UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DANIEL T. WARREN

PLAINTIFF,

V.

UNITED STATES OF AMERICA, ET AL.,

DEFENDANT.

06-CV-00226-WMS
Hon. William M. Skretny

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE SENECA NATION OF INDIANS

The Seneca Nation of Indians (the "Nation") respectfully requests leave to appear as *amicus curiae* in this action and for leave to submit the accompanying brief *amicus curiae* in opposition to Plaintiff Daniel T. Warren's Motion to Amend/Correct the Complaint to add as parties Barry E. Snyder, Sr., as President of the Nation; the Seneca Gaming Corporation ("SGC"); and E. Brian Hansberry, as President and Chief Executive Officer of SGC[1] (Docket No. 72). The Nation's purpose in seeking leave to appear as *amicus curiae* is to offer insight to the court that the parties to the litigation may be unwilling or unable to present. With respect to Plaintiff's present motion to amend/correct the complaint, the Nation seeks to present its position that the Nation's officers and the SGC enjoy sovereign immunity from this lawsuit. This purpose is a proper one for granting leave to appear as *amicus curiae*. A copy of the Nation's proposed brief is attached hereto as **Exhibit A**.

[1] On April 24, 2009, E. Brian Hansberry was removed as President and CEO of SGC. Accordingly, Plaintiff's motion to amend the Complaint as it relates to Mr. Hansberry is moot.

PROCEDURAL BACKGROUND

On August 14, 2006, the Nation requested leave to file a brief *amicus curiae* seeking dismissal of this action on the ground that the Nation and the State of New York (the "State") were necessary and indispensable parties to this action that cannot be joined due to their sovereign immunity (Docket No. 16). On August 16, 2006, Plaintiff filed an amended complaint in which Plaintiff withdrew his earlier challenge to the validity of the Gaming Compact between the Nation and the State under the Indian Gaming Regulatory Act ("IGRA") and his challenge to the restricted fee status of the Niagara and Buffalo Creek territories (Docket No. 17). Because of the substantial amendments to Plaintiff's complaint, the Nation withdrew its Motion for Leave to File Amicus Brief on September 5, 2006 (Docket No. 26).

On October 2, 2006, Plaintiff filed a Motion to Add Parties, seeking the addition of the Seneca Nation, several of its officers, and the SGC (Docket No. 28). The Nation initially opposed Plaintiff's motion on the grounds that (1) the motion was not properly before this Court because a determination had not been made that the Nation or its officers were necessary and indispensable parties; and (2) the motion was futile because the proposed parties enjoy sovereign immunity. Nation's Response to Motion to Add Parties (Docket No. 38) at 4-12.

On December 1, 2006, oral argument was held before the Honorable John T. Elfvin, United States District Court Judge for the Western District of New York, on Plaintiff's Motion to Add Parties and to Amend/Correct the Complaint. At the argument, counsel for the Nation appeared before the Court and addressed the points set forth in the Nation's Response. To date, the matter remains under advisement.

Plaintiff filed a Motion to Amend/Correct the Complaint on October 4, 2007, seeking to further amend the Complaint to include the Nation's newly elected officers (Docket No. 43). Shortly thereafter, this case was transferred from Hon. John T. Elfvin to Hon. William M. Skretny. The Nation filed a response to this new motion on October 25, 2007, raising the same arguments as were raised in its November 9, 2006 response (Docket No. 47), and requesting in its first paragraph leave to file a brief *amicus curiae*. (*Id.* at 1). The Plaintiff filed opposition papers (Docket Nos. 49-52), and on January 30, 2008, the Nation similarly replied to Plaintiff's Opposition (Docket No. 55). Although no separate application for leave to appear as *amicus curiae* was made, the first paragraph once again sought leave to file the Reply (*Id*. at 1).

By text order dated August 11, 2008, this Court struck the Nation's responses to Plaintiff's motions (Docket Nos. 38, 47 and 55), on the grounds that the Nation had not been granted permission to participate as *amicus curiae*, and had not renewed its motion in that regard. (Docket No. 60). On August 22, 2008, the Nation submitted a request for leave to file a brief *amicus curiae*, with its brief attached thereto as Exhibit A. (Docket No. 62). Plaintiff opposed the Nation's request, under the mistaken assumption that *amicus* status should be granted only to neutral parties with no interest in the outcome of the litigation. (Docket No. 66).

On March 16, 2009, Plaintiff filed the present Motion to Amend/Correct the Complaint, seeking to add as parties the Nation's newly elected officers and to add new claims based on new information. (Docket Nos. 72—74).

The Nation respectfully requests that the Court grant the Nation's request to appear as *amicus curiae* and to file the accompanying *amicus* brief in opposition to Plaintiff's motion to amend. The Nation's interests in the outcome of this lawsuit are significant, such that its participation as *amicus curiae* is warranted. Furthermore, as discussed in more detail in the

accompanying brief, Plaintiff's Motion to Amend/Correct the Complaint should be denied because any such motion is futile given the proposed parties' sovereign immunity from suit. *See American Express v. Robinson*, 39 F.3d 395, 402 (2d Cir. 1994); *John Hancock Mutual Life Ins. Co. v. Amerford Int'l Corp.*, 22 F.3d 458, 462 (2d Cir. 1994).

ARGUMENT

In his previous submission to this Court in opposition to the Nation's request for leave to appear as *amicus curiae* (Docket No. 66), Plaintiff offered as the applicable standard a set of conditions that must be met before a party may be granted *amicus* status. Those conditions include findings that (1) the petitioner has a special interest in the case at bar; (2) the petitioner's interest is not competently represented by the parties to the lawsuit; (3) the information offered by the proposed *amicus* party is timely and useful; and (4) the proposed *amicus* party is not partial to any particular outcome in the case. Docket No. 66 at 2-3. Plaintiff's characterization of these "conditions" as elements that must be met before *amicus* status may be granted is entirely erroneous. "There is no governing standard, rule or statute 'prescribing the procedure for obtaining leave to file an *amicus* brief in the district court.'" *Onondaga Indian Nation v. New York*, 1997 U.S. Dist. LEXIS 9168, *6-7 (N.D.N.Y. 1997), quoting *United States v. Gotti*, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991). As this Court stated in a previous lawsuit involving the validity of the Nation's gaming activities in its Buffalo Creek Territory, "[a] district court has broad discretion to grant or deny an appearance as *amicus curiae* in a given case." *Citizens Against Casino Gambling v. Kempthorne*, 471 F.Supp.2d 295, 311 (W.D.N.Y. 2007) ("CACGEC I"), *citing United States v. Ahmed*, 788 F.Supp. 196, 198 n.1 (S.D.N.Y. 1992). *See also, Citizens Against Casino Gambling v. Hogen*, Index No. 07-00451 at ¶ 4 (W.D.N.Y. Jan. 10, 2008)

("CACGEC II"). Quoting Judge Posner in *Ryan v. Commodity Futures Trading Comm'n*, this Court in CACGEC I pointed out that *amicus* status is "desirable" when

> a party is not represented competently or is not represented at all, when the *amicus* has an interest in some other case that may be affected by the decision in the present case…or when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.

CACGEC I, 471 F.Supp.2d at 311, *quoting Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). Based on Judge Posner's comments, there can be no question that Plaintiff's purported "conditions" are nothing more than factors the Court may use in determining whether participation as *amicus curiae* in this case is appropriate. Nevertheless, these factors weigh heavily in favor of granting the Nation's request for leave to appear as *amicus curiae*.

