

2. If any federal law provides for consultation with the Nation concerning any federally-assisted project in Madison County or Oneida County, and if the Nation exercises its consultation right, then the Nation shall give notice to the Secretary of State of New York, and the Secretary of State or his or her designee, in such consultation, shall represent the County or Counties involved in the consultation if so requested by the involved County or County. If a County requests such representation in a consultation by the Secretary of State or his or her designee, the Nation hereby consents to that representation.

3. To enhance public safety and to improve the coordination of police services, Oneida County shall enter into a deputization agreement with the Oneida Nation Police in substantially the form of Exhibit G.

4. As to all Reacquired Land that is within the Cap defined in Section VI(B)(4) of this Agreement and is not held in trust by the United States for the benefit of the Nation, the Nation shall adopt, in lieu of the laws and regulations generally applicable to non-Nation properties, ordinances that meet or exceed standards that otherwise may govern land use, building codes, zoning, health, safety and environmental matters, and weights and measures. Any land uses and improvements existing on those lands as of the Effective Date may continue and shall be deemed to be conforming uses under any zoning or other land use statutes, regulations, codes or other administrative requirements. On reasonable notice, the Counties may coordinate with the Nation site visits and testing as reasonably needed to assure that the Nation has fulfilled its meet-or-exceed obligation under this paragraph of this Agreement. For the avoidance of any doubt, Reacquired Land that is in excess of the Cap defined in Section VI(B)(4) shall be subject to State and local regulation.

5. In the event of any dispute over whether the Nation is meeting any relevant standard, the County(s) shall notify the Nation in writing, alleging with specificity the nature of the alleged violation and proposed corrective action or remedy. The Nation and the State or the County in which the property is located will inspect the

disputed use or facility and consult, within fourteen (14) days of notice receipt, to attempt to resolve the concern and provide an opportunity to implement any agreed upon corrective action. Notwithstanding any other dispute resolution process specified in this Agreement, but without altering any right, duty or dispute resolution process specified in the Nation Compact with respect to matters addressed by the compact, any and all disputes arising under this section that remain after consultation shall be resolved by binding arbitration as follows. If the Nation and the State are able to select a full panel consisting of three members, then the arbitration shall be by a Standards Review Panel, with the State selecting one member, the Nation selecting another member, and those two members selecting a third member, whose fees and expenses are to be shared equally by the State and the Nation so long as they are reasonable and proportionate to the size and complexity of the dispute presented. The Standards Review Panel will arbitrate the dispute according to a reasonable process and timetable to be established by the panel and shall issue a decision resolving the dispute, with costs and attorneys' fees to the prevailing party. The decision or award of the Standards Review Panel may be enforced by the United States District Court for the Northern District of New York, which retains jurisdiction to enforce such decisions or awards. Notwithstanding the foregoing, if there is an impasse in the selection of third panel member because the two members chosen by the State and the Nation are unable to agree on a third member, then the dispute shall be arbitrated under the Expedited

Procedures provision of the AAA Commercial Arbitration Rules. In any AAA arbitration, the Nation shall select one arbitrator, the State shall select another arbitrator, and those two arbitrators shall select the third arbitrator. The prevailing party shall be entitled to an award of attorneys' fees and costs. Arbitration awards under this section shall be enforced in the United States District Court of for the Northern District of New York, which retains jurisdiction over this agreement and over its enforcement.

6. Except as may be expressly provided in Section IV(C) of this Agreement, nothing in this section or in any other section of this Agreement replaces, modifies or repeals any provision in the Nation Compact or in any other agreement governing the Nation's gaming facilities and related enterprises and the regulations or standards that govern the operation of those facilities or related enterprises. Where there is any conflict or difference between those other agreements and this Agreement, the other agreements control.

7. The Nation shall support any referendum authorized by the State Legislature following second passage of a concurrent resolution to amend the State Constitution to permit or authorize casino gaming. Additionally, the Nation shall not directly or indirectly fund any public education campaign or program opposing any such referendum, or fund directly or indirectly any litigation or administrative challenge in connection with any such referendum.

VII. ENFORCEMENT

A. Limited Waivers of Sovereign Immunity. The Nation and State hereby irrevocably waive all immunity from suit, including tribal sovereignty immunity and eleventh amendment immunity, for the limited purpose of, and consent to, enforcement of the terms of this Agreement according to its terms by arbitration or before the Northern District of New York having jurisdiction to enforce the settlement in *State of New York v. Salazar*, No. 08-cv-644.

B. Notification of Disputes. If the State, one of the Counties or the Nation believes a Party has violated this Agreement by not fulfilling a duty that is owed to it and that it has a right to enforce, then it shall notify that party in writing. The notice shall state the nature of the alleged violation and any proposed corrective action or remedy. The notifying party and the party receiving notice shall meet initially within fourteen (14) calendar days of receipt of the notice, unless a different date is agreed to byboth parties, to attempt to resolve between themselves the issues raised by the notice of possible violation and to provide the opportunity to implement any agreed upon corrective action. Thereafter, the parties shall meet at least two further times within the next twenty-one (21) calendar days to continue good faith consultation. If the parties are unable to reach agreement, they shall within the next fourteen (14) calendar days select a mutually agreeable mediator, the cost of the mediator to be shared equally by each interested party, and shall participate in a mediation to be concluded within thirty (30) days of the selection of the mediator. If within the fourteen

(14) calendar days provided for selection of a mediator the parties are unable to agree on the selection of a mediator, then any party immediately may pursue the other dispute resolution processes as permitted by this Agreement. If a mediator is chosen but mediation is unsuccessful as of the thirtieth (30th) day, or if at any point the parties agree in writing that mediation will not be successful, then the parties immediately may pursue other dispute resolution processes as may be permitted by this Agreement. The foregoing notwithstanding, a party confronted with irreparable harm may immediately pursue those other dispute resolution processes.

C. Arbitration of Disputes. Subject to the other provisions of this agreement, in particular those providing only for judicial enforcement with respect to a Material Breach, the Parties must arbitrate any disputes concerning an alleged breach of this agreement that, if proved, would not be a Material Breach. Such binding arbitration shall be pursuant to the AAA Commercial Arbitration Rules. A three-person arbitration panel shall be chosen as provided in Section VI(C)(5) of this Agreement. A substantially prevailing party shall be entitled to an award of attorneys' fees and costs. Any award produced by the arbitration may be enforced in the United States District Court for the Northern District of New York, which retains jurisdiction for the purposes of enforcing this Agreement and arbitration awards authorized by it.

D. Consequences of Material Breach. Disputes concerning allegations of a Material Breach shall be resolved exclusively by the United States District Court for the Northern District of

New York, which shall retain jurisdiction for such purpose but after a mediation according to the provisions of Section VII(B) of this Agreement . A prevailing party shall be entitled to an award of attorneys' fees and costs. In the event of an allegation of Material Breach, the affected party shall notify the allegedly breaching party in writing of the material breach.

E. Judicial Enforcement. The United States District Court for the Northern District of New York will reserve and retain jurisdiction, exclusive of any other court, to enforce this Agreement according to its terms, to adjudicate any challenges by a party or by third parties to the enforceability of this Agreement, to compel arbitration of disputes according to the terms of this Agreement, or to confirm any arbitral award. The stipulation of dismissal that is Exhibit B to this Agreement will so provide and will provide that this Agreement is to be incorporated into the judgment of dismissal to be entered upon the stipulation. The parties hereby agree and stipulate that a showing of a material breach of this Agreement shall also be a sufficient showing of irreparable harm to justify injunctive or other equitable relief in any action to enforce this Agreement. Each party to this Agreement waives and releases any claim or defense that any term of this Agreement is not enforceable and, by seeking judicial approval of this Agreement, acknowledges that it is estopped to challenge the enforceability of any of its provisions.

VIII. IMPLEMENTATION

A. Authority. The officials executing this Agreement on behalf of the State, the Counties and the Nation, respectively, warrant that they have been authorized to so execute and that they have the lawful authority to do so, subject to the approval of the State Legislature, the County Legislatures, the Oneida Nation Council and, where applicable, the New York Attorney General and, if applicable, the U.S. Department of Interior. Each party is relying on said representation in entering into this Agreement.

B. Legislation. The State will enact legislation approving this Agreement and its exhibits and containing any terms necessary for the State and Counties to carry out their undertakings in this Agreement.

C. Sequence of Implementation. First, the parties' representatives will execute this Agreement. Second, the Agreement shall be submitted to the Counties' Legislatures for approval and the Nation's Council will approve this Agreement. Third, the Agreement shall be submitted to the State Legislature for approval. Fourth, the Parties, and the New York Attorney General and the Federal Defendants in the federal trust litigation, *State v. Salazar*, No. 08-cv-644 (LEK), will submit for approval the stipulation in substantially the form of Exhibit B to this Agreement. As previously provided in this Agreement, the Effective Date of this Agreement is the date of the federal court's entry of an order approving this Agreement. Upon the Effective Date, the parties' obligations to make payments, file other stipulations, and take

other actions are triggered as previously provided in this Agreement.

D. Cooperation. The parties shall work together in good faith to fulfill their commitments to each other under this Agreement, including adoption of necessary laws and regulations, seeking any approval of the United States Department of the Interior that may be required, and opposing any efforts to change, undermine, or invalidate any provision of this Agreement, including initiating or intervening in litigation. Nothing in this Agreement limits the State, the Counties or the Nation from engaging in intergovernmental cooperation with respect to financial or other matters not covered in this Agreement. Nothing is intended to limit or preclude further voluntary or mutual agreements regarding funding, grants or any other matter involving money that might benefit and promote the good of both the Nation and the State and Counties. Without limiting the effect of any substantive provision of this Agreement, nothing herein is or shall be construed to be an admission by any party with respect to any fact or legal issue in litigation.

E. Notices and Communications. Notice required by or related to this Agreement will be made in writing and served by overnight courier or certified mail, return receipt requested. If notice is to be given by the Nation to the Counties, it shall be to the County Executive and to the County Attorney of the relevant County or Counties, and if to the State it shall be to the Governor and the Attorney General, both individually at State Capitol, Albany, New York 12224. A copy shall also be filed concurrently with the Counsel to the Governor,

State Capitol, Room 210, Albany, New York 12224. If notice is to be given by the State or Counties, it shall be to the Oneida Indian Nation Representative and the Oneida Nation Legal Department, both located at 5218 Patrick Road, Verona, New York 13478, or to such other address as may be designated by the Nation.

F. Inadmissibility. Any statements made during the course of the settlement negotiations in this matter will not be admissible in any action or proceeding and are strictly confidential.

G. No Precedent. The parties agree that no provision of this settlement shall be interpreted to be an acknowledgment of the validity of any of the allegations or claims that have been made in any litigation covered by this agreement. This settlement does not constitute a determination of, or admission by any party to any underlying allegations, facts or merits of their respective positions. The settlement of the litigation covered by this agreement is limited to the circumstances in those actions alone and shall not be given effect beyond the specific provisions stipulated to. This settlement does not form and shall not be claimed as any precedent for, or an agreement by the parties to any generally applicable policy or procedure in the future.

H. Entire Agreement. This is a fully integrated agreement that supersedes all prior discussions and negotiations concerning it. The parties may modify this Agreement, but only by a written agreement executed by the party to be charged.

I. Non-Severability. If any material term, provision, representation, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable or is otherwise finally determined to beyond the authority of any signatory hereto, then this Agreement shall be null and void in its entirety, with each party being returned to the position it held before the effective date.

