12-1460

United States Court of Appeals for the Second Circuit

DANIEL T. WARREN,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, INDIVIDUALLY, AND AS TRUSTEE OF THE GOODS, CREDITS AND CHATTELS OF THE FEDERALLY RECOGNIZED INDIAN NATIONS AND TRIBES SITUATED IN THE STATE OF NEW YORK, KEN SALAZAR IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, DONALD LAVERDURE, IN HIS OFFICIAL CAPACITY AS THE ACTING ASSISTANT SECRETARY OF THE INTERIOR FOR INDIAN AFFAIRS, UNITED STATES DEPARTMENT OF THE INTERIOR, TRACIE STEVENS, IN HER CAPACITY AS CHAIRMAN OF THE NATIONAL INDIAN GAMING COMMISSION, NATIONAL INDIAN GAMING COMMISSION, ANDREW M. CUOMO, AS GOVERNOR OF THE STATE OF NEW YORK, JOHN D. SABINI, AS CHAIRMAN, OF THE NEW YORK STATE RACING AND WAGERING BOARD,

Defendants-Appellees.

On Appeal from the
United States District Court for the Western District of New York
Case No. 06-CV-226S
The Honorable M. William Skretny, District Court Judge

BRIEF OF THE SENECA NATION OF INDIANS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE UNITED STATES OF AMERICA SEEKING AFFIRMATION OF DECISION BELOW

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel for Seneca Nation of Indians certifies that, on information supplied by *Amicus Curiae* the Seneca Nation of Indians, the Seneca Nation of Indians has no parent corporation(s) and no publically held corporation owns stock in the Seneca Nation of Indians.

/s/ Carol E. Heckman
Carol E. Heckman

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CONCISE STATEMENT OF IDENTITY INTEREST AND AUTHORITY OF *AMICUS CURIAE*[1]

Amicus Curiae the Seneca Nation of Indians (the "Nation") respectfully submits this brief in support of Plaintiffs-Appellees.[2]

Appellant's *pro se* action seeks to prevent the Seneca Nation (the "Nation") from developing and operating a lawful gaming facility in Buffalo, New York. He challenges the decisions and actions of various federal and State officials, which authorized the Nation to develop and operate the facility. Contrary to well-established principles of sovereign immunity, appellant also seeks to add as parties to his lawsuit the President of the Nation, the President and Chief Executive Officer of the Seneca Gaming Corporation ("the SGC"), and the SGC itself.

This lawsuit is critical to the Nation's welfare and directly impacts its vital interests in its sovereignty, self-determination and economic development. The Nation files this *amicus* brief in order to protect its sovereign authority and the immunity of its officials, as well as the SGC, a tribally owned entity. All parties have consented to the filing of the Nation's *amicus* brief.

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[1] In accordance with Local Rule 29.1, Amicus Curiae Seneca Nation of Indians states that no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. Other than amicus curiae, its members, or its counsel, no person contributed money that was intended to fund preparing or submitting this brief.

[2] This brief is filed with the consent of all parties.

RULE 29(C)(5) STATEMENT

The Nation's counsel authored this brief in its entirety. No entity or person other than the Nation contributed money to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

In its Decision and Order dated March 13, 2012 ("Decision") the district properly rejected Appellant's efforts to add new defendants to the complaint, specifically, the Nation's President, the SGC, and the SGC's President. It is settled beyond question that Indian nations are immune from lawsuits in both state and federal court absent congressional authorization or express waiver. *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754 (1998). Tribally owned corporations, such as the SGC, are likewise entitled to sovereign immunity *Id*.; *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d. Cir. 2000). Appellant's arguments for the abandonment of tribal immunity in the context of tribal business activities have no support in the law. Nor would such abrogation of tribal immunity with regard to tribal commercial activities be a proper judicial function.