A. The Nation, its Officers, and the SGC have a special interest in the outcome of this litigation.

The first factor to be considered by this Court is whether the Nation, its officers, and the SGC have a special interest in the outcome of this litigation, such that the Nation's participation as *amicus curiae* is warranted. In a related case, this Court already determined that the Nation's interests will be affected by a decision relating to the legality of the Buffalo Creek Casino. In CACGEC II, in its January 10, 2008 Decision and Order, this Court granted the Nation leave to submit a brief *amicus curiae*, on the ground that "[t]he Nation will be directly affected by the decision in the present case." Because Plaintiff's claims in the present case seek to achieve the same end as the plaintiffs' claims in CACGEC II, the same reasoning should be applied and the Nation should be permitted to appear as *amicus curiae*.

Moreover, the Nation's interest in the outcome of this lawsuit extends beyond a mere loss of future income generated by the Seneca Niagara and Buffalo Creek Casinos. The Nation and the SGC have invested countless millions of dollars in improving the Nation's sovereign lands. The Seneca Niagara Casino has been in operation for several years, and the temporary Buffalo Creek Casino has been in operation for over a year. Both locations have provided substantial revenues that are utilized by the Nation for a variety of governmental and social programs in keeping with the purposes of the IGRA. Plaintiff's claims threaten the continued operation of these casinos, and therefore the Nation has a significant interest in the outcome of this lawsuit.

B. The proposed parties' sovereign immunity cannot be raised by the State or Federal Defendants.

It is well settled that an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has issued a clear waiver of its sovereign immunity. *See Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 86 (2d Cir. 2001). Where Congress remains silent on the issue of immunity, the power to waive such immunity rests solely with the tribe itself. *Id.*

Here, Congress has not abrogated the Nation's sovereign immunity. Plaintiff has suggested that the Nation's officers and the SGC waived their sovereign immunity from this lawsuit by, *inter alia*, engaging in commercial activities related to the Seneca Niagara Falls and Buffalo Creek Casinos. This argument, however, has been rejected by the Supreme Court. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 118 S. Ct. 1700 (1988). Plaintiff also argues that the SGC waived its immunity by including a "sue and be sued clause" in its charter. However, as set forth in more detail in the attached *amicus* brief in opposition to Plaintiff's Motion to Amend/Correct the Complaint, such clauses do not effect a general waiver of sovereign immunity from suits of this nature. *See Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (10th Cir. 2008); *Ninigret Development Corp. v. Narragansett Indian*

Wetuomuck Housing Auth., 207 F.3d 21, 29-30 & n. 5 (1st Cir. 2000); *Sanchez v. Santa Ana Golf Club, Inc.*, 104 P.3d 548, 551-53 (N.M. Ct. App. 2004).

It should be noted that the Federal Defendants raised the immunity issue in their opposition to Plaintiff's second motion to add parties (Docket No. 64). However, as stated above, the power to waive sovereign immunity rests solely with the Nation itself, and it is accordingly appropriate for the Nation to add its views regarding whether it has effected such a waiver.

C. The information offered by the Nation is timely and useful.

As stated above, no other party to this lawsuit has greater motivation than the Nation to raise the sovereign immunity issue. Therefore, the information offered by the Nation is certainly useful in bringing the issue of the Nation's sovereign immunity to the Court's attention. In addition, if the Nation is denied leave to submit its brief in opposition to Plaintiff's motion, Plaintiff's motion will be unopposed, and the Nation will be forced into a lawsuit from which it is immune. While it is true that sovereign immunity issues could be raised on a motion to dismiss, the powerful interests implicated by the Nation's immunity, including the interest in being free of the burden of suit at the earliest juncture possible, combined with principles of judicial economy, dictate that those issues be reviewed at this time. *See Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 87-88 (2d Cir. 2002).

D. Whether the Nation is partial to a particular outcome in this lawsuit is irrelevant to the Nation's request for leave to participate as *amicus curiae*

In his previous opposition the Nation's request for leave to participate as *amicus curiae*, Plaintiff suggests that potential *amici* should not be partial to a particular outcome in the litigation. "The partiality of a would-be amicus is a factor to consider in making that decision, but "there is no rule . . . that *amici* must be totally disinterested." *Concerned Area Residents for*

the Env't v. Southview Farm, 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993), *rev'd on other grounds*, 34 F.3d 114 (2d Cir. 1994). Indeed, "by the nature of things an amicus is not normally impartial." *Id.*

In sum, the Nation has a perspective that no party to the litigation possesses because it is the only entity with the ability to waive its sovereign immunity. Accordingly, it is not only permissible but also desirable for the Nation to appear as *amicus curiae* for the purpose of asserting its sovereign immunity.

CONCLUSION

For the above-state reasons, the Nation respectfully requests that this Court grant it leave to submit its attached Brief *Amicus Curiae* in response to Plaintiff's Motion to Amend/Correct the Amended Complaint (Docket No. 72).

Dated: Buffalo, New York
April 29, 2009

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DANIEL T. WARREN

PLAINTIFF,

v.

UNITED STATES OF AMERICA, ET AL.,

DEFENDANT.

AMICUS SENECA NATION OF INDIANS' RESPONSE TO PLAINTIFF'S MOTION TO AMEND THE COMPLAINT

06-CV-0026-WMS
Hon. William M. Skretny

PRELIMINARY STATEMENT

The Seneca Nation of Indians (the "Nation") respectfully submits the following response to Plaintiff Daniel Warren's ("Plaintiff") Motion to Amend the Complaint.[1] Plaintiff's motion is, for all intents and purposes, a reiteration of his Motion to Add Parties, which Plaintiff filed on October 2, 2006 (Docket Nos. 28-31), and his previous Motion to Amend the Complaint, which Plaintiff filed on October 5, 2007 (Docket No. 43). Plaintiff's present motion is substantively infirm, for it requests leave to add additional defendants, all of whom enjoy sovereign immunity, rendering a further amendment to the Complaint to add these defendants futile. For the reasons set forth below, the Nation respectfully requests this Court deny Plaintiff's current Motion to Amend the Complaint.

PROCEDURAL BACKGROUND

On April 6, 2006, Plaintiff filed this suit against the United States of America, the United States Department of the Interior, individual federal defendants, George E. Pataki as Governor of New York, and Cheryl Ritchko-Buley as Chair of the New York State Racing and Wagering

[1] This submission should not in any way be construed as a waiver of the Nation's sovereign immunity, which, as the arguments herein make clear, the Nation asserts unequivocally.

Board (collectively, "Defendants"). Complaint (Docket No. 1) at ¶¶ 10-17. Plaintiff's original Complaint directly challenged the validity of the Gaming Compact between the Nation and the State of New York under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. 2701 *et seq*. *Id*. at ¶¶67, 78. It also challenged the restricted fee status of the Nation's Niagara and Buffalo Creek Territories, *id*. at ¶ 64, and the validity of the Nation's Gaming Ordinance, *id*. at ¶ 70.

On August 14, 2006, based on the scope and character of these claims, the Nation filed a Motion for Leave to File Amicus Brief and accompanying Brief Amicus Curiae (Docket No. 16), requesting dismissal of this action under Fed. R. Civ. P. 19. The Nation argued that both it and the State of New York, as the only two parties to the gaming compact, had significant governmental and economic interests in the Compact's validity. In addition, the Nation argued that it had a significant governmental interest in its authority over the Niagara Falls and Buffalo Creek Territories, and in the status of its title to land parcels within those Territories. As a result, the Nation urged that both it and the State were necessary and indispensible parties to the action, rendering dismissal appropriate under Fed. R. Civ. P. 19.

