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

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY, et al.,	)	Civil Action No. 07-CV-0451
Plaintiffs,	)	Hon. William M. Skretny, U.S.D.J.
v.	)	
HOGEN, et al.,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER ENFORCING THE JUDGMENT

PRELIMINARY STATEMENT

Plaintiffs respectfully submit this Memorandum of Law in support of their motion for an order enforcing the Judgment of this Court dated July 8, 2008 (Docket #62) and directing the Defendants, and in particular the Chairman of the National Indian Gaming Commission (the "NIGC"), to order the permanent closure of the operation of Class III gambling currently being conducted by the Seneca Nation of Indians (the "SNI") at the 9-1/2 acre site located in downtown Buffalo that has been referred to in this litigation as the "Buffalo Parcel."

In the Decision and Order (Docket #61) entered July 8, 2008 in this Action, the Court vacated the July 2, 2007 determination of the NIGC that purportedly gave the SNI the authority to conduct a Class III gaming operation at the Buffalo Parcel under the Indian Gaming Regulatory Act (the "IGRA"). The Court held that the NIGC's determination was arbitrary, capricious, and not in accordance with the law.

Under IGRA, Class III gambling by an Indian tribe in the absence of an ordinance approved by the Chairman of the NIGC is illegal. 25 U.S.C. § 2710(d)(1)(A)(iii). As a result of the Decision, Order and Judgment, the Buffalo Parcel site is not currently eligible for Class III gambling, and there is no ordinance in effect authorizing Class III gambling at the site. Thus, Class III gambling cannot lawfully occur there.

Notwithstanding this Court's clear and unequivocal determination, the SNI has announced that it is "business as usual" at the Buffalo casino and that it "found no reason in Thursday's court decision to consider any alternatives" to continued gambling at the site. (Murray Aff. Ex. "B.")[1] Disturbingly, the SNI said that it had reached this determination in consultation with federal officials of the NIGC. In the meantime, the NIGC Chairman has refused to take any action, notwithstanding his power to do so, to effectuate this Court's Decision by bringing the illegal gambling to an end. This inaction, in the face of the Court's clear and unambiguous ruling, frustrates the purpose of the Decision.

Accordingly, and as further set forth below, Plaintiffs seek an order directing the Defendants, and in particular the Chairman of the NIGC, to order the SNI immediately to close all Class III gambling operations at the Buffalo Parcel site and, in the event of the Chairman's failure to do so, directing the U.S. Marshall's Office to take such action as may be reasonably necessary to ensure the immediate and permanent cessation of such activity.

[1] The facts supporting this motion are set forth in the accompanying Affidavit of Cornelius D. Murray, Esq., sworn to on July 14, 2008, and the Exhibits annexed thereto.

BACKGROUND FACTS

This action challenges the determination of the NIGC to approve the Class III Gaming Ordinance enacted by the SNI on June 9, 2007. The Ordinance purported to permit the SNI to operate a Class III gambling casino on the land it had purchased in 2005 in the City of Buffalo. Plaintiffs challenged the Ordinance on two principal grounds: first, that the Buffalo Parcel was not "Indian lands," as the Indian Gaming Regulatory Act (the "IGRA") defines that term; and second, that the land was not acquired "as part of the settlement of a land" claim so as to qualify for an exception from the IGRA's prohibition against gambling on lands acquired after October 17, 1988.

In the Complaint dated July 12, 2007 (Docket #1) and the Amended Complaint dated November 28, 2007 (Docket #49), Plaintiffs requested declaratory and injunctive relief for the purpose of halting the illegal gambling on the Buffalo Parcel. Specifically, Plaintiffs sought an order, inter alia, declaring that the Ordinance violates the IGRA, setting aside the decision of the Chairman of the NIGC approving the Ordinance, and enjoining the Defendants from "maintaining or taking any actions which would condone, allow, permit or otherwise further casino gambling on the Buffalo Parcels" pending compliance with the pertinent provisions of the IGRA.

On July 8, 2008, this Court issued the Decision and Order (Docket #61) on Defendants' motion to dismiss or for summary judgment, and Plaintiffs' cross-motion for summary judgment. In the Decision, the Court held that the Buffalo Parcel is "Indian lands" within the meaning of the IGRA. The Court further held that the Buffalo Parcel was not acquired "as part of the settlement of a land claim," and that, therefore, this exception to the IGRA's general prohibition against gaming on land acquired after October 17, 1988, does not apply to make the Buffalo Parcel gaming-eligible. Thus, the

Court issued an order vacating the NIGC Chairman's July 2, 2007 administrative decision approving the SNI Class III Gaming Ordinance; granting in part and denying in part Plaintiffs' motion for summary judgment (Docket #36), consistent with the Decision; and granting in party and denying in part Defendants' Motion to Dismiss (Docket #28), consistent with the Decision.

