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 (WMS)**
Plaintiffs,	)	**Hon. William M. Skretny, U.S.D.J.**
v.	)	
PHILLIP N. HOGEN, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' REPLY TO UNITED STATES' OPPOSITION TO MOTION TO ENFORCE AND/OR FOR CONTEMPT

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PRELIMINARY STATEMENT[1]

It has been over four months since this Court declared that the operation of a gambling casino by the Seneca Nation of Indians ("Senecas") at the Buffalo Parcel is "unlawful" under IGRA (Dkt. No. 61 at 127). It has also been over two and one-half months since this Court directed the NIGC and its Chairman to enforce that statute. (Dkt. No. 76 at 8). Since then, neither this Court nor the U.S. Second Circuit Court of Appeals has granted - nor have the Defendants applied for - a stay of the aforementioned Decisions and Orders. Nevertheless, the Senecas continue unabated to conduct gambling at the Buffalo Parcel, with the full knowledge, acquiescence and, it is respectfully submitted, assistance of the NIGC, even though the NIGC's own personnel determined that five days would be a reasonable time within which the Senecas could cease operations (Dkt. No. 78-3 at 2).

NIGC has feigned compliance with this Court's Order, going through the motions of initiating enforcement proceedings (Dkt. No. 77-2) only to defer immediately thereafter them at the Senecas' behest (Dkt. No. 78-3 at 19), and then to stop altogether by requesting a stay of its very own enforcement proceedings, from a so-called "independent" Hearing Examiner working for the NIGC's co-Defendant, the Secretary of the Interior. In filing that "request," the NIGC never advised the Hearing Examiner that this Court's August 26, 2008 Order had directed it to commence enforcement "forthwith." Without ever even mentioning that Order, the Hearing Examiner on October 28, 2008 granted the stay, pending Defendants' appeal to the Second Circuit Court of Appeals, even though no such appeal had even been filed as of that date (Dkt. No. 83-3). The Hearing Examiner then "requested" the Chairman of the NIGC to file a status report with him "every 60 days starting on January 12, 2009." *Id.* As of this date, therefore, no enforcement proceedings

[1] Plaintiffs respectfully reserve the right to respond to the Senecas' proposed *Amicus* Brief (Dkt. No. 82-2), in the event the Court grants their motion to file that Brief (Dkt. No. 82).

are being conducted whatsoever and obviously none are contemplated in the foreseeable future. So much for "forthwith"!

The notion that a self-serving stay from a Hearing Examiner within an administrative agency in the Executive Branch may provide "cover" for the same agency to avoid compliance with an Article III federal Court order is patently absurd. The Defendants' actions in this case are even more flagrantly contemptuous in that the NIGC asked for a stay despite the fact that it knew full well that this Court had already directed it to proceed with enforcement "forthwith."

From the time this Court first ruled back in July that the Senecas' gambling operations were unlawful, the Tribe and the NIGC have acted in concert to orchestrate a farce that would enable the Tribe to continue its illegal gambling activity with impunity, despite this Court's Order. The day after this Court rendered the original Decision in July, the Tribe issued a press release demeaning it as merely "procedural" and defiantly announcing that it would continue "business as usual" (Dkt. No. 63-3). A week later, it submitted a new gambling Ordinance to the NIGC for approval (Dkt. No. 65-2), and then used that Ordinance as an excuse to defer enforcement proceedings until after the 90-day period within which the NIGC had to approve the Ordinance under Section 11(e) of IGRA had elapsed. *See* 25 U.S.C. § 2710(e). *See also* Senecas *Amicus* Brief (Dkt. No. 66-2 at 12).

The next act in this farce was the sudden withdrawal by the Senecas of that Ordinance just prior to the end of the aforesaid 90-day period (Dkt. No. 82-13). The Senecas did so "reluctantly" -- or so this Court is told -- only because the NIGC asked them to do so. *See* Senecas' proposed *Amicus* Brief, filed November 4, 2008 (Dkt. No. 82-2 at 7). The NIGC apparently advised the Senecas that they could resubmit the Ordinance and the NIGC would then have more time to complete its review of the amendments. *Id.* The Senecas were only too happy to oblige and a week later they submitted yet another Ordinance (the fourth Ordinance), restarting the 90-day clock yet

again. The Senecas then invoked that resubmission as yet another reason to justify a further delay by the NIGC in taking any enforcement action (Dkt. No. 82-2 at 9).

Plaintiffs trust that this was not what the Court had in mind when it ordered the NIGC and its Chairman to enforce the IGRA "forthwith." Plaintiffs also trust that this Court will see through the transparent charade. The NIGC, acting in concert with the Senecas, have undertaken every artifice possible to avoid compliance and to allow the Senecas' illegal gambling to continue while pretending to comply with this Court's Order. They have elevated form over substance, giving lip service to the Court's Order by issuing a "toothless" Notice of Violation (the "NOV") and then unilaterally halting all enforcement. It is time to bring their contemptuous conduct to a halt and to ensure that Plaintiffs' hard-earned victory is not merely a pyrrhic one.