On August 16, 2006, Plaintiff filed an Amended Complaint (Docket No. 17). Plaintiff withdrew his claims that the Niagara and Buffalo Territories are not "Indian lands" within the meaning of IGRA (former Third Cause of Action) and that the Territories do not fall into any of IGRA's Section 20 exceptions (former Fourth Cause of Action). It was on the basis of these alleged infirmities that Plaintiff had, in his original Complaint, argued that the Compact, the approval of the gaming ordinance, and the decision to allow the lands to attain restricted fee status were unlawful. Plaintiff's claims in his First Amended Complaint instead involved matters of state law, and federal matters with respect to which Plaintiff does not enjoy standing.[2]

[2] Specifically, Plaintiff's First Amended Complaint contained four counts: (1) that IGRA violates the Tenth Amendment because it commandeers state officers and the state legislature to carry out federal policy; (2) that the

Because of Plaintiff's substantial amendments to his Complaint, the Nation withdrew its Motion for Leave to File Amicus Brief on September 5, 2006 (Doc. No. 26).

On October 2, 2006, Plaintiff filed a Motion to Add Parties seeking, on the basis that the Nation might be found necessary and indispensable to his action, the addition of (1) Barry E. Snyder, Sr. as President of the Seneca Nation of Indians; (2) John Pasqualoni as President and CEO of the Seneca Gaming Corp.; (3) the Seneca Nation of Indians; and/or (4) the Seneca Gaming Corporation. (Docket No. 28).

The Nation opposed Plaintiff's motion on the grounds that (1) the motion was not properly before this Court because a determination had not been made that the Nation or its officers were necessary and indispensible parties, and the Nation had indeed withdrawn its argument to that effect; and (2) the motion was futile because the Nation, the Seneca Gaming Corporation, and the individual Nation officials enjoy sovereign immunity.(Docket No. 38). Plaintiff filed a reply in support of his Motion to Add Parties that sought to add Maurice John to the lawsuit as the newly elected President of the Seneca Nation of Indians, and included a proposed Second Amended Complaint, (Docket Nos. 39-41). The causes of action asserted in Plaintiff's proposed Second Amended Complaint were virtually identical to those found in the First Amended Complaint. *See* Plaintiff's Proposed Second Amended Complaint (Docket No. 40).

Compact is in violation of IGRA, 25 U.S.C. § 2710(d)(1)(B), because it provides for commercial gambling in a state that does not permit such gambling for any purpose by any person, organization or entity; (3) that Part B of Chapter 383 of the Laws of 2001—the New York statute authorizing the governor to enter into the Compact—violates the New York Constitution, that the state officials who authorized and entered into the Compact acted in excess of their authority, and that the Compact is thus not in effect as required by IGRA; and (4) that the United States has failed to adhere to existing regulations and failed to promulgate and implement new regulations on "Indian lands" and/or gaming on off-reservation territory, thereby violating its statutory duties and trust obligation toward Indian nations and tribes. Docket No. 17, ¶¶ 55-107.

On December 1, 2006, oral argument was held before the Honorable John T. Elfvin, United States District Court Judge for the Western District of New York, on Plaintiff's Motion to Add Parties and to Amend/Correct the Complaint.

Plaintiff filed an additional motion to Amend/Correct the Complaint on October 4, 2007, seeking to further amend the Complaint to include as Defendants (1) Maurice John, as President of the Seneca Nation of Indians; (2) E. Brian Hansberry, as the new President and Chief Executive Officer of the Seneca Gaming Corporation (replacing John Pasqualoni); (3) the Seneca Nation of Indians; and (4) the Seneca Gaming Corporation. (Docket No. 43). Plaintiff attached to his motion a Supplemental and Amended Verified Civil Complaint, wherein Plaintiff once again asserted causes of action that were virtually identical to those asserted in the First Amended Complaint. The Nation filed a brief in opposition to Plaintiff's motion on October 25, 2007, in which it requested leave to appear as *amicus curiae* (Docket No. 47). On December 28, 2007, Plaintiff filed his opposition to the Nation's request for leave, arguing that the Nation was attempting to overstep the bounds of what a non-party is permitted to do when submitting a brief *amicus curiae* (Docket Nos. 49—52). The Nation filed a reply to Plaintiff's response on January 30, 2008 (Docket No. 55).

By text order dated August 11, 2008 (Docket No. 60), this Court struck the Nation's responses to Plaintiff's Motions to Add Parties and/or Amend/Correct the Complaint (Docket Nos. 38, 47 and 55) on the grounds that the Nation did not formally request leave to submit a brief or appear as *amicus curiae*. On August 22, 2008, the Nation formally requested leave to file a brief *amicus curiae* and attached a proposed brief in opposition to Plaintiff's Motion to Amend/Correct the Complaint (Docket No. 62). Defendants George E. Pataki and Cheryl Richko-Buley ("State Defendants") and Defendants United States of America, Lynn Scarlett,

James Cason, United States Department of the Interior, Philip N. Hogen, National Indian Gaming Commission, and Dirk Kempthorne ("Federal Defendants") also opposed Plaintiff's Motion to Amend/Correct the Complaint. (Docket Nos. 61 and 64, respectively).

Plaintiff filed the present Motion on March 16, 2009, seeking to further amend the Complaint to include as Defendants (1) Barry E. Snyder, Sr., as President of the Seneca Nation of Indians; (2) E. Brian Hansberry, as President and Chief Executive Officer of the Seneca Gaming Corporation (replacing John Pasqualoni)[3]; and (3) the Seneca Gaming Corporation. *See* Declaration of Daniel T. Warren, dated March 13, 2009 ("Warren Declaration"), at ¶ 9-10. Plaintiff does not seek to add the Nation itself as a party to this lawsuit. Attached to the Warren Declaration as Exhibit A is a Supplemental and Amended Verified Civil Complaint ("Fourth Amended Complaint"), wherein Plaintiff asserts many of the same causes of action as those asserted in the First Amended Complaint, although he adds a cause of action related to the National Indian Gaming Corporation's approval of the Nation's amended gaming ordinances.

The Nation opposes the Plaintiff's present Motion for the reasons set forth below.

ARGUMENT

Rule 21 of the Federal Rules of Civil Procedure provides for addition of parties to a lawsuit "by order of the court…and on such terms as are just." Fed. R. Civ. P. 21. The applicable standard for addition of parties is contained in Rule 15 on Amended and Supplemental Pleadings, which provides that leave to amend should "be freely given where justice so requires." Fed. R. Civ. P. 15(a). However, a court may deny leave to amend if the proposed amendment(s) would be futile. *See American Express v. Robinson*, 39 F.3d 395, 402 (2d Cir. 1994); *John Hancock Mutual Life Ins. Co. v. Amerford Int'l Corp.*, 22 F.3d 458, 462 (2d Cir.

[3] On April 24, 2009, E. Brian Hansberry was removed as President and CEO of the SGC. Accordingly, Plaintiff's motion is moot as it relates to Mr. Hansberry.

1994). In this case, Plaintiff seeks to add defendants who enjoy sovereign immunity. Thus, any amendment to add these defendants would be futile, and the motion should be denied.