ENTERED INTO THIS 16 DAY OF MAY, 2013

THE STATE OF NEW YORK

/s/ Andrew M. Cuomo
Andrew M. Cuomo
Governor

ONEIDA COUNTY

/s/ Anthony J. Picente, Jr.
Anthony J. Picente, Jr.
County Executive

MADISON COUNTY

/s/ John M. Becker
John M. Becker
Chairman, Board of Supervisors

ONEIDA NATION OF NEW YORK

/s/ Ray Halbritter
Ray Halbritter
Nation Representative

Appendix L

DEED PUTTING LAND IN TRUST FOR ORCHARD PARTY

[SEAL]

ONEIDA COUNTY – STATE OF NEW YORK
SANDRA J. DEPERNO COUNTY CLERK
800 PARK AVENUE, UTICA, NEW YORK 13601

COUNTY CLERK'S RECORDING PAGE
*****THIS PAGE IS PART OF THE DOCUMENT – DO NOT DETACH*****

[BAR CODE]

INSTRUMENT #: 2015-012939

Receipt#: 2015664467
Clerk: PF
Rec Date: 09/09/2015 02:55:42 PM
Doc Grp: RP
Descrip: DEED
Num Pgs: 52

Party1: PHILLIPS MELVIN L SR
Party2: PHILLIPS MELVIN L SR
Town: VERNON

Recording:

Cover Page	20.00
Number of Pages	260.00
Cultural Ed	14.25
Records Management – Coun	1.00
Records Management – Stat	4.75
TP584	5.00
RP5217 Residential/Agricu	116.00
RP5217 – County	4.50

RP5217 – County Clerk	4.50
Sub Total:	430.00
Transfer Tax	
Transfer Tax	0.00
Sub Total:	0.00
Total:	430.00

**** NOTICE: THIS IS NOT A BILL ****

***** Transfer Tax*****

Transfer Tax #: 736
Transfer Tax
Consideration: 0.00

Total: 0.00

WARNING***

I hereby certify that the within and foregoing was recorded in the Oneida County Clerk's Office, State of New York. This sheet constitutes the Clerks endorsement required by Section 316 of the Real Property Law of the State of New York.

Sandra J. DePerno
Oneida County Clerk

Record and Return To:

MARTIN H TILLAPAUGH
30 1/2 PIONEER STREET
COOPERSTOWN NY 13326

QUIT CLAIM DEED

THIS INDENTURE

Made this 1st day of September, Two Thousand and Fifteen

BETWEEN

MELVIN L. PHILLIPS, SR., presently of 4675 Marble Road, Oneida, NY 13421

party of the first part,

and

the "MELVIN L. PHILLIPS, SR., / ORCHARD PARTY TRUST, dated August 2015", a New York Trust having an address of 4675 Marble Road, Oneida, New York,13421

party of the second part.

WITNESSETH, that the party of the first part, in consideration of One Dollar ($1.00) lawful money of the United States and for other good and valuable consideration, paid by the party of the second part, does hereby remise, release and quit claim unto the party of the second part its successors and assigns forever,

ALL THAT TRACT OR PARCEL OF LAND situate in the Town of Vernon, County of Oneida and State of New York more particularly bounded and described on the attached Schedule "A"

TOGETHER with the appurtenances and all the estate rights of the party of the first part in and to said premises,

TO HAVE AND TO HOLD the premises herein granted unto the party of the second part, its successors and assigns forever.

IN WITNESS WHEREOF, the party of the first part has hereunto set his hand and seal the day and year first above written.

/s/ Melvin L. Phillips LS
Melvin L. Phillips, Sr.

2015664467 Clerk: PF 2016-012939
09/09/2015 02:55:42 PM
DEED
52 Pages
Sandra J. DePerno,
STATE OF NEW YORK Oneida County Clerk

ss

COUNTY OF OTSEGO

On the 1st day of September, in the year Two Thousand and Fifteen before me, the undersigned, a Notary Public in and for said State, personally appeared Melvin L. Phillips, Sr., personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

/s/ Martin H. Tillapaugh
NOTARY PUBLIC

[STAMP]
MARTIN H. TILLAPAUGH
Notary Public, State of New York
No. 4642580
Qualified in Otsego County
Commission Expires August 31, 2017

Prepared by:
Martin H. Tillapaugh, Esq.
30 ½ Pioneer Street
Cooperstown, NY 13326

SCHEDULE "A"

Parcel I

Beginning at a point in the center of Marble Hill Road and at the southwest corner of property currently owned by the grantor, Melvin L. Phillips;

THENCE north 55 degrees east, 234.09 feet to an iron pipe;

THENCE south 45 degrees east, 208.71 feet to an iron pipe;

THENCE south 55 degrees west 234.09 feet to the center of Marble Hill Road;

THENCE north 45 degrees west 208.71 feet to the point of beginning.

The above described property consists of one acre of land and is bounded north by Melvin Phillips; east and south by Martha M. Tall and west by Marble Hill Road.

This conveyance is made subject to covenants, easements, and restrictions of record.

BEING the same premises by the same description as was conveyed by Warranty Deed of Martha M. Tall to Melvin L. Phillips, which deed was dated April 4, 1974 and recorded in the Oneida County Clerk's Office on April 30, 1974 in Liber 1988 of Deeds at page 605.

Parcel II

Commencing at a point in the centerline of Marble Hill Road at the northwest corner of the above described "Parcel I", which point is and is

intended to be the same "beginning point" as Parcel I hereinabove;

THENCE northeasterly (north 55 degrees east, per above referenced deed) along the northwesterly boundary of Parcel I, a distance (per above referenced deed – 1988 D 605) of 234.09 feet to an iron pipe:

THENCE northwesterly (north 45 degrees east, per above referenced deed – 1988 D 605) a distance of 200 feet to a point;

THENCE southwesterly (south 55 degrees west, per above referenced deed – 1988 D 605) parallel with the first described course herein, and 200 feet distant therefrom, a distance of 234.09 feet to the centerline of Marble Hill Road;

THENCE southwesterly along said centerline of Marble Hill Road 200 feet to the point or place of beginning.

Containing by estimation 1 +/– acres.

BEING the same parcel as is referenced as the "adjoining" parcel belonging to the grantor herein, Melvin Phillips, and referenced as a starting point in Parcel I hereinabove and as lands adjoining Parcel I herein "on the north".

Parcel III

Commencing at an iron pipe on the easterly boundary of the lands purportedly of the State of New York, (TM # 333.00-1-46.00) which pipe marks the northeasterly corner of Parcel I above and the southeasterly corner of Parcel II above;

THENCE continuing northeasterly along the southeasterly boundary of the lands purportedly of

the State of New York a distance of 600+/– feet to the southeasterly corner of the lands purportedly of the State of New York;

THENCE southeasterly (south 45 degrees east, per above referenced deed – 1988 D 605) a distance of 208.71 feet to a point;

THENCE southwesterly (south 55 degrees west, per above referenced deed – 1988 D 605) along a line 208.71 from and parallel with the first described course herein a distance of 630+/– feet to the iron pin marking the southeasterly corner of "Parcel I" above;

THENCE northwesterly (north 55 degrees west, per deed referenced above – 1988 D 605) along the easterly line of Parcel I herein a distance of 208.71 feet to the point or place of beginning.

Parcel IV

Commencing at a point in the centerline of Marble Hill Road which point is 1325+/– feet southeasterly, as measured along said centerline, from the intersection of the centerline of Indiantown Road and the centerline of Marble Hill Road, and which point also lies on the common northwesterly boundary line of Lot # 3 of the Oneida Purchase of June 1842, and the southeasterly boundary line of Lot # 1 of the Oneida Purchase of June 1842;

THENCE southwesterly (approximately south 55 degrees west) along the common northwesterly boundary line of Lot # 3 of the Oneida Purchase of June 1842 and the southeasterly boundary line of Lot # 1 of the Oneida Purchase of June 1842, and along a southern boundary of and through the lands now or formerly of Dennison (2012/1896) and

the northerly boundary of lands purportedly of the State of New York (TM # 332.00-1-16.00) a total distance of 1960+/– feet to the easterly line of lands now or formerly of Schorman (2008 /6778);

THENCE southeasterly along the common boundary of the easterly boundary of lands now or formerly of Schorman (2008/6778) and the westerly boundary of the lands purportedly of the State of New York and the lands conveyed hereby, a distance of 860+/– feet to a corner;

THENCE northeasterly along the common boundary of Schorman (2008/6778) on the south and the lands purportedly of the State of New York on the north a distance of 500+/– feet to the northwesterly corner of lands now or formerly of Scheible (2749/39);

THENCE northeasterly along the common boundary of Scheible (2749/39) on the south and the lands purportedly of the State of New York on the north a distance of 575+/– feet to the point marking the southwest corner of lands now or formerly of Denison (2012/1896);

THENCE northwesterly along the westerly boundary of the lands now or formerly of Denison on the east and the lands purportedly of the State of New York on the west to a point twenty (20) feet southeasterly of the common boundary of Lots # 1 and 3 of the Oneida Purchase of June 1842;

THENCE northeasterly parallel to and twenty (20) feet from said common line of Lots # 1 and 3 of the Oneida Purchase of June 1842 through lands purportedly of Denison (2012/1896) and Moshier (2007/25259) a distance of 925+/– feet to a point in the centerline of Marble Hill Road;

THENCE northwesterly along the centerline of Marble Hill Road a distance of twenty (20) feet to the point or place of beginning.

Containing by estimation 20+/– acres of land.

The aforesaid four parcels comprising tribal lands belonging to the Oneida Nation/Orchard Hill Party and the grantor, Melvin L. Phillips, as further and more completely evidenced by the Exhibits (No. 1 to 12) annexed hereto.

Attachment

"Being and Habendum" Clause to Trust Deed made by Melvin L. Phillips

The grantor, Melvin L. Phillips, is a full-blooded Indian, being a direct descendent (great, great, great grandson) of William Day, a chief of the Orchard Party of the Oneida Tribe of New York, who, with other Oneida Tribe of New York chiefs on January 18, 1839, gave his free and voluntary assent to the January 15, 1838 Treaty made at Buffalo Creek, New York, between the United States and the New York Indians (7 Stat. 550, Article XIII), as amended by the resolution of the Senate of the United States on June 11, 1838.

The Affidavit of Lewis Day to United States Commissioner of Indian Affairs on October 16, 1901, **Exhibit 1**, pursuant to the Act of Congress approved February 9, 1900, to pay the judgment of the Court of Claims in favor of the New York Indians, rendered November 23, 1898, for lands set apart for them in Kansas under the terms of Article 2, of the treaty of Buffalo Creek, New York, January 15, 1838 (Lewis Day Affidavit), on file with the National Archives, establishes the lineage of successors in interest to the title of the subject property as follows:

> The said Melvin L. Phillips is the great, great grandson of Moses Day, who is the son of the said William Day, and Moses Day's wife Susan Johnson Day (sister of Chief William Johnson);
>
> The said Melvin L. Phillips is the great grandson of Lewis Day and Maggie Johnson Day;

The said Melvin L. Phillips is the grandson of Lucinda Day George, the daughter of the said Lewis Day and Maggie Johnson Day;

The said Lucinda Day George is the mother of Evelyn George Phillips; and

The said Evelyn George Phillips is the mother of the said Melvin L. Phillips.

The said Chief William Johnson signed the treaty of June 25, 1842 (New York State Archives Microfilm # AO448, Volume 3, pages 243-249), **Exhibit 2** (transcribed), between the Orchard Party of Oneida Indians residing in the Town of Vernon, Oneida County, and the State of New York.

In September 1993, the Orchard Party/Marble Hill (also known as Orchard Hill) Oneida convened in its historic meeting place, the old Methodist Church at the corner of Marble Road and Indiantown Road, Town of Vernon, Oneida County, New York. Thelma Buss, at that time, the Turtle Clan Mother and keeper of the roll of the Orchard Party/Marble Hill Oneida, chose Melvin L. Phillips as spokesman. The enrolled members of the Orchard Party/Marble Hill Oneida agreed with her choice at the meeting. The Grand Council of Chiefs of the Haudenosaunee of the Iroquois Confederacy extended formal recognition to the said Melvin L. Phillips as spokesman on September 11, 1994. **Exhibit 3.**

Lands included in the said Treaty of June 25, 1842, are depicted as Lots No. 1, 2, 3 and 4 on Historic Map 667, **Exhibit 4**, entitled Map of the Oneida Purchase from the Orchard Party, June 25, 1842. See Office of General Services, Bureau of

Land Management, Oneida Indian Reservation, Review of Treaties from 1788 Through 1846, Appendix A, February 2004, revised September 2004. (The following transcribed notes appear in the margin of Exhibit 4: "Filed by the Surveyor General, July 1, 1842, Arch. D. Campbell – Dep. Sec. of State. (This Land is in the Town of Vernon, County of Oneida – See Treaty)." "Nathan Burchard being duly sworn, deposed & says that the above map is true & correct & accurately shows the courses & distances ... of the purchase from the Orchard Party of the Oneida Indians made in Treaty June 25th 1842 from before him July 1, 1842."

Document A included in the said Treaty of June 25, 1842, identifies Moses Day and Susan Day as two of the sixteen Oneida members of the "Orchard Party who intend to remain on Lot number three named in said Treaty." Those Orchard Party members are also known as the Home Party.