In its opposition papers, the NIGC contends that it should not be held in contempt or be directed to order the Senecas to cease operations or to pay attorneys' fees and costs because (1) this Court has been divested of jurisdiction by virtue of Defendants' appeal to the Second Circuit Court of Appeals from this Court's July 8, 2008 Decision; (2) this Court may not intrude upon the discretion of an agency as to whether or not to enforce the law, and (3) Plaintiffs are not entitled to attorneys' fees and/or costs because they have failed to establish that the NIGC is now in contempt of this court. Plaintiffs will address each of those arguments.

ARGUMENT

POINT I

THE NIGC'S APPEAL TO THE SECOND CIRCUIT DOES NOT DIVEST THIS COURT OF JURISDICTION

A Court that enters a judgment which has continuing effect retains the authority to enforce it, notwithstanding an appeal by an adverse party. *Covanta Onondaga Limited Partnership v. Onondaga County Resources Recovery Agency*, 318 F.3d 392, 396 (2d Cir. 2003) (citations

omitted). In a contempt proceeding, the questions raised relate exclusively to the instructions in the prior Order of the Court and the refusal of a party to comply with them. These are issues that are entirely distinct from the issues decided by the Court in rendering the first order. *Red Ball Interior Demolition Corp. v. Palmadessa*, 947 F. Supp. 116, 120 (S.D.N.Y. 1996) ("*Red Ball*").

In *Red Ball*, Plaintiffs moved for an Order of Contempt and for an Order to Compel Compliance with a previous Order the Court issued several months earlier. 947 F. Supp. at 118. The Court held that the Trial Court had jurisdiction to "impose contempt sanctions for disobedience of an order currently on appeal." *Id.* at 120. The filing of the Notice of Appeal "only divest[s] the District Court of jurisdiction respecting the questions raised and decided in the Order appealed from." *Id.* (citing *NYS Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989) (hereinafter, "*NOW*") (subsequent op. vacated and remanded on other grounds, 506 U.S. 263 (1993)).

In *Johnson v. Roadway Express, Inc.*, 2006 U.S. Dist. LEXIS 3783 (W.D.N.Y. 2006), the Defendant moved for Rule 11 sanctions after the District Court granted summary judgment because the Plaintiff brought baseless and frivolous claims. *Id.* at *2-3. This Court held that although the case was closed upon the grant of summary judgment, the Trial Court retained jurisdiction to deal with such collateral matters. *Id.* at *4-5.

Defendants further contend that the Plaintiffs divested this Court of jurisdiction by appealing this Court's August 26, 2008 Decision as well in the July 8, 2008 Decision (Dkt. No. 83 at 6 n. 3). The Plaintiffs, however, did not appeal the August 26 decision, but mentioned it only in relation to their partial appeal from the Court's July 8, 2008 Decision insofar as that Decision held that the Buffalo Parcel was "Indian land." Plaintiffs did so in order to make clear that the time within which to file that Notice of Appeal had not run, as the Defendants' prior Rule 59 Motion and the Court's

subsequent Decision thereon extended the time within which the Plaintiffs had to file their Notice of Appeal. *See* Fed. R. App. P. 4(a)(4)(A)(v). As such, Defendants' reliance on *Motorola Credit Corp. v. Uzan* is misplaced. Quoting *NOW*, the Second Circuit stated: "the filing of a Notice of Appeal only divests the District Court of jurisdiction respecting the questions raised and decided in the Order that is on appeal." *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 53 (2d Cir. 2004) (quoting *NOW* , 886 F.2d at 1350). The Defendants have not complied with the August 26 Order , and Plaintiffs have brought the present motion so that the Court may vindicate its authority. This Motion does not raise questions brought up on appeal.

Defendants next contend that the District Court cannot "alter or enlarge the scope of its judgment, pending appeal" (Dkt. No. 83 at 5) (*quoting City of Cookville v. Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380, 394 (6th Cir. 2007)) (citations omitted). While the Defendants have given notice that they will appeal the August 26, 2008 Order, the present Motion is not one in which the Plaintiffs are asking this Court to enlarge the scope of its previous judgment. In *City of Cookville*, after the Notice of Appeal had been filed, the District Court ordered an injunction and decided two legal issues that it had not previously dealt with. 484 F.3d at 393. Here, however, the Plaintiffs are asking the Court to enforce compliance with its previous Orders and to hold the Defendants in contempt for their failure to comply with those Orders. Unlike *City of Cookville*, where the District Court left open many questions regarding the timing and manner of compliance with its previous Order, this Court did not. Four months of willful violation of the lawful order of this Court is not complying "forthwith" and this Court would not be enlarging the scope of its judgment by compelling compliance and punishing Defendants for willful failures to comply.