I. NATION OFFICIALS ENJOY SOVEREIGN IMMUNITY

Because the sovereign immunity enjoyed by the Nation and SGC officials[4] is predicated on a finding that the Nation itself enjoys sovereign immunity, it is necessary to discuss the Nation's assertion of immunity from suits of this nature. It is well-established that Indian tribes and nations are immune from lawsuits or court process in both state and federal court unless "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1988). Any abrogation of tribal immunity by Congress must be express, and any waiver by a tribe, clear and unequivocal. *C&L Enters. V. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001). Here, Congress has not abrogated the Nation's sovereign immunity, nor has the Nation waived it. While IGRA abrogates a tribe's sovereign immunity where *a state* sues a tribe that is allegedly conducting class III gaming in violation of its tribal-state compact, 25 U.S.C. § 2710(d)(7)(A)(ii), there is no such abrogation with respect to suits by a private party. *See Mescalero Apache Tribe v. State of N.M.*, 131 F.3d 1379, 1385 -1386 (10th Cir. 1997) (noting IGRA's abrogation of tribal sovereign immunity "when a state seeks to enjoin gaming activities conducted in violation of any Tribal-State compact") (internal quotation marks omitted); *Hartman v. Kickapoo Tribe Gaming Comm'n*, 319 F.3d 1230, 1232 (10th Cir.2003) (IGRA does not authorize private individuals to sue tribes under the statute for failure to comply with its

[4] Although, as stated above, this motion is moot as it relates to SGC officials since E. Brian Hansberry was removed as President and CEO of the SGC, the Nation anticipates that Plaintiff will again seek to amend the complaint to include the new President and CEO of the SGC. However, the analysis contained in this brief applies to any subsequently appointed SGC officials, because such yet-to-be-named officials enjoy the same sovereign immunity enjoyed by Mr. Hansberry.

provisions); *In re Sac & Fox Tribe of the Mississippi in Iowa/Meskewski Casino Litig.*, 340 F.3d 749, 766 (8th Cir.2003) (IGRA provides no general private right of action). Nor has the Nation come remotely close to effecting a clear waiver of its sovereign immunity. *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1243 (11th Cir. 1999).

The mere participation in gaming does not constitute a limited waiver of tribal immunity. *See id*. (holding that "waivers of sovereign immunity cannot be implied on the basis of a tribe's action, but must be unequivocally expressed"); *Davids v. Coyhis*, 869 F.Supp. 1401, 1408 (E.D.Wis. 1994) ("[I]t is still the law of the land that a waiver of sovereign immunity *cannot be implied* but must be unequivocally expressed." (emphasis in original)). Thus, the Nation has not waived its sovereign immunity, nor has Congress abrogated its immunity, for purposes of lawsuits initiated by third-parties claiming that a compact does not comport with IGRA.

The Nation's sovereign immunity having been firmly established, it is equally clear that Nation and SGC officials also enjoy sovereign immunity. Plaintiff argues that Nation officials may be sued in their official capacity for prospective injunctive or declaratory relief under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), which permits plaintiffs to sue nation officials to enjoin an ongoing violation of federal law. Plaintiff's Memorandum of Law in Support of Motion to Amend/Correct the Complaint ("Plaintiff's Brief") at p. 19. However, the *Ex parte Young* doctrine applies in the Second Circuit to nation or tribal officials only where two "important qualifications" are met: first, any law under which plaintiff seeks injunctive relief must apply substantively to the Nation; and second, plaintiff must have a private cause of action to enforce the substantive rule. *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 87-88 (2d Cir. 2001).

Under the *Garcia* test, there is no *Ex parte Young* exception available to Plaintiff with respect to any part of his Supplemental and Amended Complaint. Plaintiff seeks injunctive relief under the Administrative Procedures Act ("APA"), which does not "apply substantively" to the Nation but, by its own terms, applies only to the actions of federal agencies. *See* 5 U.S.C. §§ 701(b)(1) and 702 (creating right of judicial review for "agency action" and defining "agency" as an "authority of the Government of the United States"). For this reason alone, Plaintiff cannot avail himself of the *Ex Parte Young* doctrine.

Nor is there any indication that the statutes and constitutional provisions that underpin Plaintiff's APA suit meet the *Garcia* requirements either. With respect to Count I, alleging that IGRA violates the Tenth Amendment, Plaintiff fails to acknowledge that the protections of the Tenth Amendment run to the states as against the federal government, and not as against Indian nations; in *Garcia's* terms, the Tenth Amendment does not "apply substantively" to the Nation.

Count II alleges that the Compact between the Nation and the State of New York violates IGRA by providing for gaming that is not legal in New York for any other purpose. However, while many of IGRA's substantive provisions undoubtedly apply to the Nation, the second prong of the *Garcia* test is not met, for Plaintiff does not enjoy a private cause of action under IGRA. *Hartman v. Kickapoo Tribe Gaming Comm'n*, 319 F.3d 1230, 1232 (10th Cir. 2003); *Hein v. Capitan Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000); *Tamiani Partners LTD v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1049 (11th Cir. 1995); *Jimi Dev. Corp. v. Ute Mountain Ute Indian Tribe*, 930 F.Supp. 493, 498 (D. Colo. 1996). Indeed, *Garcia's* own facts make it clear that the *Ex Parte Young* exception does not apply to Plaintiff's IGRA claim. The *Garcia* court found that even though the Indian Civil Rights Act imposed "numerous substantive obligations on tribal governments" (as does IGRA), the fact that it did not

provide a private cause of action for plaintiffs (as IGRA does not) precluded application of the *Ex parte Young* exception. *Garcia*, 268 F.3d at 88.

The *Ex parte Young* doctrine likewise is inapplicable to Count III because the doctrine applies to violations of federal, not state, law. *See Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 310 (N.D.N.Y. 2003). Count III is primarily based on violations of the New York Constitution. To the extent that Count III alleges a violation of IGRA, that statute's lack of a private cause of action dooms Plaintiff's *Ex parte Young* theory, as explained above.

Finally, Counts IV and V do not appear to be aimed at the Nation's officials at all. These two causes of action rely upon the APA and allege that the Federal Defendants improperly approved the Nation's amended gaming ordinances, in violation of IGRA. Because the APA does not apply substantively to the Nation, and there is no private cause of action under IGRA, Counts IV and V do not meet the requirements of the *Garcia* test.

Given the Nation's sovereign immunity and Plaintiff's failure to demonstrate that the allegations in the Fourth Amended Complaint meet the test established by the Second Circuit for the invocation of *Ex parte Young*, Plaintiff's request to Amend the Complaint to add Nation and SGC officials should be denied.

II. THE SGC ALSO ENJOYS SOVEREIGN IMMUNITY FROM THIS SUIT.

Without citation to any relevant authority, Plaintiff suggests that the Nation's sovereign immunity does not extend to its commercial enterprises. Plaintiff further argues that even if the SGC were entitled to sovereign immunity protection, it waived such immunity by including a "sue and be sued" clause in its charter. Neither argument withstands scrutiny and both should be rejected by this Court.

A. The Nation's sovereign immunity extends to its commercial enterprises.

The SGC was established by the Nation in August 2002 for the purpose of "developing, constructing, owning, leasing, operating, managing, maintaining, promoting and financing" the Nation's gaming facilities. Fifth Amended and Restated Charter of the Seneca Gaming Corporation, attached hereto as **Exhibit A**, at p. 2. Under the Nation's charter, the SGC is a "governmental instrumentality of the Nation," a "subordinate arm of the Nation," and is "entitled to all of the privileges and immunities of the Nation." *Id.* at p. 3. Likewise, under federal law, the sovereign immunity of the Nation extends to the SGC as an arm of the tribe. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006)("In light of the purposes for which the Tribe founded this Casino and the Tribe's ownership and control of its operations, there can be little doubt that the Casino functions as an arm of the Tribe"); *Worrall v. Mashantucket Pequot Gaming Enter*., 131 F.Supp. 2d 328, 331 (D.Conn. 2001) ("[T]he Court concludes the Gaming Enterprise is entitled to the same tribal sovereign immunity that protects the tribe itself"); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21 (1st Cir. 2000); *Hagen v. Sisseton-Wahpeton Comm. Coll.*, 205 F.3d 1040 (8th Cir. 2000); *Seneca Niagara Falls Gaming Corporation v. Klewin Bldg. Co.*, 2005 Conn. Super. LEXIS 3295 (Conn. Super. 2005) (holding that the Nation's Seneca Niagara Falls Gaming Corporation, which is the wholly owned subsidiary of the SGC, shares in the Nation's sovereign immunity).