Following a line of cases that have considered this precise issue, the district court properly applied the factors central to a "subordinate economic analysis" in determining that the SGC is a governmental instrumentality entitled to sovereign immunity: (1) the SGC is incorporated under Nation rather than federal law; (2) the SGC's purpose is to promote the general

welfare of Nation members by providing employment and generating revenue; (3) a majority of the SGC's board of directors are required by its charter to be enrolled Nation members; (4) the SGC's principal place of business is on the Nation's Cattaraugus Reservation; (5) Nation officials maintain control over the administration and accounting activities of the SGC, and all important corporate acts require approval of the Nation's Council; (6) the Nation's Council both appoints all the SGC board members and has the power to remove the SGC board members for cause; and (7) a large judgment against the SGC could render it unable to meet its significant financial obligations to the Nation. Decision at 28.

The "sue and be sued" clause in the SGC's charter does not change this analysis because the clause expressly requires further additional approvals by the SGC Board and the Nation's Council to effectuate any waiver of sovereign immunity. This Court's decision in *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 86-87 (2d Cir. 2001), establishes that a bare "sue and be sued" clause does not constitute a waiver of sovereign immunity.

The district court also properly rejected Appellant's efforts to bring SNI and the SGC officials into the case under the *Ex parte Young* doctrine, 209 U.S. 103 (1908). Decision at 32-33. This Circuit has made clear that

for the doctrine to apply in the context of Indian nations, (1) the law under which Appellant seeks relief must apply substantively to the Nation, and (2) Appellant must have a private cause of action under the substantive rule. Appellant's claims fail both prongs of this test. His claims under the Tenth Amendment and the Administrative Procedure Act ("APA") do not "apply substantively" to the Nation, and Appellant has no private right of action under IGRA. And since his claim under the New York State Constitution does not allege a violation of federal law, the *Ex parte Young* doctrine is inapplicable there as well.

ARGUMENT

In his brief on appeal ("Appellant's Brief"), Appellant raises six arguments for overturning the sovereign immunity rulings by the court below. None of the arguments is well grounded.

Two of the arguments are so patently frivolous that they require no detailed discussion. First, Appellant asserts that his Complaint need not plead facts to overcome a defense of sovereign immunity, and that it was improper for the court to dismiss on this basis. Appellant's Brief at 39-40. This argument is clearly wrong under the well-established authority allowing a court to deny permission to amend a complaint if the amendment is futile. *See, e.g.*, *Hassan v. U.S.V.A.*, 137 Fed. Appx. 418 (2d Cir. 2005) ("While *pro*

se plaintiffs are generally given leave to amend a deficient complaint, a district court may deny leave to amend when amendment would be futile" (citations omitted)); *Am. Express v. Robinson*, 39 F.3d 395,402 (2d Cir. 1994); *John Hancock Mut. Life Ins. Co. v. Ameriford Int'l Corp.*, 22 F.3d 458, 462 (2d Cir. 1994). Where a plaintiff seeks to add defendants who enjoy sovereign immunity, an amendment to add these defendants is futile and therefore the motion must be denied. *Lucas v. Brooklyn Academy of Music*, 1997 U.S. App. LEXIS 32223 (2d Cir. 1997).

Appellant also argues - for the first time on this appeal - that the Nation is not a federally recognized tribe and is therefore not eligible for application of the doctrine of sovereign immunity. Appellant's Brief at 41. This argument is equally frivolous. Appellant himself admits that the Nation appears on the list of tribal entities recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian tribes. Appellant's Brief at 41-42; 75 Fed. Reg. 190, 60180-60814 (Oct. 1, 2010); *see also* 25 CFR 83.7. In addition, contrary to Appellant's suggestion, the Nation was not required to participate in the Part 83 regulatory process in order to achieve federal recognition. As is the case with a great number of federally recognized Indian nations throughout the country, the United States had formally recognized the Nation prior to

promulgation of the Part 83 regulations, and those expressly apply only to recognitions going forward. 3 Fed. Reg. 39,361 (Sept. 5, 1978) (preamble). Indeed, since as far back as the eighteenth century, the United States has had a government-to-government relationship with the Nation. *See*, *e.g.*, Treaty of Fort Stanwix, 7 Stat. 15 (1784).