On July 8, 2008, shortly following the issuance of the Decision, Plaintiffs' counsel emailed a letter to Mary Pat Fleming, the Assistant United States Attorney representing the Defendants in this action. (See Murray Aff. ¶ 9; Murray Aff. Ex. "B.") In that letter, Plaintiffs' counsel asked the Assistant U.S. Attorney to "advise whether or not the Chairman of the NIGC intends to exercise his authority pursuant to 25 U.S.C. § 2713(b) to order immediate cessation of the current gaming operation conducted by the Seneca Nation of Indians at the Buffalo Parcel." (Murray Aff. ¶ 9; Murray Aff. Ex. B.)

The following day, July 9, 2008, the SNI held a news conference to announce its intention to continue gaming operations and construction at the Buffalo Parcel, notwithstanding the Court's holding that the Buffalo Parcel is not gambling eligible. The SNI characterized the Court's Decision as "procedural," and announced that "everything is business as usual." Perhaps the most disturbing aspect of the press release was the statement that:

> The Nation, in consultation with federal officials of the National Indian Gaming Commission, has found no reason in Tuesday's court decision to consider any alternatives.

Id. (emphasis added). The press release also stated that the SNI intended to continue its construction of a 90,000-square-foot casino with 2,000 slot machines and 45 table games and a 22-story hotel with 206 suites. Id.

On July 9, 2008, following the SNI's announcement, Plaintiffs' counsel emailed another letter to Assistant U.S. Attorney Fleming. (Murray Aff. ¶ 10; Murray Aff. Ex. "C.") In that letter, Plaintiffs' counsel asked Ms. Fleming to state, no later than Thursday, July 10, 2008, at 5:00 p.m., whether or not the Chairman of the NIGC would be taking steps to order the immediate cessation of the current gaming operation at the Buffalo Parcel. The U.S. Attorney did not respond to this letter. (Murray Aff. ¶ 12.)

Instead, on Thursday, July 10, 2008, at approximately 3:40 p.m., an attorney identifying herself as Penny Coleman, counsel for the NIGC, telephoned Plaintiffs' counsel and stated that she was responding to the letters to Ms. Fleming regarding the NIGC's intentions with respect to this Court's Decision and Order. Ms. Coleman stated that the NIGC was still weighing its options and had not yet made any decisions with respect to whether to abide by the determination or appeal it. (Murray Aff. ¶ 13.) She also stated that there would be no further response from the U.S. Attorney's office to Plaintiffs' counsel's letters. After that conversation, Plaintiffs' counsel emailed another letter to the U.S. Attorney memorializing the conversation with the NIGC counsel. (Murray Aff. ¶ 13; Murray Aff. Ex. "D")

It is the Defendants' failure to act, and in particular the NIGC Chairman failure to exercise his statutory power and authority, see 25 U.S.C. § 2713(b), that necessitates this motion to enforce the Judgment in this Action.

ARGUMENT

PLAINTIFFS ARE ENTITLED TO AN ORDER ENFORCING THE JUDGMENT IN THIS ACTION

The United States Department of the Interior is the federal administrative agency charged with the administration of Indian affairs. The NIGC, a commission within the Interior Department, is the federal authority with responsibility for regulating gambling on Indian lands. 25 U.S.C. § 2704. The NIGC is charged with, among other things, the development of regulations and the administrative enforcement of the IGRA.

Under the IGRA, Class III gaming on Indian lands is lawful only if, inter alia, such activities are authorized by an ordinance approved by the Chairman of the NIGC. 25 U.S.C. § 2710(d)(1)(A)(iii). If there is no ordinance, then Class III gambling on Indian land is illegal. The NIGC Chairman has the power and authority to order the closure of gaming activities and to impose civil fines if he determines that any person or tribe is conducting gambling in substantial violation of IGRA. Id., §§ 2705(a), 2713(b)(1). In this regard, 25 U.S.C. § 2713(b) provides, in pertinent part:

> (1) The Chairman [of the NIGC] shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this Act, of regulations prescribed by the Commission pursuant to this Act, or of tribal regulations, ordinances, or resolutions approved under section 11 or 13 of this Act [25 U.S.C. § 2710 or 2712].