Moreover, an order by this Court that any such unilateral, administrative self-imposed stay violates this Court's prior order would not expand its prior orders which, of course, had nothing to

do with such stay. It would merely prevent the violation of its August 26 Order, which required the NIGC to abide by the intent of Congress in enacting the IGRA. (Dkt. No. 76 at 21.)

It is abundantly clear, therefore, that the NIGC's appeal to the Second Circuit from this Court's July 8, 2008 Decision did not divest this Court of jurisdiction to entertain this Motion.

POINT II

THE NIGC AND ITS CHAIRMAN DO NOT HAVE DISCRETION WHETHER TO ENFORCE COMPLIANCE WITH THE IGRA

Defendants assert that the decision of the NIGC not to prosecute or enforce the provisions of the IGRA is unreviewable by the courts because of the "insuitability for judicial review of agency decision to refuse enforcement" (Dkt. No. 83 at 7), *citing Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The Defendants' reliance on the case law cited is unpersuasive.

In *Heckler*, the Supreme Court held that the agency decisions not to enforce violations were judicially reviewable only if Congress had indicated an intent to "circumscribe Agency enforcement discretion." *Id.* at 834-835. This Court, in contrast, has already held that Congress demonstrated such an intent, and, therefore, ordered Defendants to comply with the intent of Congress under IGRA (Dkt. No. 76 at 14-15) (directing "the NIGC and its Chairman to comply forthwith with Congress' mandate as set forth in 25 U.S.C. § 2713(a)(3) and with NIGC regulations and the Chairman, upon issuance of the NOV, "to take such action as is consistent with the Court's July 8, 2008 Decision, the IGRA's mandates and intent, and NIGC regulations").

When the NIGC issued the NOV, all subsequent proceedings were stayed and nothing else has been done. To take no action is not to exercise discretion, particularly where the continuing violation is, by the NIGC's own regulations, a "substantial violation." *See* 25 C.F.R. 573.6(a)(3). Absent a "valid" ordinance (and there is none), and absent a court ordered stay of this Court's July 8, 2008 and August 26, 2008 Decisions (and there are none), there is no basis for the casino's

continued operation. "Where agency recalcitrance is in the face of a clear statutory duty or is of such magnitude that it amounts to an abdication of statutory responsibility, the Court has the power to order the Agency to carry out its statutory mandate." *Public Citizens Health Research Group v. Comm'r FDA.*, 740 F.2d 21, 22 (D.C. Cir. 1984).

At the time of the August 26, 2008 Decision, it may have been inappropriate or premature for this Court to order closure of the casino before the NIGC undertook actual enforcement proceedings by issuing the NOV and giving the Senecas time to comply. The situation has changed dramatically since then. The NIGC's continued foot-dragging since that time now warrants such action. Given that the Senecas have refused to cease their illegal activities, and that the Chairman of the NIGC halted enforcement proceedings, has failed to impose a civil fine on the Senecas for their "substantial violation" of the law and has failed to issue an Order directing closure of the casino to prevent ongoing violations, it is now appropriate to order closure to stop an on-going violation and prevent frustration of this Court's earlier order. A fine would not suffice to stop ongoing violations. There is no other alternative but closure. Such action by this Court would simply vindicate this Court's authority and ensure the effectiveness of its prior orders. *See NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 589 (6th Cir. 1987) (District court has authority to enforce and clarify its order after filing of Notice of Appeal).

Indeed, the Chairman of the NIGC has conceded that the only way to cure the violation is for gambling to cease. See NIGC's NOV to the Senecas (Dkt. No. 77-2 at 6). Section 19 of IGRA makes clear Congress's intent by stating that gambling "shall not be conducted" on after-acquired land like the Buffalo Parcel, in the absence of exceptions which the Court already has held do not apply. The NIGC has left the Court with no choice. Unless it acts, the law will continue to be flouted with impunity and Plaintiffs' hard-earned victory will be hollow and meaningless.