The remaining arguments on sovereign immunity are addressed below.

I. THE LOWER COURT CORRECTLY FOUND THAT THE SGC IS A GOVERNMENTAL INSTRUMENTALITY ENTITLED TO SOVEREIGN IMMUNITY.

It is well-settled that Indian tribes are protected by sovereign immunity and, thus, are not subject to suit in state or federal court absent a clear and unequivocal waiver of their sovereign immunity or Congressional authorization. *Kiowa Tribe of Okla. v. Manufacturing Tech., Inc.*, 523 U.S. 751, 754, 760 (1998); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84-85 (2d Cir. 2001). It is similarly well established that a fundamental purpose of sovereign immunity is "to promote the ability of Indian tribes to control their own enterprises," *Pink v. Modoc Indian Health Project*, 157 F. 3d 1185, 1188 (9th Cir. 1998), and "an action against a tribal enterprise is, in essence, an action against the tribe itself." *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 393 (E.D. Wis. 1995) (citation omitted). Put another way, "tribal sovereign

immunity protects tribal governmental corporations owned and controlled by a Tribe, and created under its own tribal laws…Tribal law corporations are assumed to be a subdivision of the tribal government." *Wright v. Colville Tribal Enterprise Corporation*, 147 P.3d 1275, 1279 (Wash. 2006).

Appellant challenges the lower court's determination that the SGC is a tribal entity entitled to sovereign immunity protection, arguing that the Nation has failed to meet its burden of proof on this issue. Appellant's Brief at 45-46.

The district court's determination that the SGC enjoys sovereign immunity was fully supported by both the factual record and persuasive precedent. The district court applied the seven-factor test set forth by the New York Court of Appeals in *Ransom v. St. Regis Mohawk Tribe*, 86 N.Y.2d 553, 559 (1995), for determining whether an organization is entitled to tribal immunity. Decision at 28. Other courts have applied variations of these factors, referred to as the "subordinate economic entity" analysis. These factors include:

> (1) whether the entity is organized under the tribe's laws or constitution rather than federal law; (2) whether the organization's purposes are similar to or serve those of the tribal government; (3) whether the organization's governing body is comprised mainly of tribal officials; (4) whether the tribe has legal title or ownership of property used by the organization; (5) whether tribal

> officials exercise control over the administration or accounting activities of the organization; (6) whether the tribe's governing body has power to dismiss members of the organization's governing body; and, (7) more importantly, whether the corporate entity generates its own revenue, whether a suit against the corporation will impact the tribe's fiscal resources, and whether the sub-entity has the power to bind or obligate the funds of the tribe.

Seneca Niagara Falls Gaming Corp. v. Klewin, 2005 Super Conn. LEXIS (Sup. Ct. New London Dist. 2005).

Applying these factors to this case, it is clear that the SGC is a governmental instrumentality entitled to immunity. The SGC's charter, which was attached to the Nation's *amicu*s brief in the court below, states that 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." A-505. The Charter provisions further establish that: (1) the SGC is incorporated under Nation rather than federal law; (2) the SGC's purpose is to promote the general welfare of Nation members by providing employment and generating revenue; (3) a majority of the SGC's board of directors are required by its charter to be enrolled Nation members; (4) the SGC's principal place of business is on the Nation's Cattaraugus Reservation; (5) Nation officials maintain control over the administration and accounting activities of the SGC, and all important corporate acts

require approval of the Nation's Council; (6) the Nation's Council both appoints all the SGC board members and has the power to remove the SGC board members for cause; and (7) a large judgment against the SGC could render it unable to meet its significant financial obligations to the Nation. A-503, et seq. At no time has appellant disputed these charter provisions, and the district court properly considered them in finding that the SGC is an arm of the Nation.

In addition to considering the undisputed factual record, the district court's decision followed a number of cases involving the SGC or its subsidiaries holding that the SGC is a governmental instrumentality entitled to immunity.