25 U.S.C. § 2713(b)(1). The NIGC has exercised its power under § 2713(b) in appropriate cases to order the closure of illegal gambling activity. See, e.g., United States v. Seminole Nation of Oklahoma, 321 F.3d 939 (10th Cir. 2002); United States v. Santee Sioux Tribe of Nebraska, 135 F.3d 558 (8th Cir. 1998).

The Court's Decision in this action establishes that there is no valid Ordinance to conduct Class III gambling on the Buffalo Parcel. Consequently, such gambling on the

Buffalo Parcel is a "substantial violation" of the provisions of IGRA, within the meaning of 25 U.S.C. § 2713(b). Notwithstanding the Court's clear and unambiguous ruling, the SNI has said that the Decision is "procedural," that "everything is business as usual," and that it intends to continue its gaming operations at the Buffalo Parcel. See Murray Aff. ¶ 7; Murray Aff. Ex. A. According to the SNI, it reached this decision upon "consultation with federal officials of the National Indian Gaming Commission" and "found no reason in Thursday's court decision to consider any alternatives." See Murray Aff. ¶ 7; Murray Aff. Ex. A. The NIGC, in turn, is "weighing its options." (Murray Aff. ¶ 13.) There is no indication whether or when it will decide on a final course of action. In the meantime, illegal gambling on the Buffalo Parcel continues.

This Court has the inherent power and authority, codified in the All Writs Act, 28 U.S.C. § 1651, to issue such orders and commands as may be necessary or appropriate to effectuate and prevent the frustration of such orders which the Court has previously issued in its exercise of jurisdiction otherwise obtained. See United States v. New York Telephone Co., 434 U.S. 159 (1977) (citations omitted). The All Writs Act provides an arsenal of judicial implements designed to achieve the "rational ends of law." Id. at 172 (quoting Harris v. Nelson, 394 U.S. 286, 299 (1969)). As the United States Supreme Court has repeatedly recognized, a federal court may avail itself of the auxiliary writs as aids in the performance of its duties when necessary "in its sound judgment to achieve the ends of justice entrusted to it." Id. at 172-73 (citations omitted). The federal court's authority under the All Writs Act should be exercised "'flexibly in conformity with these principles.'" Sprint Spectrum L.P. v. Mills, 283 F.3d 404, 413 (2d Cir. 2002) (quoting N.Y. Tel., 434 U.S. at 173).

Plaintiffs commenced this action not as a mere academic exercise, but to bring a halt to the illegal gambling activity on the Buffalo Parcel. In the Decision, this Court agreed with Plaintiffs that the NIGC Chairman's determination that the Buffalo Parcel falls within the "settlement of a land claim" exception is arbitrary, capricious, an abuse of discretion and not in accordance with law. The Defendants' inaction in the face of this clear and unambiguous order frustrates the purpose and intent of the Court's ruling and renders it a mere pyrrhic victory for the Plaintiffs.

Plaintiffs have the right to expect that, upon establishing their right to relief as they have, their hard-earned victory will be enforced, and not ignored by the federal governmental officials who have the power and authority to give effect to this Court's determination. A motion to enforce is the appropriate procedural vehicle for a party to seek compliance with a court order. See, e.g., Pena v. New York State Div. for Youth, 708 F.2d 877 (2d Cir. 1983) (affirming district court's grant of motion to enforce); Sanchez v. Maher, 560 F.2d 1105, 1108 (2d Cir. 1977) (same); Vassell v. Reliance Sec. Group, 328 F. Supp. 2d 454, 462 (S.D.N.Y. 2004) ("[The] motion is properly characterized as a motion to enforce the judgment previously entered.").

In this case, unless and until the SNI cease their illegal Class III gambling operation, the SNI will continue to act as if this Court's decision was an irrelevant academic exercise and the Defendants, including the NIGC Chairman, will continue to fail to take any steps to enforce their compliance. Accordingly, to give effect to this Court's Decision, the requested order is necessary and should be granted.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that this Court issue an order directing Defendants, and in particular the Director of the NIGC, to order the permanent closure of the Class III gambling casino currently being conducted by the SNI at the Buffalo Parcel site and to refrain from taking or maintaining any actions that would condone, allow, permit or otherwise further Class III casino gambling there, and granting such additional and further relief as to this Court appears just and proper.

Dated: Albany, New York
July 14, 2008

Respectfully submitted,

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