The SGC enjoys sovereign immunity with respect to its commercial activities. In *Kiowa Tribe*, *supra*, the Supreme Court reaffirmed tribal sovereign immunity for purely commercial activities, and left to Congress the question of whether, as a matter of federal law, policy considerations should ever counsel in favor of abrogating that immunity. *See Kiowa Tribe*, 523

U.S. at 758. Under current law, Congress has not abrogated tribal immunity for a tribe's commercial activities, and, as the Court in *Kiowa Tribe* made clear, abrogation of sovereign immunity is not a proper judicial function. Therefore, the SGC enjoys sovereign immunity from this suit and Plaintiff's attempt to amend the Complaint to add the SGC is futile. For these reasons, Plaintiff's motion should be denied.

B. The inclusion of a "sue or be sued" clause in the SGC's charter did not waive immunity.

Plaintiff argues that the Seneca Gaming Corporation has waived its immunity to this suit through the "sue and be sued" clause in its corporate charter (Plaintiff's Brief at 5, 21-23), which provides:

> The Council hereby gives its consent to allowing the Company, by resolution duly adopted by the Board of Directors, to sue and be sued in its corporate name, upon, or to submit to arbitration or alternative dispute resolution any controversy arising under, any contract, claim or obligation arising out of its activities under this Charter, provided, that such resolution shall be subject to the approval of Council.

Fifth Amended and Restated Charter of the Seneca Gaming Corporation at 7(a).

Plaintiff fails to acknowledge that the majority of courts have rejected the notion that this type of "sue and be sued" clause effects a general waiver from suit. *See, e.g., Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (10th Cir. 2008); *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 29-30 & n. 5 (1st Cir. 2000); *Sanchez v. Santa Ana Golf Club, Inc.*, 104 P.3d 548, 551-53 (N.M. Ct. App. 2004); American Indian Law, William C. Canby, Jr. at 102 ("A majority of courts. . . has held that a mere 'sue and be sued' clause does not constitute a waiver.") The only Second Circuit case to consider the question has likewise rejected Plaintiff's argument. *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 87-88 (2d Cir. 2001).

Instead, "[m]ost courts have reasoned that tribal adoption of a charter with such a clause simply creates the power in the corporation to waive immunity, and that adoption of the charter alone does not independently waive tribal immunity." Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 7.05(1)(c) (2005 ed.). *See, e.g., Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1044 (8th Cir. 2000) (no waiver where tribal college's charter provided that college could "sue and be sued in its corporate name in a competent court to the extent allowed by law" and that the Tribe gave its "consent to allowing the [college] to sue and be sued upon any contract" and "authorize[d] the [college] to waive any immunity from suit which it might otherwise have."); *Chance v. Coquille Indian Tribe*, 963 P.2d 638 (Or. 1998) (no waiver where tribal management corporation's articles provided that corporation had power to "consent to be sued in courts"). This interpretation—that charters generally empower the tribal corporation to waive immunity but do not themselves effect a waiver—is fully consistent with the language of the Nation's charter, which allows the Nation's Gaming Corporation to sue and be sued in its corporate name "*by resolution duly adopted by the Board of Directors*" so long as that resolution receives "*the approval of Council*." Fifth Amended and Restated Charter of the Seneca Gaming Corporation at 7(a) (emphasis added). Here there has been no such resolution by the Gaming Corporation, let alone approval of that resolution, and Plaintiff does not claim otherwise. Moreover, the Charter in several places refers to sovereign immunity in a manner entirely inconsistent with interpreting the "sue and be sued" clause as a waiver. *See, e.g.* Charter at 7(a) ("The Company's ability to sue and be sued and to waive its immunity from suit shall at all times remain with the Board of Directors to be granted by duly adopted resolution subject to the approval of Council."). Finally, the Charter explicitly disclaims any waiver of immunity:

> Except as expressly provided by this section, the Nation by the adoption of this Charter and the establishment of the Company is not waiving its sovereign immunity in any respect or consenting to the jurisdiction of any court.

Charter at 7(c). If the "sue and be sued" clause were interpreted, as Plaintiff advocates, as a general waiver of immunity from suit, it is not clear what this disclaimer could mean.

The cases Plaintiff cites in support of his waiver argument are inapposite. For example, while *Lineen v. Gila River Indian Cmty.*, 276 F.3d 489 (9th Cir. 2002) held that the "sue and be sued" clause there effected a waiver of immunity, the court made it clear that the immunity extended to commercial activities, not governmental activities. *Id.* at 493. Since *Lineen,* the Ninth Circuit has established that a tribal casino is an arm of a tribe which engages in governmental activities, *Allen v. Gold Country Casino,* 464 F.3d 1044, 1047 (9th Cir. 2006), sapping *Lineen* of any applicability to the instant case. In the same circuit, *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974 (9th Cir. 2006) found that the "sue and be sued" clause in an enabling ordinance constituted a waiver of immunity. But the ordinance language contrasts sharply with the language at issue here, providing that the Blackfeet Housing Authority could be sued without any further steps (unlike the resolution or council approval necessary for waiver of the Gaming Corporation's immunity). *Id.* at 978 ("The Council hereby gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have.") Finally, *Ute Distribution Corp. v. Ute Indian Tribe,* 149 F.3d 1260 (10th Cir. 1998) does not even reach the issue whether the "sue and be sued" clause in that case effected a waiver. These cases do not support Plaintiff's argument that the "sue and be sued" clause waives the immunity of the Nation's Gaming Corporation.

CONCLUSION

For the above-stated reasons, the Nation respectfully requests that Plaintiff's Motion to Amend the Complaint (Docket No. 72) be denied.

Dated: Buffalo, New York
April 29, 2009

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EXHIBIT A

FIFTH AMENDED AND RESTATED CHARTER

OF THE

SENECA GAMING CORPORATION

WHEREAS, Section I of the Constitution of the Seneca Nation of Indians of 1848, as amended, vests the Legislative Authority of the Seneca People in the Nation's Tribal Council; and

WHEREAS, it is declared the policy of the Nation to promote the welfare and prosperity of its members and to actively promote, attract, encourage and develop economically sound commerce and industry through governmental action for the purpose of preventing unemployment and economic stagnation; and

WHEREAS, the Gaming industry is vitally important to the economy of the Nation and the general welfare of its members; and

WHEREAS, the ability of the Nation to finance, develop, construct, operate, and maintain certain Nation Gaming Facilities will be enhanced by the creation of a separate entity for such purposes, and the Company created by this Charter will be able to perform these functions, and, accordingly, will be of benefit to the Nation and its members; and

WHEREAS, on August 1, 2002, the Nation's Council granted a Charter to create, appoint and constitute the SENECA GAMING CORPORATION, which Charter has been previously amended and restated; and

WHEREAS, the need now arises to amend and restate the Fourth Amended and Restated Charter of the SENECA GAMING CORPORATION.

NOW, THEREFORE, the Nation's Council, pursuant to its constitutional authority, does

hereby grant this Fifth Amended and Restated Charter to re-create, re-appoint and re-constitute the SENECA GAMING CORPORATION.

1. Creation of Seneca Gaming Corporation and Principal Place of Business

By this Charter, the Nation creates the Seneca Gaming Corporation (the "Company"). The Company shall have its principal place of business at the William Seneca Administration Building, 1490 Route 438, Cattaraugus Reservation, Irving, New York 14081, or at such other location within the Nation's territories that the Board of Directors of the Company shall determine.

2. Purpose

The Company is organized for the purpose of developing, constructing, owning, leasing, operating, managing, maintaining, promoting and financing Nation Gaming Facilities and engaging in any other lawful activity, subject to any limitations imposed by any contract, indenture or other instrument by which the Company is bound. The Nation intends that the Company shall assume all obligations, responsibilities and duties of the Nation under gaming law existing at the date of enactment of this Charter, with the sole exception of the power of gaming regulation, gaming licensing and enforcement of applicable law, which powers are reserved to the Nation.