The first decision came from the Superior Court of Connecticut in 2005 and involved the Nation's Seneca Niagara Falls Gaming Corp. ("the SNFGC"), a wholly-owned subsidiary of the SGC. *Seneca Niagara Falls Gaming Corp. v. Klewin*, *id.* After applying the factors identified above, the court held that the SNFGC was a governmental arm of the Nation and therefore entitled to the Nation's sovereign immunity protection.

Then, in *Myers v. Seneca Niagara Casino*, 488 F. Supp. 2d 166, 171 (N.D.N.Y. 2006), the United States District Court for the Northern District of New York dismissed the plaintiff's claims against the SNFGC for lack of

subject matter jurisdiction based on the Nation's sovereign immunity. In so doing, the court found that the SNFGC "enjoys all of the privileges and immunities of the Nation" and that its sovereign immunity had not been abrogated or waived with respect to the asserted FMLA, contract, and tort claims. *Id.* at 167 n. 2, 171. Central to the court's determination was its recognition that the SNFGC is a "subordinate arm of the Nation." *Id*. at 167 n.2. The Court of Common Pleas in Ohio reached the very same result. *Lechlitner v. Seneca Alleghany* [sic *Allegany*] *Casino & Hotel, Seneca Gaming Corp.*, CV-09-688740 (Ct. Common Pleas, Ohio, May 18, 2009).

In 2011, the Erie County Supreme Court followed these decisions in dismissing the SGC and the SNFGC from a case, *Sue/Perior Concrete & Paving v. Seneca Gaming Corp.*, Index No. 800073/2010 (Sup. Ct. Erie County, Sept. 14, 2011), finding that both entities were arms of the Nation and entitled to the Nation's sovereign immunity. [3]

In sum, Appellant has failed to articulate any basis for disturbing the district court's well-reasoned and thorough opinion on this issue.

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[3] The New York State Supreme Court in Sue/Perior denied the motion to dismiss with respect to the individual tribal officials, but the Appellate Division, Fourth Department reversed the lower court's decision on this point. The plaintiff did not appeal the lower court's dismissal on sovereign immunity grounds as to the SGC and the SNFGC, and the Fourth Department did not disturb the lower court's ruling as to the gaming entities. *Sue/Perior Concrete & Paving, Inc. v. Seneca Gaming Corp.*, ___A.D.3d ___, 2012 N.Y. App. Div. LEXIS 6624 (4th Dep't Oct. 5, 2012).

II. TRIBAL IMMUNITY APPLIES TO BOTH COMMERCIAL AND GOVERNMENTAL ACTIVITIES OF AN INDIAN NATION.

Appellant next argues that because the SGC is engaged in commercial activities, as opposed to governmental ones, it does not qualify for sovereign immunity. This argument has been repeatedly rejected by the courts. Sovereign immunity applies to both the commercial and the governmental activities of an Indian tribe, whether they take place on or off a reservation. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998) (declining to abrogate tribal sovereign immunity for commercial or off-reservation activities); *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001) (same); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d. Cir. 2000) ("*Basset I*") (explaining that "a tribe's immunity extends to its off-reservation commercial activities").

Moreover, commercial enterprises that act as a division or arm of a tribe share in the tribe's sovereign immunity. *See, e.g., Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292-96 (10th Cir. 2008) (tobacco manufacturer had sovereign immunity as an enterprise of the tribe); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (casino was entitled to tribal sovereign immunity as an arm of the tribe); *Bassett I*, 204 F.3d at 358 ("The question is not whether the [museum] may be characterized as a business, which is irrelevant under *Kiowa*, but whether the

entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe."); *Hagen v. Sisseton-Wahpeton Cmty. College*, 205 F.3d 1040, 1043 (8th Cir. 2000) ("[T]he College serves as an arm of the tribe and not as a mere business and is thus entitled to tribal sovereign immunity."); *Ramey Constr. Co. v. Apache Tribe*, 673 F.2d 315, 320 (10th Cir. 1982) (an inn was "a sub-entity of the Tribe rather than a separate corporate entity, and is thus clothed with the sovereign immunity of the Tribe").