The members of the Home Party and their descendants, including the said Melvin L. Phillips, have fulfilled the intention of those identified in the said Document A to remain on Lot No. 3 as members of the Home Party of the Orchard Indians; they have continuously used and occupied said Lot No. 3.

Section 1 of Chapter 185, page 244, 66th Session of the Laws of New York (April 18, 1843), **Exhibit 5**, provides that the "Oneida Indians owning lands in the counties of Oneida and Madison, are hereby authorized to hold their lands in severalty, in conformity to the surveys, partitions and schedules annexed to and accompanying the treaties made

with the said Indians, by the people of this state, in the year one thousand eight hundred and forty-two, and now on file in the office of the secretary of state ...", the said Treaty of June 25, 1842, being one of those treaties.

The said Moses Day certified that the said Document A contained an accurate list of all those of the Home Party and that the list was made "in full council with the consent and approbation of the whole Orchard Party of the Oneida Indians."

The said Susan Johnson Day is a Marble Hill Oneida and the sister of Oneida Chief William Johnson. See Lewis Day Affidavit. The said Susan Johnson Day is among the beneficiaries of Chapter 529, page 1279, Ninety-Second Session of the Laws of New York (May 3, 1869). **Exhibit 6**. Pursuant to that act, the Commissioners of the Land Office referred to in Article 2 of said Treaty were authorized to cancel the patent to "lot number two of the Orchard Indian purchase" upon a determination that the patent had been "obtained illegally or by error, or by mistake of law or facts."

In his last will and testament, November 13, 1926, **Exhibit 7**, the said Lewis Day bequeathed the use of all his real property on the said Lot No. 2 for "her natural life" to his daughter Lucinda Day George and at her death to his grandchildren Elsie May Hyonoust, Irene Hyonoust, Melvin George, Evelyn George and Pierre George.

In her last will and testament, **Exhibit 8**, December 11, 1952, the said Lucinda Day George stated that "In accordance with the wish of my father and my own wish, I direct that all the land belonging to the George family property and at

present owned in shares by myself and my children, shall not be sold, but shall be retained intact for the use of my children during their lifetime and upon the death of the last of my children shall be divided among the grandchildren; with the following exception: I leave the three-cornered piece of land belonging to this property and adjoining Nelson Johnson's land to Nelson Johnson," the George family property being a portion of the said Lot No. 2 and a portion of the said Lot No. 3.

In her last will and testament, December 11, 1952, the said Lucinda Day George bequeathed a portion of the said Lot No. 2 to her daughter Elsie Eckhard, "provided only that on her death her portion of the land goes back to the family property."

In her last will and testament, December 11, 1952, the said Lucinda Day George bequeathed the house and land on the said Lot No. 3 occupied by her daughter Evelyn Phillips to her "as long as she lives, but at her death both house and land on which it stands are to revert to the family property."

In her last will and testament, December 11, 1952, the said Lucinda Day George stated that the said Melvin George "may have the use of all the land on which my house and Evelyn Phillips' house stand **(sic)** during his lifetime, and at his death divide both land and houses of this property among the grandchildren," said land being portions of Lot No. 2 and Lot No. 3.

In her last will and testament, December 11, 1952, the said Lucinda Day George bequeathed the house and land on the said Lot No. 2 occupied by her to her son Pierre George for his use during his lifetime and at his death" to her son Melvin George.

Pierre George died on or around March 18, 1995.

In her last will and testament, December 11, 1952, the said Lucinda Day George identified Evelyn Phillips as her daughter and bequeathed to her "the use of the house in which she lives as long as she lives, but at her death both house and land on which it stands are to return to the family property," said land consisting of twenty (20) acres more or less, being the portion of Lot No. 3 identified as Parcel 16 on 2014 Tax Map # 333.000-1, Town of Vernon, Oneida County, State of New York, together with a road way twenty (20) feet wide to it from Marble Road on Lot number three abutting its northwest boundary and traversing Parcel 43.10 and Parcel 43.2 depicted on said 2014 Tax Map # 333.000-1, Town of Vernon, Oneida County, State of New York.

The land depicted on **Exhibit 9**, Oneida County Tax Map No. 333.000-1 for the Town of Vernon, NY, subject to the conveyance into trust by the said Melvin L. Phillips being,

ALL THAT TRACT OR PARCEL OF LAND situate in the Town of Vernon, Oneida County, State of New York, distinguished as Lot No. 2 of the Orchard Party of Oneida Indians by Treaty bearing date the 25th of June 1842 and bounded and described in the field book and map of said tract made by Nathan Burchard on file with the Secretary of State. See Catalogue of Maps and Surveys in the Offices of the Secretary of State, State Engineer and Surveyor and Comptroller, and the New York State Library (1859) **Exhibit 10** (cover page) and more specifically described as follows: that portion of Parcel 48, one acre more or less, lying within

Lot No. 2 and Lot No. 4 established by said treaty that is subject to the indenture recorded April 30, 1974, **Exhibit 11**, in Liber 1988, Page 605 for land owned by the said Melvin L. Phillips and depicted on 2014 Oneida County Tax Map #333.000-1 for the Town of Vernon, NY; and those portions of Parcel 46 and Parcel 48 depicted on said 2014 Oneida County Tax Map #333.000-1 for the Town of Vernon, NY, within said Lot No. 2 and bounded as follows: beginning at a point where the boundary between the said Lot No. 2 and Lot No. 4 meets Marble Road (formerly known as Knoxboro Road) thence northwesterly along the centerline of said Marble Road four hundred (400) feet more or less; thence northeasterly three hundred (300) feet more or less on a line parallel to the said boundary between Lot No. 2 and Lot No. 4; thence southeasterly two hundred (200) feet more or less to the boundary of Parcel No. 46 on said 2014 Oneida County Tax Map #333.000-1; thence northeasterly on a line parallel to the eastern boundary of Lot No. 2 to the northern boundary of Lot No. 2; thence southeasterly to the boundary between Lot No. 2 and Lot No. 4; thence southwesterly on said boundary to the point of beginning.

ALSO ALL THAT TRACT OR PARCEL OF LAND situate in the Town of Vernon, Oneida County, State of New York, distinguished as Lot No. 3 of the Orchard Party of Oneida Indians by Treaty bearing date the 25th of June 1842 and bounded and described in the field book and map of said tract made by Nathan Burchard on file in the Secretary's office and more specifically described as "Wooded & Overgrown Area, State of New York (Reputed Owner), Moses Day (Formerly), (Melvin

George Formerly)" on map titled "Portion of the Lands of Thurston Farms, Inc., Marble Road, Town Of Vernon – Oneida County, State of New York File No. 05-137/5 and dated October 16, 2007, and further described on said 2014 Oneida County Tax Map #333.000-1 as Parcel 16, consisting of 20 acres more or less; and that portion of Parcel 43.2 and Parcel 43. 10 within said Lot No. 3 depicted on 2014 Oneida County Tax Map #333.000-1, bounded as follows: beginning at the point on the intersection of the boundaries of Lots No. 1, 2, 3 and 4 on Historic Map 667, **Exhibit** 4, entitled Map of the Oneida Purchase from the Orchard Party, June 25, 1842; thence southwesterly on the boundary between Lot No. 1 and Lot No. 3 to the boundary of Parcel 16 within said Lot No. 3 depicted on 2014 Oneida County Tax Map #333.000-1; thence twenty (20) feet easterly on the boundary of said Parcel 16; thence northeasterly to the boundary between Lot No. 3 and Lot No. 4; thence twenty (20) feet northwesterly to the place of beginning.

Being the same premises exclusively owned, possessed and occupied by Melvin L. Phillips variously for residential, commercial, hunting, farming, gathering, water supply, and ceremonial uses by him and his heirs and assigns and as steward of said premises pursuant to his authority and responsibility as spokesperson for the Marble Hill Oneida.

Being also land on which the Oneida ancestors of Melvin L. Phillips were settled, and secured in possession pursuant to Article II of the Treaty with the Six Nations, 7 Stat. 15, October 22, 1784.

Being also a portion of the land that, pursuant to Article II of the Treaty with the Six Nations, 7 Stat. 44, November 11, 1794, the United States: (1) acknowledged were reserved to be the property of the Oneida Nation in its treaties with the State of New York; (2) pledged never to claim nor disturb the possession of the Oneida Nation or the free use and enjoyment of said land by Oneida Indians or their Indian friends residing thereon: and (3) pledged would remain in the Indians residing there until they choose to sell the same to the people of the United States.

Being also a portion of the land referred to in Article XIII of the Treaty with the New York Indians at Buffalo Creek, 7, Stat. 550, January 15, 1838, for which arrangements were not made to be purchased by the State of New York.

Being also a portion of the land referred to as the said Lot No. 3 in the said Treaty of June 25, 1842.

Being also a portion of the land in the said Lot No. 2, the patent to which that was issued on or about December 17, 1867, to William Hamilton, was cancelled pursuant to the authority of Chapter 529 of the Laws of the 92 Session of the New York Legislature (May 3, 1869) because the patent had been "obtained illegally, by error or by mistake." Id, section 1.

MELVIN L. PHILLIPS, SR.
and
the "MELVIN L. PHILLIPS, SR./
ORCHARD PARTY TRUST, dated August 2015"

EXHIBIT 1

#406

The Commissioner of Indian Affairs:

I hereby make application for such share, as may be due me, of the fund appropriated by the act of Congress approved February 9, 1900, to pay the judgment of the Court of Claims in favor of the New York Indians, rendered November 28, 1898, for lands set apart for them in Kansas under the terms of Article 2, of the treaty of Buffalo Creek, N. Y., January 15, 1838. The evidence of identity is herewith subjoined:

1. State full name. Louis Day
2. Residence. Town of Williamson, Wis.
3. Town or Post-office. Varnum
4. County. Oneida
5. State. New York
6. Date of birth and place. 8/14/1830 Town of Vernon
7. To what tribe or band do you belong? Oneida
8. By what right do you claim membership? My mother Lucy Cadiz Johnson a sister of William Johnson a Chief of the Oneidas and Indian Reservation from whom I obtained my interest.
9. Are you married? Yes
10. Name of wife or husband, and age if living. Margaret Day age 49
11. If an Indian, to which tribe or band of New York Indians does he or she belong? Oneida
12. Names of all your living children and their ages, with date of birth:

Name.	Age.	Date.
Lucinda Day	19	April 27 1882

13. Do you and your family draw annuities from the United States? Yes
14. At what Agency? Salamanca New York
15. Give names of your father and mother, also wife's or husband's parent's as the case may be:

Man's parents.	Woman's parents.
Moses Day	William Johnson
Lucy Johnson	Dolly Cornelius

16. Where were they born? Town of Bombay N.Y.
17. Did they reside in the United States? Yes
18. To which tribe or band of New York Indians did they belong? Oneida

NOTE.—TO BE EXECUTED IN DUPLICATE. ONLY ONE COPY TO BE SWORN TO.

19. Name all their children:

William Day — Alyns Day
Henry Day — Mely Day
Timothy Day — Louise Day
Abram Day — Margaret Day

20. Date of death of father and mother:

Father, August 11 1882 Mother, January 23rd 1897

21. Were they enrolled at any agency; if so, state name of such with approximate years.

Fox, Salamanca Agency

22. State whether you have resided elsewhere than in the United States; if so, where?

No

23. State names of grandparents, their tribes or band, on both father's and mother's side, if possible:

William Day Jr. Oneida
G.M. Indiana "
Hannah Johnson Oneida
Betsy Cornelius "

24. Where did they reside? Town of Vernon N.Y.

25. Give names of all their children and residence, if possible:

Moses Day — town of Vernon
Nicholas Day " "
Mary Day " "

26. Have you ever applied for enrollment for annuities, land or other benefits; and if so and been denied, state the date. No

27. Did your grandparents, parents, or yourself ever possess land in Kansas given by the United States?

Claimed but never possessed

To expedite identification, claimants should give the full names, if possible, of their paternal and maternal ancestors back to 1835.

G. F.
William Day
G.M. Indiana
Father Walter
Moses Day
Susan Johnson
G. Father Johnson
Hannah Johnson
Betsy Cornelius

REMARKS.

(Under this head the applicant may give any additional information that he believes will assist in proving his identity.)

Note.—Answers should be brief but explicit; the words "Yes," "No," "Unknown," etc., may be used in cases where applicable. Read the questions carefully.

I solemnly swear that the foregoing statements made by me are true to the best of my knowledge and belief.

(Signature) Lewis Dury

Subscribed and sworn to before me this 16th day of October, 1901.

My commission expires March 20th, 1902. L. L. Judson

Notary Public.