3. Relation to Nation

a. The Company shall constitute a governmental instrumentality of the Nation, having autonomous existence separate and distinct from the Nation.

b. For purposes of civil jurisdiction, regulatory jurisdiction and taxation, the Company shall be deemed a subordinate arm of the Nation and shall be entitled to all of the privileges and immunities of the nation.

c. The Company shall have no power to exercise any regulatory or legislative power; the Nation reserves from the Company all regulatory, legislative and other governmental power, including, but not limited to the power to grant, issue, revoke, suspend or deny licenses, conduct background investigations, and enact legislation regulating Gaming on the territories of the Nation.

4. Definitions

For purposes of this Charter, when capitalized, the following terms shall have the meanings respectively specified---

a. "Board of Directors" shall mean the Board of Directors of the Company created by this Charter.

b. "Compact" shall mean the "Nation-State Gaming Compact Between The Seneca Nation of Indians And The State Of New York."

c. "Company" shall mean the Seneca Gaming Corporation, created by this Charter.

d. "Councillors" shall mean the duly elected Councillors of the Nation.

e. "Council" shall mean the legislative elected body of the Nation.

f. "Felony" shall mean only those offenses set forth under the Indian Major Crimes Act (18 U.S.C. § 1153).

g. "Gaming" shall mean to deal, operate, carry on, conduct, maintain or expose for play any gaming as contemplated in the Seneca Nation of Indians Class III Gaming Ordinance of 2002 or the Indian Gaming Regulatory Act.

h. "Management Contract" shall mean any contract, subcontract or collateral agreement between the Company and a contractor or a contractor and a subcontractor if such contract or agreement provides for the management of all or a part of a Nation Gaming Facility.

i. "Nation" shall mean the Seneca Nation of Indians, a sovereign nation.

j. "Nation Entity" shall mean any entity created or owned by the Nation for economic or governmental purposes and any entity which is controlled by the Council. An entity shall be deemed controlled by the Council if a majority of persons serving on the body which governs the entity are chosen by or are required to be Councillors.

k. "Nation Gaming Facility" shall mean any existing and future establishment of the Nation (i) upon which Gaming takes place, (ii) which is authorized and licensed under applicable law, and (iii) which the Council designates for ownership, lease, development, construction, operation or management by the Company, including without limitation any Class III Gaming facilities established in accordance with the Compact.

l. "Obligations" shall mean any notes, bonds, interim certificates, debentures or other evidences of indebtedness issued by the Company under this Charter.

m. "Obligee" shall mean any holder of an Obligation, and any agent or trustee for any holder of any Obligation.

5. Assets of Company

The Company shall have only those assets of the Nation formally assigned or leased to it by the Council or by a Nation Entity, together with whatever assets it acquires by other means as provided in this Charter. No activity of the Company nor any indebtedness incurred by it shall encumber, implicate or in any way involve assets of the Nation or another Nation Entity not assigned or leased in writing to the Company.

6. Perpetual Succession

The Company shall have perpetual succession in its corporate name, provided, that the Council shall review the Company's operations at least every ten (10) years to assess whether the Company continues to serve the interests of the Nation and its people.

7. Ability to Sue and Be Sued

a. The Council hereby gives its consent to allowing the Company, by resolution duly adopted by the Board of Directors, to sue and to be sued in its corporate name, upon, or to submit to arbitration or alternative dispute resolution any controversy arising under, any contract, claim or obligation arising out of its activities under this Charter, provided, that such resolution shall be subject to the approval of Council. The Council also authorizes the Company, by resolution duly adopted by the Board of Directors, to agree by contract to waive its immunity from suit, provided that such waiver shall be subject to the approval of Council. Notwithstanding the foregoing, the Nation shall not be liable for the debts or obligations of the Company and the Company shall have no power to pledge or

encumber the assets of the Nation. This action does not constitute a waiver of any immunity of the Nation or a delegation to the Company of the power to make such a waiver. The Company's ability to sue and be sued and to waive its immunity from suit shall at all times remain with the Board of Directors to be granted by duly adopted resolution subject to the approval of Council.

b. The Company, by resolution duly adopted by the Board of Directors and approved by the Council, shall have the authority to consent (i) to the exercise of jurisdiction over any suit or over the Company by the courts of any state, the federal courts, the courts of the Nation or any other Indian Nation, or the courts of any United States territory or foreign jurisdiction, and (ii) to arbitration or alternative dispute resolution. Such authority shall at all times remain with the Board of Directors to be granted by duly adopted resolution subject to the approval of Council.

c. Except as expressly provided in this section, the Nation by the adoption of this Charter and the establishment of the Company is not waiving its sovereign immunity in any respect or consenting to the jurisdiction of any court. This section shall be strictly construed with a view toward protecting Nation assets from the reach of creditors and others.

8. Powers of Company

a. It is the purpose and intent of this Charter to authorize the Company to do any and all things necessary or desirable in connection with the financing, development, construction, ownership, lease, operation, management, maintenance, and promotion of Nation Gaming Facilities, or in connection with any other authorized

activities conducted by the Company, and to secure the financing and assistance necessary for such activities.

b. Each Nation Gaming Facility shall be operated by the Company as provided in this Charter.

c. Subject to the limitations set forth in this Charter and Nation law, the Board of Directors shall manage and have complete control over the conduct of Company affairs and shall have the full power to act for and bind the Company. Such authority shall be exercised pursuant to the bylaws of the Company and, where appropriate, by duly adopted resolution.

d. Subject to the limitations set forth in this Charter and Nation law, the Company, by and through the Board of Directors acting on behalf of the Company, shall have the following powers which it may exercise consistent with the purposes for which the Company was established:

    i. to develop, construct, own, lease, mortgage, operate, manage, promote and finance Nation Gaming Facilities, including expansions and enlargements thereof, including the power to enter into leases and leasehold mortgages, provided, that prior to engaging in any of the activities authorized by this subsection that require a significant expenditure of Company resources that the Company submit a comprehensive business plan to Council for its review and approval;

    ii. if the Board of Directors determines it to be in the best interests of the Company and the Nation, to terminate the operation of any Nation Gaming

Facility and to dispose of, demolish or abandon any facilities relating thereto, subject to the approval of Council;

iii. to have a corporate seal, and alter the seal, and use it by causing it or a facsimile to be affixed, impressed or reproduced in any other manner;

iv. to adopt, amend or repeal bylaws, including emergency bylaws, relating to the business of the Company, the conduct of its affairs, its rights and powers and powers of its Board of Directors and officers, subject to the review and approval of Council as provided in this Charter;

v. to elect or appoint officers, employees or other agents of the Company, prescribe their duties and fix their compensation, and indemnify members, officers, employees and agents;

vi. to enter into, make, perform and carry out, cancel and rescind contracts, agreements and understandings for any lawful purpose pertaining to its business with any Nation, federal, state or local governmental agency or with any person, partnership, limited partnership, corporation, limited liability company, Indian Nation, Nation Entity, or other entity, provided, that any such contracts, agreements or understandings with any government or governmental agency or entity shall be subject to the approval of Council;

vii. to enter into, make, perform and carry out, cancel and rescind any Management Contract, subject to the approval of Council;

viii. to lease property from the Nation, a Nation Entity or others for such periods as are authorized by law, and to hold, mortgage, manage or sublease the

same; provided, however, that nothing herein shall be construed to include, and the Company shall not have, any power to grant or permit or purport to grant or permit any right, lien, encumbrance or interest in or on any real property within Nation territories unless pursuant to a lease, authorized and approved by the Council;

ix. to give guarantees and incur liabilities, provided that significant guarantees or liabilities shall be subject to the approval of Council;