POINT III

THE CHAIRMAN AND THE NIGC ARE IN CONTEMPT OF COURT

The United States claims that the NIGC and its Chair cannot be held in contempt because this Court did nor order them to act (Dkt. No. 83 at 10). At the risk of repetition *ad nauseum*, Plaintiffs again point to the Court's order that the NIGC "comply forthwith with Congress' mandate as set forth in [IGRA], and with NIGC regulations" and direction that the Chairman, upon issuance of the NOV, "take such violation as is consistent with the Court's July 8, 2008 Decision, the IGRA's mandates and intent, and NIGC regulations" (Dkt. No. 76 at 20). This Court obviously directed the NIGC to enforce the statute and to stop the illegality. All that the NIGC and the Chairman have done, however, is issue the NOV. There has been no order of closure, no assessment of a fine, and no stay by this Court or the Second Circuit of the August 26, 2008 Decision. The NIGC has boldly issued its own self-serving stay to ensure that, in fact, there will be no enforcement any time soon, thereby totally frustrating this Court's Decision to commence enforcement proceedings forthwith. This self-imposed stay has enabled the Senecas to continue their illegal gambling.

Defendants rely on *Chao v. Gotham Registry, Inc.*, 514 F.3d 280 (2d Cir. 2008). That reliance is misplaced as the criteria identified in *Chao* by the Second Circuit with respect to contempt, have been satisfied in the present matter (requiring that "(1) that the Decree was clear and unambiguous, and (2) the proof of non-compliance was clear and convincing … [and that] the Defendant has not been reasonably diligent and energetic in attempting to comply." *Id.* at 291.

Applying the above-mentioned criteria, the decree by this Court on August 26 was unambiguous, even if one were to accept the dubious proposition that the NIGC's responsibilities were not clearly set forth in this Court's earlier July 8 decision. In *McComb v. Jacksonville Paper Company*, 336 U.S. 187 (1949), the District Court prohibited actions that were violations of a

specific act of Congress. *Id.* at 191-192. The Supreme Court held that "[d]ecrees of that generality are often necessary to prevent further violations where proclivity for unlawful conduct has been shown." *Id.* at 192 (citation omitted). As required by the Second Circuit, this Court's order was more than sufficient "to apprise those within its scope of the conduct that is being prescribed." *Now,* 996 F.2d at 1351-52.

It is also clear that the NIGC has not been diligent in its effort to comply with the intent of IGRA. In *King v. Allied Vision Ltd.*, 65 F.3d 1051, 1058-59 (2d Cir. 1995), another case curiously relied on by the Defendants, the Second Circuit upheld a finding of contempt. The District Court had ordered that the Defendant in that case comply "immediately" with its Order to conduct mailings to distributors, but that the Defendant failed to do so for three weeks. *Id.* at 1058. The Second Circuit disregarded the argument that the District Court only required immediate steps without imposing a firm deadline, and held that "[w]hatever constitutes 'immediate,' it is certainly less than three weeks." *Id.*[2] Here, it has been two and one-half months.

POINT IV

PLAINTIFFS ARE ENTITLED TO ATTORNEYS' FEES AND COSTS

As Defendants themselves state, "[s]anctions for a finding of civil contempt serve two functions: to coerce future compliance and to remedy past non-compliance with a court order" (Dkt. No. 83 at 12, *citing Swift v. Blum*, 502 F. Supp. 1140, 1145 [S.D.N.Y. 1980] [citation omitted]). The District Court is vested with wide discretion in fashioning a remedy to ensure future compliance with its Order. *Vuitton, et fils. S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979).

[2] "Forthwith" is defined by dictionary.com as "immediately; at once; without delay." *See also American Heritage Dictionary*, 527 (2d Ed. 1985) (defining "forthwith" as "at once; immediately").

As in *Vuitton*, sanctions are appropriate here because the Defendants had notice of a court order and yet willfully failed to abide by its terms. As stated by the Southern District of New York, "failure to compensate the expenses of enforcing [an] Order, where the Defendants' behavior was genuinely, if not willfully, worthy of a contempt sanction, would not only permit the offender to violate the Court's Order with impunity, but would leave the party that obtained the order worse off for its efforts to secure compliance with its rights and the Court's command." *Shady Records, Inc. v. Source Enterprises, Inc.*, 351 F. Supp. 2d 64, 67 (S.D.N.Y. 2004).

CONCLUSION

The U.S. Seventh Circuit Court of Appeals said it best when it observed that "[t]he Executive Branch of Government has no right to treat with impunity the valid orders of the judicial branch. An order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until reversed by orderly improperly proceedings, and the greater the power that defines law, the less tolerant can this Court be of defiance." *Nelson v. Steiner*, 279 F.2d 944, 948 (7th Cir. 1960). For all the foregoing reasons, this Court should issue an Order (1) directing Defendants to order the Senecas to immediately [within five business days] terminate any further Class III gambling by the Senecas at the Buffalo Parcel; (2) holding the NIGC and Chairman Hogen in contempt of court for failure to adhere to this Court's August 26, 2008 Decision; and (3) award Plaintiffs attorneys' fees and costs in compelling the Defendants to comply with the Court's prior Orders.

DATED: Albany, New York
November 14, 2008

Respectfully submitted,

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