AFFIDAVIT.

(The following affidavit must be sworn to by two or more witnesses who are well acquainted with the applicant.)

Personally appeared before me B. F. Gray and Charles H. Christie, who being duly sworn, on oath depose and say that they are well acquainted with Lewis Dury, who makes the foregoing application and statements, and have known him for 32 years and 20 years, respectively, and know him to be the identical person he represents himself to be, and that the statements made by Lewis are true, to the best of their knowledge and belief, and they have no interest whatever in his claim.

Witnesses by mark. Signatures of witnesses.

B. F. Gray

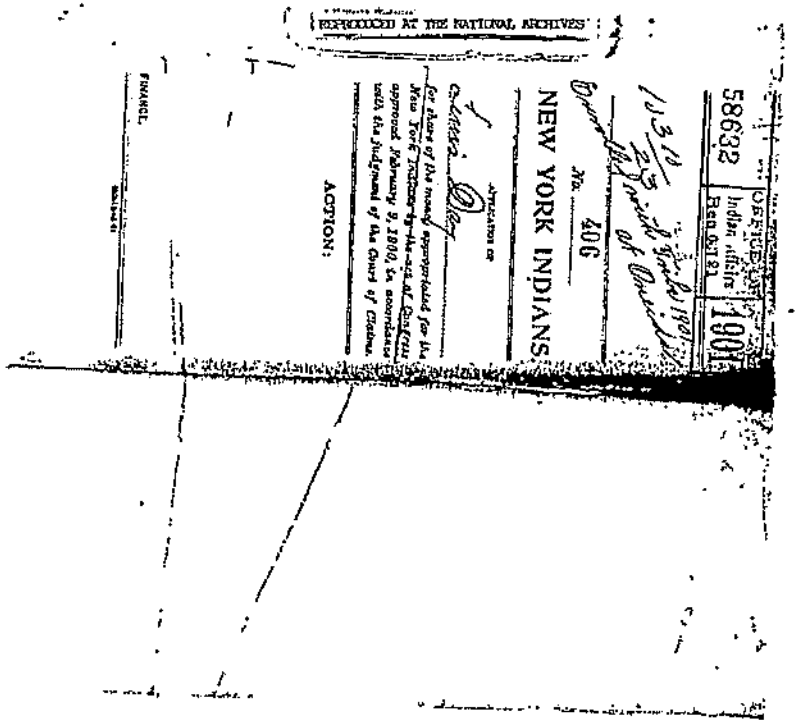
Charles H. Christie

Subscribed and sworn to before me this 16th day of October, 1901.

My commission expires: March 20th, 1902. L. L. Judson

Notary Public.

Note.—Affidavits should be made, wherever practicable, before a notary public, clerk of court, or before a person having a seal. If sworn to before an Indian agent or disbursing agent of the Indian Service, it need not be executed before a notary, etc.


REPRODUCED AT THE NATIONAL ARCHIVES
58632
Indian affairs
Received
1901
No. 406
NEW YORK INDIANS.
ACTION:
FINANCIAL

MELVIN L. PHILLIPS, SR.
and
the "MELVIN L. PHILLIPS, SR./
ORCHARD PARTY TRUST, dated August 2015"

EXHIBIT 2

Pg. 243 * - A Treaty Between the Orchard Party of the Oneida Indians residing in the town of Vernon county of Oneida and State of New York constituting party of the first part and the people of the State of New York by their lawful agents the Commissioners of the Land Office being party of the Second part Witnesseth as follows to wit:

JUNE 25, 1842 TREATY

Article 1 The above named party of the first part for and in consideration of the agreement hereinafter contained another part of the party of the second part and the receipt of the sum of money hereinafter mentioned to be paid Do hereby grant, bargain, sell, cede and surrender to the people of the State of New York all the right title, estate and interest in and to all that part of their reservation known and distinguished as Lots Number One, two and Four containing in the aggregate one hundred fourteen 24/100 acres in Nathan Burchards Survey and located in the town of Vernon county of ...

Pg. 248 Referred to in the foregoing treaty contains an accurate list of all those of the Orchard Party who intend to remain on Lot number three named in said Treaty known as the Home party of the Orchard Indians the names and members of the home party.

NYSTATE ARCHIVES MICROFILM #A0448 VOL. 3

Document A

William Johnson chief			
Elizabeth Johnson			
Hannah Johnson			11 souls
Jenny Johnson		Moses Day	
Caty Johnson		Susan Day	
David Johnson	6	Margaret Day	
		Sally Day	
Margaret John		Baptist Day	5
Dolly John		amount	16 souls
Thomas John			
Caty John			
Eve John	5		
	11 souls		

Oneida County SS:

We hereby certify that documents A and B contain an accurate list of all those of the emigrating and home party of the Orchard Party of the Oneida Indians and that the same were made by us in full council with the consent and approbation of the whole of the Orchard Party of the Oneida Indians.

Moses x Day — William x Cornelius Chief

Moses x Cornelius — William x Johnson

Henry x Cornelius — David x Johnson

In presence of us Nathan Burchard
Jacob Cornelius
Joseph Cornelius

MELVIN L. PHILLIPS, SR.
and
the "MELVIN L. PHILLIPS, SR./
ORCHARD PARTY TRUST, dated August 2015"

EXHIBIT 3

HAUDENOSAUNEE

ONEIDA NATION OF ORCHARD HILL
MELVIN L. PHILLIPS - REPRESENTATIVE
VIA RD#2 MARBLE RD
ONEIDA, N.Y. 13421
(315) 363-9293

To Whom it May Concern:

This letter is to inform you that on September 11, 1994 the *Grand Council of Chiefs* of the *Five Nations Iroquois Confederacy* - in our language the *Haudenosaunee* - in accord with the traditional laws of the Longhouse extended formal recognition to Melvin L. Phillips as Representative of the *Oneida Nation of Orchard Hill*.

The *Orchard Hill Oneidas* dwell on lands that have been passed down from generation to generation since time immemorial. These sacred lands remain unrelinquished and unceded to the *United States*, or to any other foreign government. Our people are the direct descendants of the Oneidas who have remained in these ancestral lands when the other citizens of the original *Oneida Nation* were scattered to the Onondaga Territory, Canada, and Wisconsin due to treaties entered into in the 1840s.

We maintain our own distinctive customs, traditions, treaties, rolls, and burial ground. As a separate and independent people we are fully participating members of the *Five Nations Iroquois Confederacy*. We continue to manage our own affairs, and respect as sacred the traditional form of government of the *Haudenosaunee*.

Representative - Melvin L. Phillips Melvin L Phillips

Clanmother - Thelma Buss Thelma Buss

In attestation of the foregoing:
Tadodaho of the *Haudenosaunee* - Leon Shenandoah Chief Leon Shenandoah Tadodaho

MELVIN L. PHILLIPS, SR.
and
the "MELVIN L. PHILLIPS, SR./
ORCHARD PARTY TRUST, dated August 2015"

EXHIBIT 4

Historic Map No. 677

MAP

OF THE

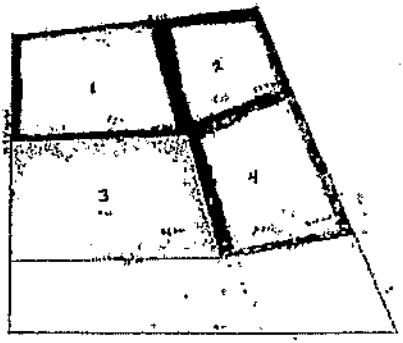
ONEIDA PURCHASE

FROM THE

ORCHARD PARTY

JUNE 25

1842



MELVIN L. PHILLIPS, SR.
and
the "MELVIN L. PHILLIPS, SR./
ORCHARD PARTY TRUST, dated August 2015"

EXHIBIT 5

Duration of act. § 7. This act shall continue in force for two years from the time of its passage.

CHAP. 185.

AN ACT *relative to the Oneida Indians.*

Passed April 18, 1843.

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

Indians owning lands to hold the same in severalty. § 1. The Oneida Indians owning lands in the counties of Oneida and Madison, are hereby authorized to hold their lands in severalty, in conformity to the surveys, partitions and schedules annexed to and accompanying the treaties made with the said Indians, by the people of this state, in the year one thousand eight hundred and forty-two, and now on file in the office of the secretary of state; and the lots so partitioned and designated by said survey to the said Indians, shall be deemed to be in lieu of all claims and interest of the said Indians, in and to all other lands and property in the Oneida Reservation, except the mission lot on lot one, and the church lot on lot two, of the Oneida Purchase, of May 23d, 1842, which are to be held by the said Indians as tenants in common.

Superintendent to be appointed. § 2. The governor shall appoint a superintendent of the Oneida Indians, who shall hold his office for the term of two years, subject to be removed for cause.

Indians may sell and convey lands. § 3. It shall be lawful for the said superintendent of the Oneida Indians, upon application made to him for that purpose, by any Indians or Indian owning lands as aforesaid, to sell and convey such lands to the person or persons so applying, provided the price agreed upon between said Indians or Indian and the said person or persons so applying to purchase said lands, shall, in the opinion of the said superintendent, be not less than a fair and reasonable price therefor: And the said superintendent shall receive, at the time of making such sale, not less than one-fourth part of the purchase money in hand, and shall secure the residue by bond and mortgage, payable within four years from the date thereof, with annual interest, to the said superintendent and his successors in office, in trust for the said Indians respectively. A deed of an Indian shall be valid to convey the title of himself, his wife and minor children; and every deed executed by virtue of this act, shall be acknowledged by the grantor before the first judge of Madison county, and the consent of the superintendent shall be endorsed thereon; and, when so

executed and acknowledged and certified, shall be recorded in the county in which said land shall lie, with the same effect as other deeds.

Superintendent limited to keep account of debit and credit with Indians.

§ 4. The said superintendent shall keep a book, in which he shall open and keep a full account of debit and credit with each Indian for whom he acts and for whom he shall receive any money by virtue of this act, which book shall at all times be open for inspection to all persons; and he shall pay over all money as it shall, from time to time, come to his hands, to the Indian or Indians to whom it may rightfully belong, on demand, deducting therefrom his reasonable charges.

His power to sell and convey lands by consent of Indians.

§ 5. The said superintendent shall, with the consent of a majority of the chiefs and head men of the said Indians, sell and convey the above mentioned lots of land, held according to Indian usages, and sanctioned by treaties with them on the part of this state, as the common property of all the Oneidas who did not cede their lands to the people of this state previous to the treaty made with them, March 8th, 1841, for a fair price, into any purchases or purchasers, by requiring from them cash payments: And the conveyances shall be made, executed, and acknowledged by the said superintendent; and the consent of the chiefs and head men in council shall also be acknowledged in the presence of an officer duly qualified to take acknowledgments of deeds; and such acknowledgments shall be endorsed on such deeds, in the like manner and to the same effect as conveyances mentioned in the third section of this act; and the money arising from the sale of said common lands, after deducting the reasonable expenses incurred in the survey, description and the partition of all lands which are the subject of this act, and of all the expenses in the negotiation and conclusion of the administration of their public affairs, shall be paid by him to the said chiefs and head men.

Effect of such deeds.

§ 6. The deeds and conveyances made as aforesaid, shall convey all the right, title and interest of the said Indians or Indian, whose lands shall have been conveyed as aforesaid, of, in and to the same, and shall vest in the purchaser or purchasers, his or their heirs or assigns forever, an absolute estate of inheritance in fee simple.

Superintendent to give bond with sureties.

§ 7. Before the said superintendent shall proceed to execute the trust reposed in him by this act, he shall, with two good and sufficient sureties to be approved by the first judge of Madison county, execute a bond to the people of this state, in the sum of five thousand dollars, conditioned for the faithful performance of the trust reposed in him by this act; which said bond shall be filed in the office of the comptroller of this state.

To report to comptroller.

§ 8. The said superintendent shall, on the first Monday of February in each and every year, report to the comptroller of this state, his proceedings under and by virtue of this act, stating his account with each Indian, required to be kept as above.

MELVIN L. PHILLIPS, SR.
and
the "MELVIN L. PHILLIPS, SR./
ORCHARD PARTY TRUST, dated August 2015"

EXHIBIT 6

Chap. 529.

AN ACT to authorize the Commissioners of the Land Office to vacate a certain patent, issued to William Hamilton, to lands claimed by the widow and heirs of William Johnson, deceased, of the Oneida Indians.

Passed May 3, 1869; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Conditions, upon which letters patent may be vacated.