As already demonstrated in Part I, *supra*, the district court correctly concluded that the SGC is an arm of the Nation. Accordingly, the Nation's sovereign immunity for commercial activities extends to the SGC.

In arguing that this Court should ignore or overrule *Kiowa*, which he wrongly understands this Court to have the power to do, Appellant presents the decision as outdated and no longer good law. Appellant's Brief at 46-47. Again, Appellant is off the mark. In addition to the cases cited above, just in the last few years, the Sixth, Seventh, Eighth and Ninth Circuits have all followed *Kiowa's* teaching, applying immunity to commercial as well as governmental activities. *See Michigan v. Bay Mills Indian Community*, 2012 U.S. App. LEXIS 17026 (6th Cir. 2012); *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684 (7th Cir. 2011); *Alltel*

Commc'ns. v. DeJordy, 675 F.3d 1100 (8th Cir. 2012); *Cook v. AVI Casino Enters.*, 548 F.3d 718 (9th Cir. 2008).

The cases cited by Plaintiff in support of his claim that the doctrine should be overturned are easily distinguishable. Both *Victory Transp., Inc. v. Comisaria General de Abastecimentos y Transportes*, 336 F.2d 354 (2d Cir. 1964), and *Nat'l City Bank v. Republic of China*, 348 U.S. 356 (1955), involved the sovereign immunity of commercial activities of foreign nations and did not address the unique circumstances involving Indian nations and tribes. Moreover, the legal issues addressed in *Victory Transport* were superseded by the Foreign Sovereign Immunities Act.

Appellant contends that the doctrine of sovereign immunity for the commercial activities of the tribe applies only to claims for money damages and not to claims for declaratory or injunctive relief. Appellant's Brief at 45. While a few courts have drawn this distinction, *see, e.g.*, *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680-81 (5th Cir. 1999), the Second Circuit has not limited the sovereign immunity of the commercial arm of an Indian nation to claims for money damages. *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 87 (2d Cir. 2001) (holding that the Akwesasne Housing Authority, as an agency of the St. Regis Mohawk Tribe, cannot be named as a defendant in the case under any circumstances, including in a claim for injunctive relief).

In sum, Appellant's arguments ignore long-standing precedent, which the court below correctly applied in denying as futile Appellant's motion to amend to name the SGC. Because the SGC is clearly immune from suit, this Court should affirm the lower court's decision.

III. THE "SUE AND BE SUED" CLAUSE CONTAINED IN THE SGC'S CHARTER DOES NOT OPERATE AS A WAIVER OF SOVEREIGN IMMUNITY.

Appellant next argues that the SGC has waived its immunity to suit through the "sue and be sued" clause in its corporate charter. This clause, which provides in pertinent part as follows, clearly does no such thing:

> 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 the 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 the Council . . . 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 the Council.

A-507-508. While the clause gives the SGC the power to waive immunity by following the process set forth in the charter, it plainly does not constitute

a waiver itself, because no waiver can be completed without an additional resolution approved by the Council.

Even in cases with "sue and be sued" clauses less restrictive than the one found in the SGC charter, the majority of courts have rejected the notion that a "sue and be sued" clause, without more, effects a general waiver from suit. *See, e.g., Hagen v. Sisseton-Wahpeton Cmty College*, 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."); *Ninigret Dev. Corp. v. Narangansett Wuetuomuck Housing Auth.*, 207 F.3d 21, 29-30 and n.5 (1st Cir. 2000); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583-84 (8th Cir. 1998); *Sanchez v. Santa Ana Golf Club, Inc.*, 104 P.3d 548, 551-553 (N.M. Ct. App. 2004); *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 the courts").

The only Second Circuit case to consider the question has likewise rejected Appellant's argument. *Garcia*, 268 F.3d at 86-87, noted that in the

context of both foreign and tribal sovereign immunity, "courts considering a bare 'sue and be sued' clause…have arrived at the same conclusion: the clause constitutes a waiver of immunity (if at all) only in the courts of the sovereign." In *Garcia*, a tribal ordinance granted the tribe's Housing Authority the Council's "irrevocable consent" to sue and be sued on any contract, claim or obligation and to agree by contract to waive any immunity from suit. *Id.* at 86. Relying on the clause, plaintiff brought an employment discrimination claim in federal court against the Housing Authority. The Court concluded that the ordinance itself did not waive the Authority's immunity to suit in federal court. It also rejected plaintiff's contention that she and the Authority had implicitly contracted for such a waiver, noting that such waivers must be explicit. *Id.* at 87.