x. to lend money to any subsidiary corporation subject to the approval of Council, invest and reinvest funds, and take and hold the Company's real and personal property as security for the payment of funds so loaned or invested;

xi. subject to the provisions of this Charter, to obtain financing and refinancing, to borrow money at rates of interest as the Company may determine, to issue temporary or long term indebtedness and to repay the same;

xii. subject to the provisions of this Charter, to mortgage or pledge assets and receipts of the Company as security for debts;

xiii. to agree to any conditions attached to federal, state or local financial assistance;

xiv. to purchase, receive, take by grant, devise, bequest or otherwise, lease or otherwise acquire, own, hold, improve, employ, use, and otherwise enjoy all powers necessary or appropriate to deal in and with, real and personal property, or an interest in real or personal property, wherever situated;

provided, that purchases of real property and significant expenditures of personal property shall be subject to the approval of Council;

xv. subject to the provisions of this Charter, to sell, convey, lease, exchange, transfer or otherwise dispose of, or mortgage or pledge, or create a security interest in any of its property or an interest in its property, wherever situated; provided, however, that nothing herein shall be construed to include, and the Company shall not have, any power to grant or permit or purport to grant or permit any right, lien, encumbrance or interest in or on any real property within the Nation unless pursuant to a lease, authorized and approved by the Council;

xvi. to purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, employ, sell, lend, lease, exchange, transfer or otherwise dispose of, pledge, use and otherwise deal in and with, bonds and other obligations, shares or other securities or interests issued by others, whether engaged in similar or different business, governmental, or other activities, including banking corporations and trust companies, subject to the approval of Council;

xvii. to employ contractors, consultants, attorneys and accountants, provided that the Company shall not engage in any efforts to politically influence any Indian nation, federal, state, or local government or their officials;

xviii. to employ, discipline and discharge employees and establish personnel policies and terms and conditions of employment;

xix. to undertake and carry out studies and analyses of existing and potential Nation Gaming Facilities;

xx. to establish procedures for resolving disputes between the Gaming public and the Nation Gaming Facility or any management contractor, and to establish and implement any such procedures that may be required to be established and implemented with respect to operation of the Nation Gaming Facility in accordance with the Compact or applicable law;

xxi. to purchase insurance from any stock or mutual company for any property or against any risk or hazards;

xxii. to establish and maintain such bank accounts as may be necessary or convenient;

xxiii. to participate with others in any corporation, partnership, limited partnership, limited liability company, or other association of any kind, or in any transaction, undertaking, or agreement which the Company would have power to conduct by itself, subject to the approval of Council;

xxiv. subject to the provisions of this Charter, to allow the Company to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this Charter and to agree by contract to waive its immunity from suit;

xxv. subject to the provisions of this Charter, to consent to the exercise of jurisdiction over any suit or over the Company by the courts of any state, the federal courts, the courts of the Nation or any other Indian Nation, or

the courts of any United States territory or foreign jurisdiction, or to arbitration or alternative dispute resolution;

xxvi. to utilize, with the consent of the President of the Nation, the agents, employees and facilities of the Nation for in-kind services, paying the Nation mutually agreed upon share of the costs for said in-kind services;

xxvii. to act as, and to exercise all rights and perform all obligations of, the "Nation Gaming Operation" as such entity is defined in the Compact;

xxviii. to take such further specific actions as the Board of Directors may deem necessary to effectuate any or all of the purposes for which the Company is organized;

xxix. to enjoy the sovereign immunity of the Nation, to the same extent as the Nation, provided that the actions of the Company or any of its officials, employees, or duly authorized agents are authorized by the provisions of this Charter; and

xxx. upon the direction of the Council, to exercise any or all of the foregoing powers through the control, operation and management of any subsidiary company or other entity created by or under authority of the Nation for the purpose of developing, financing, operating and conducting the business of any one or more Nation Gaming Facility; provided, however, that any such subsidiary company or other entity shall be operated and managed in accordance with and in fulfillment of the purposes set forth in this Charter and any charter or other enabling authority governing such subsidiary company or other entity.

9. Management of the Company

a. There is hereby established a Board of Directors of the Company, the purpose of which is to carry out the duties and powers of the Company as set forth in this Charter.

b. There shall be no less than four (4) nor more than seven (7) members of the Board, not less than five (5) of whom shall be enrolled Senecas. No Councillor may serve on the Board, nor shall any Company employee or any person with an economic interest in any of the Company's activities. Board members shall constitute "public officials" for purposes of the Nation Ethics Law.

c. The Council shall appoint Board members. Vacancies shall also be filled by Council appointment. An appointment of a Board member shall take effect from the date and time at which the Council adopts the resolution authorizing such appointment.

d. Any Board candidate who is at least twenty-one years old, who has earned at least a high school diploma or equivalent, and who shall not have been convicted of a Felony, is eligible to serve as a member of the Board.

e. Board members shall serve for a term of three (3) years, provided, however, that of the initial Board, four (4) members shall be appointed to serve a term of three (3) years, two (2) members shall be appointed to serve a term of two (2) years, and one (1) member shall be appointed to serve a term of one (1) year from the date of appointment by the Council.

f. The Council, upon the recommendation of a majority of the Board, may remove a Board member for cause. The Council, upon its own initiative, may remove a Board member for cause upon the affirmative vote of at least ten (10) Councillors.

10. Operation of Company

a. The Company shall conduct business pursuant to bylaws consistent with this Charter and adopted by the Board of Directors, subject to the approval of Council.

b. The Company may have such officers and committees as the bylaws may provide.

c. The Board of Directors shall meet as often as necessary to conduct its business, but no less frequently than monthly. All meetings shall be held at either the Allegany or Cattaraugus Territory. Four (4) members of the Board of Directors shall be necessary to constitute a quorum for the transaction of business. An action taken or approved by at least four (4) of the Board members present at a meeting at which a quorum is present shall be necessary to constitute an official act of the Company. The Board of Directors shall keep complete and accurate records of all meetings and actions taken.

d. The Board of Directors shall keep full and accurate financial records, make periodic reports to the Council and submit a complete annual report, in written form, to the Council as required by the provisions of this Charter.

e. The members of the Board of Directors may receive a stipend for their services as provided in the bylaws, and shall be reimbursed for actual expenses incurred in the discharge of their duties, including necessary travel expenses. In no event shall compensation be based on the profitability of Gaming operations.

11. Obligations

a. The Company may obtain financing and issue Obligations from time to time subject to the approval of Council for any of its purposes and may also refinance and issue refunding obligations for the purpose of paying or retiring Obligations as it may determine, including Obligations on which the principal and interest are payable:

i. exclusively from the income and revenues of the Nation Gaming Facility financed with the proceeds of such Obligations, or with such income and revenues together with a grant or subsidy from the federal, state or Nation government in aid of such establishment or development;

ii. exclusively from the income and revenues of certain designated Nation Gaming Facilities whether or not they were financed in whole or in part with the proceeds of such Obligations; or

iii. from its revenues generally.

b. Neither the members of the Board of Directors nor any person executing the Obligations shall be liable personally on the Obligations by reason of issuance thereof.

c. The Obligations of the Company shall not be a debt of the Nation and the Obligations shall explicitly so state on their face.

d. Obligations of the Company may be in negotiable form.