SECTION 1. The Commissioners of the Land Office are hereby authorized to vacate a certain patent, issued on or about the seventeenth day of December, eighteen hundred and sixty-seven, to William Hamilton, to certain lands claimed by the widow and heirs of William Johnson, deceased, member of the Oneida tribe of Indians, for twenty-eight acres of land situate in the town of Vernon, Oneida county, and being lot number two of the Orchard Indian purchase of June twenty-fifth, eighteen hundred and forty-two, provided the same was obtained illegally or by error, or by mistake of law or facts.

Land commissioners, may make compensation to widow and heirs.

§ 2. And in case it shall satisfactorily appear that said William Hamilton was legally entitled to said patent for said premises, then said commissioners are hereby authorized and required to make to said widow and heirs of said William Johnson, such compensation as shall in their judgment be equitable in the premises, taking into consideration the value of said lands at the date of such sale to said Hamilton.

§ 3. This act shall take effect immediately.

MELVIN L. PHILLIPS, SR.
and
the "MELVIN L. PHILLIPS, SR./
ORCHARD PARTY TRUST, dated August 2015"

EXHIBIT 7

LAST WILL AND TESTAMENT.

I Lewis Day of the town of Vernon in the County of Oneida, and State of New York, being of sound mind and memory do make publish and declare this my last will and testament, in the matter following, that is to say:

FIRST, I direct that all my just debts and funeral expenses be paid.

SECOND, I give unto my daughter Lucinda George the use of all my property both personal and real of every name and nature during her natural life.

THIRD, At the death of my daughter Lucinda George, I give devise and bequeath unto my grand children all of my property equally both personal and real their names being as follows: Elsie May, Hyonoust and Irene Hyonoust also Melvin George, Evelyn George and Pierre George and any after born children to take the same share with the others as mentioned and in existance at the time of the making of said will.

LASTLY, I hereby appoint Lucinda George my daughter execrutrix and in case of her death Frank George, Executor and trustee of this my last will and testament hereby revoking all former wills by me made. I also authorize my executor and trustee to do and preform all things incumbent upon them to carry out the terms of said will and if it becomes necessary for them to sell the real property to carry out the terms of the will they are authonized to execute and deliver a deed with the same force and effect as though done by me during my life time.

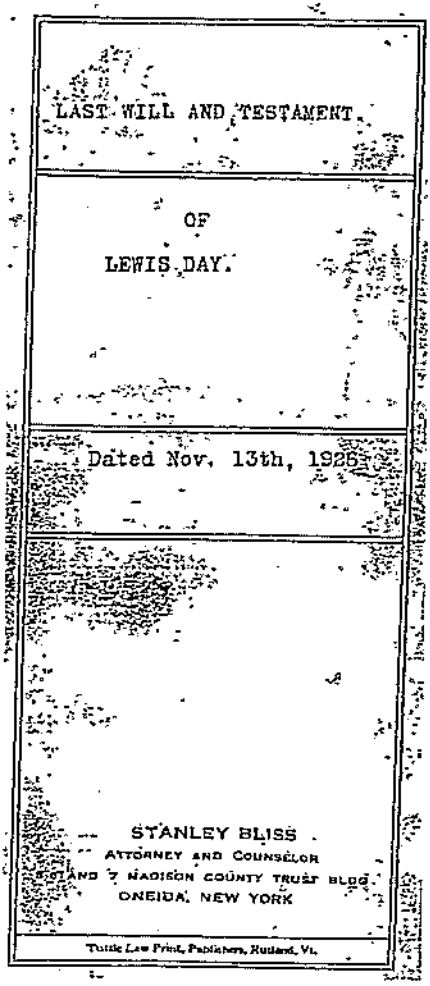
IN WITNESS WHEREOF, I have hereunto subscribed my name the thirteenth day of November, 1926 Lewis Day

We, whose names are hereto subscribed, DO CERTIFY, that on the thirteenth day of November, 1926 Lewis Day the testator subscribed his name to this instrument in our presence and in the presence of each of us, and at the same time, in our presence and hearing declared the same to be his last will and testament and

requested us, and each of us to sign our names thereto as witnesses to the execution thereof which we hereby do in the presence of the testator and of each other of the said date and write opposite our names our respective places of residence.

Robert L. Crockett residing at 302 Main St. Alameda

Estelene McCracken residing at 1690 Caledonia Ave. Oak.



LAST WILL AND TESTAMENT

OF

LEWIS DAY.

Dated Nov. 13th, 1926

STANLEY BLISS

ATTORNEY AND COUNSELOR

AND 7 MADISON COUNTY TRUST BLDG.

ONEIDA, NEW YORK

Tuttle Law Print, Publishers, Rutland, Vt.

MELVIN L. PHILLIPS, SR.
and
the "MELVIN L. PHILLIPS, SR./
ORCHARD PARTY TRUST, dated August 2015"

EXHIBIT 8

Wm. Williamson Law Book Co., Publishers, Rochester, N. Y.

Last Will and Testament

I Lucinda George, of the Town of Vernon, in the County of Oneida and State of New York, being of sound mind and memory, do make, publish and declare this my last Will and Testament, in manner following, that is to say:

First—I direct that all my just debts and funeral expenses be paid.

Second— I leave my house and my furniture to my son Melvin George for his use during his lifetime and at his death, if he predeceases them, I direct that my daughters Elsie Eckhard and Irene Burdick divide the furniture share and share alike, and the house goes to my son Melvin George.

Third - I leave the piano to my granddaughter, Ruthie Yardley.

Fourth - In accordance with the wish of my father and my own wish, I direct that all the land belonging to the George family property and at present owned in shares by myself and my children, shall not be sold, but shall be retained intact for the use of my children during their lifetime and upon the death of the last of my children shall be divided among the grandchildren; with the following exceptions: I leave the three-cornered piece of land belonging to this property and adjoining Nelson Johnson's land to Nelson Johnson.

I wish that the disposition of the rights of my children in the family property consisting of the land and the houses standing upon it or to be erected upon it should be made as follows:

My daughter Elsie Eckhard, who owns her house, may live in that house or move it from the property and bequeath it or sell it as she desires, provided only that on her death her portion of the land goes back to the family property.

My daughter Irene Burdick, who owns one acre of the family property, may build on it and dispose of such building as she wishes, but at her death her share of the land is to revert to the family property.

My daughter Evelyn Phillips is to have the use of the house she lives in as long as she lives, but at her death both house and land on which it stands are to return to the family property.

My son Melvin George may have the use of all the land on which my house and Evelyn Phillips' house stand during his lifetime, and at his death divide both land and houses of this property among the grandchildren.

Lastly, I hereby appoint my son, Melvin George, executor of my will.

Justin — I hereby appoint Malvin George

executor of this, my last will and testament, with full power and authority to sell and convey real or mortgage real estate, hereby revoking all former wills by me made.

In Witness Whereof, I have hereunto subscribed my name the 11th day of December, in the year One thousand nine hundred and 52

DIED AUGUST 22, 1957 @ ONEIDA CITY HOSPITAL

Lucinda George L. S.

And We Do Certify that the foregoing instrument, partly printed and partly written, was at the date thereof (December 11, 1952) at Kenwood, Oneida, Madison County, N. Y., signed, sealed, published and declared by the said testatrix, as and for her last will and testament, in the presence of us, who, at her request and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto.

Florence B. Aldrich residing at Kenwood, Oneida N.Y.

Ethel C. Williams residing at Oneida, N.Y.

Will

of

Lucinda George

Dated December 11, 1952

MELVIN L. PHILLIPS, SR.
and
the "MELVIN L. PHILLIPS, SR./
ORCHARD PARTY TRUST, dated August 2015"

EXHIBIT 9

Map on page 195a
in 8.5 by 11 inch section

MELVIN L. PHILLIPS, SR.
and
the "MELVIN L. PHILLIPS, SR./
ORCHARD PARTY TRUST, dated August 2015"

EXHIBIT 10

CATALOGUE

OF

MAPS AND SURVEYS,

IN THE

OFFICES

OF THE

SECRETARY OF STATE, STATE ENGINEER AND SURVEYOR,

AND

COMPTROLLER,

AND THE

NEW YORK STATE LIBRARY.

PRINTED BY ORDER OF THE ASSEMBLY AND UNDER THE DIRECTION OF THE SECRETARY OF STATE, 1851, AND

REVISED, CORRECTED AND ENLARGED BY ORDER OF THE ASSEMBLY AND UNDER THE DIRECTION OF THE SECRETARY OF STATE, BY

DAVID E. E. MIX., C. E.

ALBANY:
PRINTED BY CHARLES VAN BENTHUYSEN.
1859.

MELVIN L. PHILLIPS, SR.
and
the "MELVIN L. PHILLIPS, SR./
ORCHARD PARTY TRUST, dated August 2015"

EXHIBIT 11

Indenture on page 199a
in 8.5 by 11 inch section

MELVIN L. PHILLIPS, SR.
and
the "MELVIN L. PHILLIPS, SR./
ORCHARD PARTY TRUST, dated August 2015"

EXHIBIT 12

MELVIN L. PHILLIPS, SR./ ORCHARD PARTY TRUST DECLARATION

On this 1st day of ~~August~~ September, 2015, MELVIN L. PHILLIPS, SR., presently of 4675 Marble Road, Oneida, NY 13421 (hereinafter referred to as "Grantor"), and MELVIN L. PHILLIPS, SR. in his capacity as spokesman, for the Orchard Party / Marble Hill (a/k/a Orchard Hill) and as "representative" to the Grand Council of Chiefs of the Haudenosaunee, in accordance with the traditional laws of the Longhouse presently of 4675 Marble Road, Oneida, NY, 13421 (hereinafter referred to as "Trustee"), hereby declares and accepts the responsibility to act as Trustee for the benefit of his lineal heirs and all current and future members of the Orchard Party, relative to and over certain real property currently owned, occupied, titled to, possessed by, and under the stewardship of MELVIN L. PHILLIPS, SR. as hereinafter described. The name of this Trust will be the "MELVIN L. PHILLIPS, SR. / ORCHARD PARTY TRUST dated August of 2015".

1) TRUST PROPERTY. The Grantor, desiring to create a Trust for the benefit of himself, his lineal heirs as well as the present and future members of the Orchard Party, hereby transfers and conveys to the Trustee (by deed recorded in the Oneida County Clerk's Office) certain real property as more particularly and specifically described on the attached Schedule "A" (hereinafter referred to as the "trust property"), in trust for the following uses and purposes, and on the conditions hereinafter stated. It is the intent of

MELVIN L. PHILLIPS, SR., to relinquish all personal ownership interest, occupancy and possessory rights in all real property now or hereafter transferred and assigned to the Trustee.

2) DEFINITIONS. Whenever the following terms are used in this Trust, they shall be defined as follows:

a) Trust principal (corpus): all Trust real property.

b) Net income: interest, rents after all expenses chargeable to their production, if any.

c) Interested parties: For the New York Estates, Powers and Trusts Law, Section 7-1.9, the "interested parties" to this Trust Agreement shall consist only of the lineal descendants of the Granter and any others named under Paragraph "4 c)", and the Grantor, if living and competent.

3) PURPOSE. The purpose of this trust is to insure, in furtherance of and in keeping with the intent of the ancestors of MELVIN L. PHILLIPS, SR., and the resulting previously stated and agreed upon intent of the State of New York (as established by Treaty, Statute and Resolution(s)), and the members of the Orchard Party past, present and future, that the lands described herein will now and in the future be reserved to MELVIN L, PHILLIPS, SR,, and his heirs and lineal descendants if said heirs and descendants actually occupy, possess and live on the lands described herein for uses including but not specifically limited to: residential, recreational, stewardship, social, cultural, ceremonial, commercial, hunting, agricultural, and gathering. And should MELVIN

L. PHILLIPS, SR., leave no lineal descendants, or none who meet the foregoing possession and occupancy obligations, then, and in that event, to other members of the Orchard Party who actually live on and occupy the said lands described herein.