Appellant has failed to identify any reason why this analysis does not apply with equal force to this case. Indeed, the clause Appellant relies on here is far more restrictive than the clause at issue in *Garcia:* the clause does not grant the SGC a unilateral right to waive immunity and in fact explicitly requires the SGC to seek approval by the Nation's Council of any waiver of sovereign immunity ("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") A-507. The SGC Charter also specifically states that the inclusion of the "sue and be sued" clause "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." A-508. Appellant's interpretation would render these provisions completely meaningless. Accordingly, the court below properly recognized that this clause alone does not waive immunity in this case.

The cases Appellant cites in support of his waiver argument are inapposite. In *Rosebud Sioux Tribe v. A&P Steel*, 874 F.2d 550 (8th Cir. 1989), the "sue and be sued" clause, unlike the one here, was unconditional because it did not require a subsequent resolution to effectuate a waiver. In *Marceau v. Blackfeet Housing Auth.*, 455 F.3d 974, 980-81 (9th Cir. 2006), the court criticized this Court's decision in *Garcia* limiting the clause to tribal courts but also noted that the defendant tribal entity "has not asked us to go as far as the Second Circuit, nor given us any additional reason that we should limit the 'sue and be sued' clause to tribal courts…." And in *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 n.2 (10th Cir. 2008), the court did not address the effect of the "sue and be sued" clause at all. None of the cases provide justification for departing from the majority view adopted by this Circuit in *Garcia*.

IV. THE *EX PARTE YOUNG* DOCTRINE DOES NOT APPLY.

Even if the SGC is immune from suit, Appellant argues that his claims against the Nation's President and the SGC's President survive under *Ex parte Young*, 209 U.S. 123 (1908), which permits plaintiffs to sue State officials to enjoin an ongoing violation of federal law. Appellant's Brief at 54-55, *citing Crowe v. Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011). This Court has plainly held that the *Ex Parte Young* doctrine may be applied to Indian naton 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*, 268 F.3d at 87-88.

Appellant's claims fail both tests. Other than the claims asserted under IGRA, none of the remaining claims apply substantively to the Nation. More importantly, none of the statutory provisions cited by Appellant give him a private right of action to enforce the substantive rule.

With respect to Count I, which alleges that IGRA violates the Tenth Amendment, the district court correctly recognized that the protections of the Tenth Amendment "run to the states as against the federal government, and not as against Indian nations." Decision at 32. Thus, 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. The district court found that the second prong of the *Garcia* test is not met because Appellant 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 Appellant'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.

Count III is based on violations of the New York Constitution and IGRA. The *Ex parte Young* doctrine is inapplicable to the alleged violations of the New York Constitution because the doctrine applies only to violations of federal, not state, law. *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d

at 310. Moreover, IGRA's lack of a private cause of action dooms Appellant'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 claims 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 by its own terms applies only to actions of federal agencies (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")), it does not apply substantively to the Nation. And, as shown above, Appellant has no private right of action under IGRA.

CONCLUSION

For the foregoing reasons, Appellant's arguments should be rejected and the Court's decision below should be affirmed.

Dated: Buffalo, New York
October 26, 2012

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(C)(i), the foregoing Brief *Amicus Curiae* of the Seneca Nation of Indians is proportionally spaced in Times New Roman font, has a 14 point typeface in both the text and footnotes and contains 4,434 words.

Dated this 26th day of October, 2012.

/s/ Carol E. Heckman
Carol E. Heckman

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2012, I caused the foregoing brief *amicus curiae* to be filed with the Court electronically by CM/ECF. The following counsel will be automatically served via the ECF system:

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