e. In connection with the issuance of Obligations and to secure the payment of such Obligations, the Company, subject to the limitations in this Charter and the requirements of the Compact, may;

i. pledge all or any part of the gross fees or revenues of the Company to which its rights then exist or may thereafter come into existence;

ii. provide for the powers and duties of Obligees and limit their liabilities; and provide the terms and conditions on which such Obligees may enforce any covenant or rights securing or relating to the Obligations;

iii. covenant against pledging all or any part of the fees and revenues of the Company or against mortgaging any or all of the real or personal property of the Company to which its title or right then exists or may thereafter come into existence or permitting or suffering any lien on such revenues or property;

iv. covenant with respect to limitations on the right of the Company to sell, lease or otherwise dispose of any Nation Gaming Facility or any part thereof;

v. covenant as to what other or additional debts or obligations may be incurred by it;

vi. covenant as to the Obligations to be issued and as to the issuance of such Obligations in escrow or otherwise, and as to the use and disposition of the proceeds thereof;

vii. provide for the replacement of lost, destroyed or mutilated Obligations;

viii. covenant against extending time for the payment of its Obligations or interest thereon;

ix. redeem the Obligations and covenant for their redemption and provide for the terms and conditions thereof;

x. covenant concerning any fees to be charged in the operation of a Nation Gaming Facility, the amount to be raised each year or other period of time by such fees and other revenues, and as to the use and disposition to be made thereof;

xi. create or authorize the creation of special funds for monies held for construction, development or operating costs, debt service, reserve or other purposes, and covenant as to the use and disposition of the monies held in such funds;

xii. prescribe the procedure, if any, by which the terms of any contract with holders of Obligations may be amended or abrogated, the proportion of outstanding Obligations the holders of which must consent thereto, and the manner in which such consent may be given;

xiii. covenant as to the use, maintenance and replacement of the real and personal property of the Company, the insurance to be carried thereon and the use and disposition of insurance proceeds;

xiv. covenant as to the rights, liabilities, powers and duties arising upon the breach by it of any covenant, condition or obligation;

xv. covenant and prescribe as to events of default and terms and conditions upon which any or all of its Obligations become or may be declared due before maturity, and as to the terms and conditions upon which such declaration and its consequences may be waived;

xvi. vest in any Obligees or any proportion of them the right to enforce the payment of Obligations or any covenant securing or relating to the Obligations;

xvii. exercise all or a part or a combination of the powers granted in this section;

xviii. make covenants other than and in addition to the covenants expressly authorized in this section, of like or different character;

xix. make any covenants and do any acts and things necessary or convenient or desirable in order to secure its Obligations, or, in the absolute discretion of the Company, tending to make the Obligations more marketable although the covenants, acts or things are not enumerated in this section;

xx. pledge, mortgage or grant a security interest in all or any part of the assets of the Company; and

xxi. waive, conditionally, or unconditionally, the sovereign immunity of the Company;

provided, however, that nothing herein shall be construed to include, and the Company shall not have, any power to waive any of the privileges or immunities of the Nation, to borrow or lend money on behalf of the Nation, or to grant or permit or purport to grant or permit any right, lien, encumbrance or interest in or on any of the assets of the Nation.

12. Reports to the Council

a. The Board of Directors shall prepare and submit to the Council within thirty (30) days after the close of each quarter a quarterly report, signed by the Board Chairperson and the Chairperson of the Board Finance Committee, showing:

   i. a summary of the quarter's activities;

   ii. the financial condition of the Company and of each Nation Gaming Facility;

   iii. any significant problems and accomplishments;

   iv. plans for the following quarter; and

   v. such other information as the Board of Directors or the Council deems pertinent.

b. The Board of Directors shall prepare and submit to the Council within sixty (60) days after the close of each fiscal year an annual report, signed by the Board Chairperson and the Chairperson of the Board Finance Committee, showing;

   i. a summary of the fiscal year's activities;

   ii. the complete financial condition of the Company and of each Nation Gaming Facility including a detailed report outlining the operations of the Company and of each Nation Gaming Facility;

   iii. any significant problems and accomplishments;

   iv. plans for the following fiscal year; and

   v. such other information as the Board of Directors or the Council deems pertinent.

13. Finances and Accounting

a. The fiscal year of the Company shall be the fiscal year of the Nation.

b. The Board of Directors shall establish and install an accounting system (i) in conformity with accounting principles generally accepted in the Gaming industry, and (ii) necessary and advisable, in the reasonable discretion of the Board of Directors, in order to manage the assets of the Company and the Gaming assets of the Nation. Such accounting system shall insure the availability of information as may be necessary to comply with the Compact, and with applicable Nation and federal regulatory requirements.

c. The accounts and records of the Company shall be audited at the close of each fiscal year in accordance with the provisions of the Indian Gaming Regulatory Act and the regulations of the National Indian Gaming Commission and, to the extent applicable, the Compact. Copies of such audit reports shall be furnished to the Council.

d. In its capacity as the "Nation Gaming Operation" for any Nation Gaming Facility, the Company shall establish a "System of Internal Controls" for purposes of, and as defined in, the Compact.

e. The books, records and property of the Company shall be available for inspection at all reasonable times by authorized representatives of the Nation.

14. Indemnification

a. The Company shall (i) indemnify, save and hold harmless the Nation and its agents and employees from any and all claims arising out of its activities, (ii) defend at its own cost and expense any action or proceeding commenced for the purpose of

asserting any claim arising out of its activities, and (iii) reimburse any expense which may be incurred by the Nation to defend any such claim until the Company assumes such defense; provided, however, that the Nation shall have the right, but not the obligation, to participate, at the Company's expense, in any settlement, compromise or litigation thereof through counsel of its own choice and shall have the right to direct and control the negotiations, settlement and litigation if the same shall have a direct effect upon the Nation.

b. The Company shall indemnify, save and hold harmless the Board members and officers of the Company, or any person acting at their official direction, if any one of them is a party or is threatened to be made a party to any threatened, pending or completed action or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that he or she is or was a Company Board member or officer, or person acting at their official direction, against expenses (including attorneys' fees), judgments, fines and amounts paid in connection with such action, suit or proceeding, if such person had no reasonable cause to believe that his or her conduct was unlawful or otherwise improper; provided, however, that no indemnification shall be made for which such person shall have been adjudged to be liable for willful misconduct or a violation of the criminal law in the performance of such person's duty to the Company, unless, and then only to the extent that, the court in which such action or suit is brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expense as such court shall deem proper.

15. Bond

The Board of Directors, on behalf of and in the name of the Company, shall obtain or provide for the obtaining of adequate fidelity bond coverage of its officers, agents, or employees handling cash or authorized to sign checks or certify vouchers.

16. Judgment Proof Property

All property including funds acquired or held by the Company pursuant to this Charter shall be exempt from levy and sale by virtue of an execution, and no execution or other judicial process shall issue against the same nor shall any judgment against the Company be a charge or lien upon such property. However, the provisions of this section shall not apply to or limit the right of lenders or Obligees to pursue any remedies for the enforcement of any pledge or lien given by the Company on its fees or revenues, nor to any explicit waiver of immunity specifically subjecting Company property to levy, execution or judicial process which is contained in a contract and approved by resolution of the Board of Directors as provided in this Charter.

17. Dissolution or Liquidation

a. In the event of the dissolution or final liquidation of the Company, none of the property of the Company nor any proceeds thereof shall be distributed to or divided

among any of the directors or officers of the Company or inure to the benefit of any individual.

b. After all liabilities and obligations of the Company have been paid, satisfied and discharged, or adequate provision made therefor, all remaining property and assets of the Company shall be distributed to the Nation or, at the Nation's direction, to one or more organizations designated pursuant to a plan of distribution.

18. Amendment

This Charter may be amended within the first sixty (60) days if its adoption by a majority vote of the Council; provided, however, that thereafter no provision of this Charter may be amended unless the Council shall have twice approved such amendment by twelve (12) votes of the Councillors at two (2) separate sessions of the Council convened no less than one (1) week apart.

19. Severability

If any provision of this Charter is held invalid, the remainder of the provisions of this Charter shall not be affected.

20. Effective Date

This Charter shall be effective on December 20, 2004.