4) DISPOSITIVE PROVISIONS. The Trustee shall hold and manage the Trust property for the benefit of MELVIN L. PHILLIPS, SR., his lineal descendants who live thereon or who use the lands for the purposes and uses mentioned herein above.

a) For so long as MELVIN L. PHILLIPS, SR., is living he shall have the absolute and unfettered right to live upon occupy, possess and use the lands which constitute the corpus of this trust for the purposes listed hereinbefore.

b) In the event any government action or threatened government action impairs or threatens to impair, or threatens to defeat the stated purpose and intent of this trust or impairs the grantor's or the grantor's lineal descendant's or future members of the Orchard Party's right to use, occupy and live upon the lands which are the corpus of this Trust, the Trustee, acting jointly with at least one other beneficiary, in his sole and absolute discretion, may terminate this Trust and distribute the corpus as he in his sole and absolute discretion deems proper and appropriate.

c) This Trust shall automatically terminate on the happening of both of the following events:

(1) the death of MELVIN L. PHILLIPS, SR., and

(2) the failure of any of MELVIN L. PHILLIPS, SR.'s, lineal descendants to live upon, possess

and occupy the lands constituting the corpus of this trust or upon their collective determination that none of them intend to live upon, possess and occupy the lands described herein. Once no lineal descendant of MELVIN L. PHILLIPS, SR., resides upon, possesses and/or occupies said lands, then and in that event this trust shall terminate and the title to the lands herein shall pass collectively to the then surviving members of the Orchard Party then living upon, occupying and using said lands.

Nothing herein shall obligate the Trust or Trustee to pay any portion of the carrying charges which may be incurred by the real property (i.e., insurance, maintenance, etc.) all such charges being the sole obligation of the person or persons living upon, occupying and using the real property and upon said individuals failing to do so then their respective rights hereunder shall cease.

Nothing contained herein shall be interpreted as altering the tax exempt status of the trust principal (corpus) as it currently exists under New York State law.

5) ADDITIONS TO TRUST PROPERTY. From time to time, additions may be made to the Trust property and such additions to the Trust property shall be received by the Trustee and administered in accordance with the terms and conditions of this Trust Agreement.

6) TRUSTEES' POWERS AND DUTIES. In addition to any powers hereinbefore conferred upon the Trustee, and subject to any rights or uses reserved to the beneficiaries, the Trustee, in

accordance with prudent fiduciary standards, is empowered to take any action desirable for the complete administration of the Trust created hereunder, including, but not by way of limitation, the power to hold and own real property; to use Trust funds to improve, maintain, and preserve Trust property; and to compromise any claim against or in favor of the Trust to the extent deemed advisable by the Trustee; and, the power to remove an individual or entity who/which are not in compliance with the terms of this trust. Upon the termination of this Trust, the Trustee may continue to exercise any of the powers described above as they shall deem reasonable and necessary to wind up the affairs of the Trust and to distribute the assets of the Trust to the named beneficiaries. The Trustee herein shall be permitted to qualify and act as such without the giving of a bond for the faithful performance of their duties.

The Trustee hereby waives the right to receive any statutory or other fee for carrying out the duties of Trustee.

7) SUCCESSOR TRUSTEE. In the event the Trustee herein is unable to continue to serve in such capacity, whether because of death, disability, resignation or otherwise, DANIEL MARK PHILLIPS, (the grantor's son) presently of 4669 Marble Road, Oneida, NY, 13421 shall serve as Successor Trustee. Should the said DANIEL MARK PHILLIPS also be unable to serve for any reason whatsoever, then and in that event I direct that the Trustee shall be any other direct lineal descendant of MELVIN L. PHILLIPS, SR. Who are then residing upon and possessing the land which constitutes the corpus of this trust, and if none,

then and in that event such person as is then designated as "spokesman" by the Orchard Party. Said Successor Trustee(s) shall have the same obligations, responsibilities and powers as the original Trustee and shall be bound, in all respects, by all of the terms and conditions of this Trust Agreement.

8) SITUS. The Trust created hereunder shall be governed and regulated in accordance with the laws, rules and governing regulations of the State of New York and of the Orchard Party, and in the event of a conflict between the two then and in that event the Orchard Party's rules, regulations, laws, traditions and decisions shall prevail and control.

IN WITNESS WHEREOF, the parties hereto have executed this instrument in duplicate the day and year first above written.

/s/ Melvin L. Phillips
MELVIN L. PHILLIPS, SR., Grantor

/s/ Melvin L. Phillips
MELVIN L. PHILLIPS, SR., Grantor

STATE OF NEW YORK

ss:

COUNTY OF OTSEGO

On this 1st day of September, 2015, before me, the undersigned, a Notary Public and for said State, personally appeared, MELVIN L. PHILLIPS, SR., personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual, executed the instrument.

/s/ Martin H. Tillapaugh
Notary Public

[STAMP]
MARTIN H. TILLAPAUGH
Notary Public, State of New York
No. 4642560
Qualified in Otsego County
Commission Expires August 31, 2017

STATE OF NEW YORK

ss:

COUNTY OF OTSEGO

On this 1st day of September, 2015, before me, the undersigned, a Notary Public and for said State, personally appeared, MELVIN L. PHILLIPS, SR., personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his

signature on the instrument, the individual, or the person upon behalf of which the individual, executed the instrument.

/s/ Martin H. Tillapaugh
Notary Public

[STAMP]
MARTIN H. TILLAPAUGH
Notary Public, State of New York
No. 4642560
Qualified in Otsego County
Commission Expires August 31, 2017

Prepared by:
Martin H. Tillapaugh, Esq.
30 ½ Pioneer Street
Cooperstown, NY 13326
Tel.: (607) 547-7004

Appendix M

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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

ONEIDA INDIAN NATION
1 Territory Road
Oneida, NY 13421,

Plaintiff,

—v.—

MELVIN L. PHILLIPS, SR.,
individually and as trustee,
4675 Marble Road
Oneida, NY 13421

and

MELVIN L. PHILLIPS, SR./
ORCHARD PARTY TRUST
c/o Trustee Melvin L. Phillips
4675 Marble Road
Oneida, NY 13421,

Defendants.

DEFENDANTS MELVIN L. PHILLIPS, SR. AND MELVIN L. PHILLIPS, SR./ ORCHARD PARTY TRUST'S ANSWER AND COUNTERCLAIMS TO THE COMPLAINT

Defendants Melvin L. Phillips, Sr. and Melvin L. Phillips, Sr./Orchard Party Trust (collectively "Orchard Party Trust") answer Plaintiff Oneida Indian Nation's ("OIN") Complaint as follows. Any allegations or averments not specifically admitted herein are denied.

1. The Orchard Party Trust admits that OIN is suing to quiet title to 19.6 acres of land. The Orchard Party Trust states that Melvin L. Phillips, Sr. is a full-blooded Oneida Indian residing in the Town of Vernon and a direct descendant of the Oneida Indians identified as the Orchard Party in Article 13 of the United States Treaty with the New York Indians, of January 15, 1838, 7 Stat. 550 (also known as the Treaty of Buffalo Creek and attached as Answer Exhibit 1). Members of the Orchard Party Oneida, including Phillips' ancestors, chose not to remove to lands in the west pursuant to the Treaty of Buffalo Creek but instead made "satisfactory arrangements" for the Orchard Party Oneida lands with the State of New York by the Treaty of June 25, 1842, pursuant to the authority of the Buffalo Creek Treaty. The Orchard Party Trust further states that Mr. Phillips is the official spokesman for the descendants of the Orchard Party of Oneida Indians and their duly appointed representative to the Grand Council of the Iroquois Confederacy. The Orchard Party further states that as an Orchard Party Oneida descendant and spokesman, Mr. Phillips is trustee for the Melvin

L. Philips, Sr./Orchard Party Trust and possessed of the lands of the Orchard Party Oneida held in that trust, including the land subject to this suit. The Orchard Party Trust denies the remaining allegations contained in paragraph 1 of the Complaint.

2. The Orchard Party Trust states that the 19.6 acres at issue in this case have been held, used and occupied collectively by generations of Orchard Party Oneida descendants, whose continuity of ownership, possession, use and occupancy are documented and culminate in the deed at issue in this case. The Orchard Party Trust further states that Melvin L. Phillips, Sr., acting in his leadership capacity as the spokesman for the Orchard Party/Marble Hill (aka Orchard Hill) Oneida and as an Orchard Party Oneida descendent and member presently occupying Orchard Party Oneida land, acted to conserve the Orchard Party Oneida lands for the use and enjoyment of current and future members of the Orchard Party Oneida by placing the land at issue in this case into a trust. The Orchard Party Trust denies the remaining allegations in paragraph 2.

3. The Orchard Party Trust states that the 19.6 acres at issue in this case have been held, used and occupied collectively by generations of Orchard Party Oneida descendants, whose continuity of ownership, possession, use and occupancy are documented and culminate in the deed at issue in this case. The Orchard Party Trust further states that Melvin L. Phillips, Sr., acting in his leadership capacity as the spokesman for the Orchard Party/Marble Hill (aka Orchard Hill) Oneida and as an Orchard Party Oneida descendent

and member presently occupying Orchard Party Oneida land, acted to conserve the Orchard Party Oneida lands for the use and enjoyment of current and future members of the Orchard Party Oneida by placing the land at issue in this case into a trust. The Orchard Party Trust denies the remaining allegations in paragraph 3 of the Complaint.

4. The Orchard Party Trust states that the 19.6 acres at issue in this case have been held, used and occupied collectively by generations of Orchard Party Oneida descendants, whose continuity of ownership, possession, use and occupancy are documented and culminate in the deed at issue in this case. The Orchard Party Trust further states that Melvin L. Phillips, Sr., acting in his leadership capacity as the spokesman for the Orchard Party/Marble Hill (aka Orchard Hill) Oneida and as an Orchard Party Oneida descendent and member presently occupying Orchard Party Oneida land, acted to conserve the Orchard Party Oneida lands for the use and enjoyment of current and future members of the Orchard Party Oneida by placing the land at issue in this case into a trust. The Orchard Party Trust denies the remaining allegations in paragraph 4 of the Complaint.

Jurisdiction and Venue

5. Paragraph 5 of the Complaint contains conclusions of law, no response is required. To the extent that a response is deemed required to the remaining allegations of paragraph 5 of the Complaint, the Orchard Party Trust denies the remaining allegations of paragraph 5 of the Complaint.

6. The Orchard Party Trust admits Melvin L. Phillips, Sr. and Melvin L. Phillips, Sr./Orchard Party Trust reside in this district and are New York residents. The Orchard Party Trust admits the property that is the subject of this action is situated in this district. The remaining allegations in paragraph 6 of the Complaint contain conclusions of law, to which no response is required. To the extent that a response is deemed required to the remaining allegations of paragraph 6 of the Complaint, the Orchard Party Trust denies the allegations.

Parties

7. Paragraph 7 of the Complaint contains conclusions of law, to which no response is required. To the extent that a response is deemed required to the allegations of paragraph 7 of the Complaint, the Orchard Party Trust denies the allegations..

8. The Orchard Party Trust states that Melvin L. Phillips, Sr. is a full-blooded Oneida Indian residing in the Town of Vernon and a direct descendant of the Oneida Indians identified as the Orchard Party in Article 13 of the United States Treaty with the New York Indians, of January 15, 1838, 7 Stat. 550 (also known as the Treaty of Buffalo Creek and attached as Answer Exhibit 1). The Orchard Party Trust further states that Mr. Phillips is the official spokesman for the descendants of the Orchard Party of Oneida Indians and their duly appointed representative to the Grand Council of the Iroquois Confederacy. The Orchard Party

Trust further states that as an Orchard Party Oneida descendant and spokesman, Mr. Phillips is trustee for the Melvin L. Philips, Sr./Orchard Party Trust and possessed of the lands of the Orchard Party Oneida held in that trust, including the land subject to this suit. The Orchard Party Trust admits that Mr. Phillips is sued individually and as the trustee of the Melvin L. Phillips, Sr./Orchard Party Trust, which also is a defendant. The Orchard Party Trust denies the remaining allegations of paragraph 8 of the Complaint.

Facts

A. The 19.6 Acres of Land the Nation Seeks to Protect

9. The Orchard Party Trust admits that members and ancestors of the Orchard Party Oneida used, occupied, and possessed the land at issue in this case since time immemorial. The Orchard Party Trust denies the remaining allegations in paragraph 9 of the Complaint.

10. Paragraph 10 of the Complaint contains conclusions of law, to which no response is required. To the extent that a response is deemed required, the Orchard Party Trust denies the allegations in paragraph 10 of the Complaint.

11. The Orchard Party Trust admits that members and ancestors of the Orchard Party Oneida used, occupied, and possessed the land at issue in this case since time immemorial. The Orchard Party Trust denies the remaining allegations in paragraph 11 of the Complaint.

12. The Orchard Party Trust admits that the State never obtained the 19.6 acres at issue in this case. The Orchard Party Trust denies that OIN ever possessed the 19.6 acres, which had always been in possession of members of the Orchard Party Oneida. Therefore, the land was never OIN's to convey. The Orchard Party Trust denies the remaining allegations in paragraph 12 of the Complaint.

13. The Orchard Party Trust denies that OIN ever possessed the 19.6 acres at issue in this case, which had always been in possession of members of the Orchard Party Oneida. The Orchard Party Trust denies the remaining allegations of paragraph 13 of the Complaint.

B. June 25, 1842 Treaty with the State of New York

14. The Orchard Party Trust admits that, pursuant to the Treaty of Buffalo Creek, the State of New York and members of the Orchard Party Oneida entered into a treaty on June 25, 1842 regarding Orchard Party Oneida land, more specifically Lots 1, 2, 3, and 4 as depicted in Exhibit B of the Complaint. The Orchard Party Trust denies the remaining allegations of paragraph 14 of the Complaint.

15. The Orchard Party Trust admits on information and belief that the State of New York surveyed Orchard Party Oneida lands Lots 1, 2, 3, and 4. The survey map referred to in paragraph 15 of the Complaint speaks for itself and to the extent that the allegations raised in paragraph 15 do not comport with the language and depictions of the survey map, they are denied.

16. The Orchard Party Trust admits the 19.6 acres that are the subject of this action are wholly within Lot 3 and were never conveyed as part of the June 25, 1842 treaty. Rather, the treaty confirmed that the land would be "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." Complaint, Ex. A, Art. 4. The Orchard Party Trust denies the remaining allegations of paragraph 16 of the Complaint.

17. The Orchard Party Trust admits that Exhibit C purports to be a Bureau of Land Management map, purportedly filed in Oneida land claim litigation. The Orchard Party Trust admits the 19.6 acres that are the subject of this action were never conveyed as part of the June 25, 1842 treaty. Rather, the treaty confirmed that the land would be "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." Complaint, Ex. A, Art. 4. The Orchard Party Trust denies the remaining allegations of paragraph 17 of the Complaint.

18. The Orchard Party Trust admits that there was a 2013 settlement between the State of New York, Madison County, Oneida County, and OIN. The Orchard Party Trust denies that the 2013

settlement agreement had any effect on Orchard Party Oneida members' ownership of land in Lot 3 or that the settlement agreement conveyed or purported to convey any land. The remaining allegations of paragraph 18 of the Complaint contain conclusions of law, to which no response is required. To the extent that a response is deemed required, the Orchard Party Trust denies the remaining allegations in paragraph 18 of the Complaint.

C. The Nation's Members Living in the Vicinity of the 19.6 Acres on Marble Hill

19. The Orchard Party Trust admits the land in the vicinity of the 19.6 acres has been known to belong to and be occupied by the Orchard Party / Marble Hill (Orchard Hill) Oneida. The Orchard Party Trust admits that members or ancestors of the Orchard Party Oneida have lived in the area since time immemorial. The Orchard Party Trust denies the remaining allegations in paragraph 19 of the Complaint.

20. The Orchard Party Trust admits that the 32 acres of land was the subject of separate Christian Party treaties and has no relevance to the 19.6 acres subject to the Orchard Party treaty. The Orchard Party Trust denies the remaining allegations of paragraph 20.

21. The Orchard Party trust admits that New York State had separate treaties with the Christian Parties and with the Orchard Party Oneida. The Orchard Party Trust denies that OIN was party to or acceded to any rights under the Orchard Party treaty. The Orchard Party Trust denies the remaining allegations in paragraph 21 of the Complaint.

22. On information and belief, the Orchard Party Trust admits that certain beneficiaries of the Orchard Party Trust may be members of OIN and as such may receive certain services and benefits from OIN and may participate in OIN government. The Orchard Party Trust denies the provision of services or receipt of benefits from OIN or participation in OIN's government is relevant to Orchard Party Oneida members' ownership of the 19.6 acres. As to the remaining allegations in paragraph 22 of the Complaint, the Orchard Party Trust lacks knowledge or information sufficient to form a belief about the truth of the allegations, and therefore denies them.

23. On information and belief, the Orchard Party Trust admits that certain beneficiaries of the Orchard Party Trust may be members of OIN. The Orchard Party Trust denies that membership in OIN is relevant to Orchard Party Oneida members' ownership of the 19.6 acres. The Orchard Party Trust denies the remaining allegations of paragraph 23 of the Complaint.

24. The Orchard Party Trust states that Melvin L. Phillips, Sr. is a full-blooded Oneida Indian residing in the Town of Vernon and a direct descendant of the Oneida Indians identified as the Orchard Party in Article 13 of the United States Treaty with the New York Indians, of January 15, 1838, 7 Stat. 550 (also known as the Treaty of Buffalo Creek and attached as Answer Exhibit 1). The Orchard Party Trust further states that Mr. Phillips is the official spokesman for the descendants of the Orchard Party of Oneida Indians and their duly appointed representative to the Grand Council of the Iroquois Confederacy. The Orchard Party

Trust further states that as an Orchard Party Oneida descendant and spokesman, Mr. Phillips is trustee for the Melvin L. Philips, Sr./Orchard Party Trust and possessed of the lands of the Orchard Party Oneida held in that trust, including the land subject to this suit. The Orchard Party Trust denies the remaining allegations of paragraph 24 of the Complaint.

D. Prior Rejections of Phillips' Erroneous Claim to Head a Separate Marble Hill Oneida Tribe

25. The Orchard Party Trust states that Melvin L. Phillips is a full-blooded Oneida Indian residing in the Town of Vernon and a direct descendant of the Oneida Indians identified as the Orchard Party in Article 13 of the United States Treaty with the New York Indians, of January 15, 1838, 7 Stat. 550 (also known as the Treaty of Buffalo Creek and attached as Answer Exhibit 1). The Orchard Party Trust further states that Mr. Phillips is the official spokesman for the descendants of the Orchard Party/Marble Hill (aka Orchard Hill) Oneida and their duly appointed representative to the Grand Council of the Iroquois Confederacy. The Orchard Party Trust further states that as an Orchard Party Oneida descendant and spokesman, Mr. Phillips is trustee for the Melvin L. Philips, Sr./Orchard Party Trust and possessed of the lands of the Orchard Party Oneida held in that trust, including the land subject to this suit. The Orchard Party Trust denies the remaining allegations of paragraph 25 of the Complaint.

26. To the extent that paragraph 26 of the Complaint contains conclusions of law, no response

is required. To the extent that a response is deemed required, the Orchard Party Trust denies the allegations of paragraph 26 of the Complaint.

27. To the extent that paragraph 27 of the Complaint contains conclusions of law, no response is required. To the extent that a response is deemed required, the Orchard Party Trust denies the allegations of paragraph 27 of the Complaint.

28. To the extent that paragraph 28 of the Complaint contains conclusions of law, no response is required. To the extent that a response is deemed required, the Orchard Party Trust denies the allegations of paragraph 28 of the Complaint.

E. Phillips' Trust and Recorded Quitclaim Deed

29. As to paragraph 29 of the Complaint, the trust instrument referred to in Paragraph 29 speaks for itself and to the extent that the allegations raised in paragraph 29 comport with the language of the trust instrument, they are admitted. To the extent that they do not comport with the language of the trust instrument, they are denied.

30. As to paragraph 30 of the Complaint, the trust instrument referred to in paragraph 30 speaks for itself and to the extent that the allegations raised in paragraph 30 comport with the language of the trust instrument, they are admitted. To the extent that they do not comport with the language of the trust instrument, they are denied.

31. As to paragraph 31 of the Complaint, the trust instrument referred to in paragraph 31 speaks for itself and to the extent that the allegations raised in paragraph 31 comport with the

language of the trust instrument, they are admitted. To the extent that they do not comport with the language of the trust instrument, they are denied.

32. The Orchard Party Trust admits that Mr. Phillips asserts in the papers filed with the deed that the 19.6 acres "compris[e] tribal lands belonging to the Oneida Nation/Orchard Hill Party and the grantor, Melvin L. Phillips," that he represents the interests of Orchard Party Oneida members, and that the lands are "currently owned, occupied, titled to, possessed by, and under the stewardship of Melvin L. Phillips, Sr." The Orchard Party Trust denies the remaining allegations in paragraph 32 of the Complaint.

33. The Orchard Party Trust denies the allegations in paragraph 33 of the Complaint.

Claim

34. The Orchard Party Trust denies all allegations in paragraph 34 of the Complaint.

35. The Orchard Party Trust denies all allegations in paragraph 35 of the Complaint.

36. The Orchard Party Trust denies all allegations in paragraph 36 of the Complaint.

37. The Orchard Party Trust denies all allegations in paragraph 37 of the Complaint.

38. The Orchard Party Trust denies all allegations in paragraph 38 of the Complaint.

39. The Orchard Party Trust denies all allegations in paragraph 39 of the Complaint.

Prayer for Relief

The Orchard Party Trust denies the allegations of paragraphs a–d of OIN's Prayer for Relief and denies that OIN is entitled to any of the relief it requests.

Affirmative Defenses

The Orchard Party Trust hereby asserts the following defenses without undertaking or otherwise shifting any applicable burdens of proof. The Orchard Party Trust reserves the right to assert additional defenses, as warranted by facts revealed though investigation and discovery.

40. OIN's claims are barred by the Eleventh Amendment to the United States Constitution.

41. OIN has failed to join the United States, the State of New York, Oneida County, the Town of Vernon, and other necessary individuals who are all indispensable parties to this litigation.

42. OIN's claims are barred by the statute of limitations.

43. OIN's claims are barred by collateral estoppel.

44. OIN's claims are barred by res judicata.

45. OIN's claims are barred by release.

46. OIN's claims are barred by accord and satisfaction.

47. OIN's claims are barred by Congressional act.

48. OIN's claims are barred by laches.

49. OIN's claims are barred by impossibility.

50. OIN has failed to present a justiciable dispute.

51. OIN has abandoned any rights it may have to Orchard Party Trust lands.

52. OIN has failed to state a claim upon which relief can be granted.

53. OIN's claims are barred by the doctrine of acquiescence and estoppel.

Counterclaims

Jurisdiction

54. Subject matter jurisdiction is established by 28 U.S.C. § 1367.

Parties

55. Melvin L. Phillips, Sr. is a full-blooded Oneida Indian, descended from members of the Orchard Party of the Oneida, who have resided on and possessed lands now located in the State of New York since time immemorial. Mr. Phillips is a leader of the Orchard Party Oneida, a successor-in-interest to the historic Oneida Indian Nation (distinct from the Plaintiff in this proceeding). Mr. Phillips' leadership role as spokesman for the Orchard Party Oneida is recognized by the Haudenosaunee—the Grand Council of Chiefs of the Five Nations Iroquois Confederacy.

56. Melvin L. Phillips, Sr./Orchard Party Trust is the trust 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. Mr. Phillips also acts as trustee.

57. The Plaintiff in this case is OIN, which "is a federally recognized Indian Tribe and a direct descendent of the Oneida Indian Nation...." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 (2005). As *City of Sherrill* recognizes, OIN is one of the successors-in-interest to the historic Oneida Indian Nation, as is the Orchard Party Oneida.

The Lands

1. Time Immemorial and Early Treaties

58. Since time immemorial, Indians of the historic Oneida Indian Nation have lived on land located in what is now the State of New York.

59. 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. The Treaty of Fort Schuyler, in 1788, resulted in the shrinking of Oneida lands from around six million acres to closer to 300,000 acres. *City of Sherrill*, 544 U.S. at 203 (2005).

60. The Treaty of Canandaigua in 1794 resulted in the federal government's recognition of an Oneida reservation comprising the approximately 300,000 acres of land in the State of New York retained by the Oneidas in the Treaty of Fort Schuyler. *City of Sherrill*, 44 U.S. at 203–05. The property at issue in this case was part of the original Oneida reservation.

2. The Treaty of Buffalo Creek

61. In the Treaty of Buffalo Creek, entered into in 1838, members of the Orchard Party Oneida and members of another group of Oneida Indians, the First Christian Party, made an agreement with the United States to, amongst other things, sell their lands in New York to the State of New York. Answer Ex. 1. Article 13 of the treaty contained a provision for the "Oneidas Residing in the State of New York" that authorized the Oneida parties to "make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida."

3. The Treaties of 1842

62. Following the Treaty of Buffalo Creek, in 1842, the First and now Second Christian Parties of the Oneida and the Orchard Party Oneida entered into separate treaties with the State of New York, selling significant portions of their remaining land.

63. The State of New York entered into a treaty with the First and Second Christian Parties of the Oneida Indians in May of 1842. *United States v. Boylan*, 265 F. 165, 167 (2d Cir. 1920). The First and Second Christian Parties agreed to sell a portion of their land to the State of New York. *Id.* at 167–68. None of the land included in the treaty is at issue in this case.

64. On June 25, 1842, the State of New York entered into a separate treaty with the Orchard Party Oneida. Complaint, Ex. A. The treaty effected the purchase of the majority of remaining Orchard

Party Oneida lands, labeled as Lots 1, 2, and 4 on the survey map in Exhibit B of the Complaint. The unpurchased Lot 3 was reserved for the Orchard Party Oneida identified in Document A of the treaty as the "Home party of the Orchard Indians" who decided to remain on their land in New York. According to the terms of the treaty, Orchard Party land in Lot 3 was "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." Complaint, Ex. A, Art. 4. In recognition of the Orchard Party Oneida's ownership of the lands under the deed, the State of New York and Oneida County exempt those lands from taxation.

4. Post 1842

65. Members of the Home party of the Orchard Indians, otherwise known as the Orchard Party Oneida, have used and occupied 19.6 acres of Lot 3 ever since the 1842 Treaty. Melvin Phillips is directly descended from those members of the Home Party of the Orchard Indians. He is the great, great grandson of 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. Mr. Phillips and his direct ancestors have remained on the land of Lot 3 since the 1842 treaty, as summarized in the trust deed: "The members of the Home Party and their

descendants, including the said Melvin L. Phillips, have fulfilled the intention of those identified in said Document A to remain on Lot No. 3 as members of the Home Party of the Orchard Indians; they have continuously used and occupied said Lot No. 3." Complaint, Ex. E, Attach. p. 3.

66. This Court has previously determined that Orchard Party Oneida lands do not belong to OIN. In *Shenandoah v. U.S. Dept. of the Interior*, 1997 WL 214947 (N.D.N.Y. Apr. 14, 1997), *aff'd*, 159 F.3d 708 (2d Cir. 1998), this Court determined that Orchard Party Oneida Clanmother Thelma Buss, who was residing on Orchard Party Oneida lands located on Lot 2, directly adjacent to Lot 3, "does not reside on Oneida Nation territory" *Id.* at *8 n.6 (citation omitted).

67. The Bureau of Indian Affairs (BIA) has also recognized that OIN's lands do not extend to the Orchard Party Oneida land at issue. In a 2001 affidavit, the BIA Deputy Commissioner, M. Sharon Blackwell, 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." Notably excluded from Deputy Commission Blackwell's affidavit is any mention of the Orchard Party Oneida or its lands.

68. In 2005, OIN filed an application to put land OIN had reacquired into federal trust. The land at issue in this case was not included in OIN's application. OIN has never attempted to put the land at issue in this case into federal trust, and,

indeed, could not, as it has always been in possession of members of the Orchard Party Oneida.

5. 2013 Settlement

69. In 2013, OIN, the State of New York, and Madison and Oneida Counties entered into a comprehensive settlement of litigation over land that had previously been part of the historic Oneida Indian Nation reservation, some of which OIN had repurchased from non-Indian owners and some of which OIN had applied to put into federal trust. Complaint, Ex. D; see *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) (examples of the litigation). 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). The Orchard Party Oneida was not a party to the settlement.

70. Included in the settlement's definitions section are 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 land was retained by the Orchard Party Oneida. As part of the settlement, "Nation Land," while not subject to state taxes, is subject to a comprehensive taxation scheme on activities carried out on the land, to be implemented by OIN. *Id.* at Sec. V.A, E.

The Trust Deed

71. Melvin L. Phillips, Sr. acting in his leadership capacity as the spokesman for the Orchard Party Oneida and as an Orchard Party Oneida descendent and member presently occupying Orchard Party Oneida land, acted to conserve the Orchard Party Oneida lands for the use and enjoyment of current and future members of the Orchard Party Oneida. To accomplish this goal, Mr. Phillips placed the land at issue in this case, as well as other parcels located in Lots 2 and 3, into a trust. OIN has made no claims in this case related to these latter parcels.

72. On September 1, 2015, Mr. Phillips executed a quitclaim deed, transferring the rights of those parcels to the Melvin L. Phillips, Sr. / Orchard Party Trust. Complaint, Ex. E. Under the trust instrument, Mr. 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.

Claims

73. Melvin L. Phillips, Sr. / Orchard Party Trust, as a successor-in-interest to the historic Oneida Party Oneida, does possess and has a right to possess the 19.6 acres, and the other lands under

the deed, a right arising from and protected against infringement by federal treaty, state treaty, statutory and common law, and by the Constitution.

74. The Orchard Party Oneida never alienated the 19.6 acres to any person or entity.

75. Melvin L. Phillips, Sr., as spokesman for the Orchard Party Oneida, conveyed the 19.6 acres to a trust.

76. Mr. Phillips' execution and recording of the trust declaration, quitclaim deed and other documents in county land records 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.

Prayer for Relief

WHEREFORE, the Orchard Party Trust prays for entry of judgment in its favor and against OIN:

a. Declaring that OIN does not own nor has any property interest in the 19.6 acres;

b. Declaring that the trust document, the quitclaim deed and all related documents filed by Melvin L. Phillips, Sr. on behalf of the Orchard Party Oneida in the Oneida County land records are valid so far as they concern the 19.6 acres;

c. Enjoining OIN (i) not to claim the 19.6 acres for itself, (ii) not to assert that OIN owns or has a property interest in the 19.6 acres, and (iii) not to create or cause to be created, or file or cause to be filed, in land

records any document asserting that OIN owns or has a property interest in the 19.6 acres; and

d. Granting such other relief as the Orchard Party Trust may be entitled to at law or in equity.

Respectfully submitted,

/s/ Eric N. Whitney
Eric N. Whitney
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000
Eric.Whitney@apks.com

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

Dated: January 12, 2018

Defendant Exhibit 1
Treaty of Buffalo Creek
on pages 232a to 246a
in 8.5 by 11 inch section

Appendix N

UNITED STATES CONSTITUTION ELEVENTH AMENDMENT

AMENDMENT XI

Passed by Congress March 4, 1794. Ratified February 7, 1795. **Note:** Article III, section 2, of the Constitution was modified by amendment 11.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Appendix O

NEW YORK INDIAN LAW 7 PARTITION OF LANDS

New York Indian Law § 7. Partition of tribal lands

Any nation, tribe or band of Indians which owns and occupies land in this state as the common property of such nation, tribe or band may, by the act of its Indian government, divide such lands into lots, and distribute and partition the same, quantity and quality relatively considered, among the individuals and families of such nation, tribe or band, so that the same may be held in severalty and in fee simple, according to the laws of this state. No lands occupied and improved by any Indian according to the laws, usages or customs of the nation, tribe or band shall be set off to any person other than the occupant or his family. The officers, agents or commissioners to execute the deeds to effect such partition shall be appointed by the nation, tribe or band, whose lands are to be distributed, subject to the approval of the commissioner of general services. They shall go before the county judge of the county in which such lands are situated, and prove to his satisfaction that they are authorized to effect such transfers, and shall acknowledge before him the deeds necessary therefor. The county judge shall examine such deeds, and his indorsement thereon that he has examined the same, and that they are executed in pursuance of authority duly conferred, shall authorize the county clerk to record such deeds.

Lands partitioned or distributed in pursuance of this section shall not be subject to any lien or

incumbrance, by way of mortgage, judgment or otherwise, or be alienable by the grantee or his heirs, for twenty years after the recording of the deed effecting the partition; but may be partitioned among the heirs of a grantee who dies.

Appendix P

Unpublished decision by Judge Port from *Oneida Nation of New York v. County of Oneida*

ROBERT T. COULTER, ESQ.
GERALD L. HILL, ESQ.
c/o Indian Law Resource Center
1101 Vermont Avenue, N.W.
Washington, D.C. 20005
Attorneys for Plaintiff-Intervenor

EDMUND PORT, Judge

O R D E R

The "Government of the Oneida Nation of New York" has requested a reconsideration of the denial of its motion to intervene as party plaintiff. The motion to intervene was made returnable on short notice at the same time that a motion for summary judgment, filed by the defendant County of Madison, was scheduled to be heard. The motion to intervene was denied "for failure to establish facts warranting intervention."

A companion motion to postpone the argument of the motion for summary judgment was denied but the applicant was granted leave to argue as amicus curiae in opposition to the motion if he felt it necessary. He was thus not disadvantaged by the denial of intervention in relation to the motion.

The application for reconsideration fleshes out the motion to intervene by affidavits of Robert T. Coulter, attorney for the applicant, and Ray Halbritter and Lyman Johns, each claiming to be

an authorized representative of the "Government of the Oneida Nation of New York" which the affidavits allege governs the Oneida people of New York living on the Oneida Indian Territory, the Oneida Community of Marble Hill and elsewhere.

The Halbritter and Johns affidavits further allege that each has been "informed by the Bureau of Indian Affairs that the United States government does not give official recognition to any Oneida Indian government in New York and has not since 1975'." This statement apparently has as its source a letter from the Eastern Area Director of the Bureau of Indian Affairs to the Postmaster of Oneida, New York dated December 18, 1975, stating that as of that date, "Nor do we recognize any group of individuals as official representatives of the Oneida Indian Nation of New York."

No one questions that the proper party plaintiff is "The Oneida Indian Nation of New York State." The plaintiff, the Oneida Indian Nation of New York State, at the time of the trial (November 12-14, 1975), was a "tribe presently recognized by the Bureau of Indian Affairs" and was represented in court by its duly authorized representatives. Oneida Indian Nation of New York v. County of Oneida, 434 F. Supp. 527, 538 (N.D.N.Y. 1977).

The applicant for intervention asserts its interest in the property because the individual members of the Oneida Nation residing in the area for which it claims to speak has "the right to share and participate in the use or distribution of all Oneida property." I assume that they are asserting a right claimed to belong to each individual Oneidan. The assertion of such an interest would permit the intervention of each individual

Oneidan, a proposition whose very nature demonstrates its undesirability. The applicant further claims as entitlement to intervention that its interests will not adequately be represented by the existing parties.

Up to this point, the parties' representations of the interest of all the Oneidas needs no apologist. Jurisdiction in this court was successfully established by the plaintiffs only after litigating the matter through the United States Supreme Court which reversed a dismissal for lack of jurisdiction by this court, affirmed in the Second Circuit Court of Appeals. Oneida Indian Nation of New York v. County of Oneida, 414 U.S. 661 (1974). On remand, they successfully established liability against the defendants, leaving the question of damages only to be determined. Oneida Indian Nation of New York v. County of Oneida, 434 F. Supp. 527 (N.D.N.Y. 1977). In the matter in which intervention is sought they successfully opposed a motion for summary judgment made by the defendant County of Madison. See Order dated May 17, 1979. The present parties have demonstrated that they have and can adequately represent the interest of the plaintiffs and all persons having an individual interest in any recovery that might be obtained here. All Oneidas should share a common interest in disposing of this litigation in a manner which will serve their best collective interests. As indicated, those interests have been, and there is no evidence that they will not continue to be, adequately represented by a continuation of the present parties.

Affidavits and exhibits on this motion indicate that the balkanization of the Oneidas of New York

with its internecine sniping and worse, should not be introduced into this lawsuit. As indicated by the exhibits, this is not the forum in which to resolve the internal problems of governance.

If for no other reason, intervention should be denied because it was not timely pursued. The applicant for intervention states "The issue of the adequacy of representation by the parties now before the Court did not arise until after the trial which was held in November of 1975." Memorandum on Motion for Reconsideration at 8. However, the factionalism and questions concerning recognition of leadership arose shortly afterward. See Coulter affidavit, Attachments A and B. The conflict that the applicant asserts results in inadequate representation existed before the liability issue was decided. Yet the applicant made no move for intervention until a few days before the return date of the Madison County motion for summary judgment in this case and in 74-CV-187. Hopefully, before the next phase of the litigation arrives, the parties will conclude that cooperation is preferable to conflict. For the reasons herein, it is

ORDERED, that the motion for reconsideration be and the same hereby is granted and it is further

ORDERED, that upon reconsideration, the order denying intervention is adhered to.

/s/ Edmund Port
Senior United States District Judge

Dated: June 7, 1979
Auburn, New York