

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

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**UNITED STATES OF AMERICA**

*Plaintiff,*

**vs.**

**Case No. 11-CR-57-A**

**BERGAL L. MITCHELL, III**

*Defendant.*

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**DEFENDANT’S OBJECTIONS TO THE REPORT AND RECOMMENDATION  
(Dkt. 119) DENYING DEFENDANT’S MOTION TO DISMISS BASED ON HIS  
SOVEREIGN IMMUNITY ARGUMENT REGARDING RECENT STATE  
APPELLATE DIVISION DECISION ON BEHALF OF DEFENDANT BERGAL L.  
MITCHELL, III.**

Defendant Bergal L. Mitchell, III, respectfully submits these objections to the Report and Recommendation (“Report”), issued by Magistrate Judge Jeremiah J. McCarthy on December 28, 2012 (Dkt. 119). All of defendant’s previous assertions regarding this issue (Dkts. 114 and 118) are incorporated herein.

In sum, the government should be barred from prosecuting defendant under the doctrine of sovereign immunity based in part on a recent state appellate court decision, Sue / Perior Concrete and Paving, Inc., v. Seneca Gaming Corporation, et al., 99 A.D.3d 1203; 952 N.Y.S.2d 353; 2012 NY Slip Op 6671; 2012 N.Y. App. Div. LEXIS 6624; 2012 WL 4748213 (4<sup>th</sup> Dep’t 2012), decided by the New York State Supreme Court, Appellate Division, Fourth Judicial Department, on October 5, 2012. Therein, the court ruled that defendants, Seneca Gaming Corporation (“SGC”) and the Seneca Niagara Falls Gaming Corporation (“SNFGC”), could not be sued under the doctrine of sovereign immunity. The civil complaint in Sue / Perior Concrete alleged that the defendant

corporations interfered with plaintiff's contracts. The Appellate Division held that the plaintiffs failed to allege in the complaint that defendants acted outside of their authority as officers of the SGC and SNFGC (both important parties in our matter), and were therefore protected under the doctrine of sovereign immunity.<sup>1</sup>

The Magistrate cites to United States v. Williams, 2011 U.S. Dist. LEXIS 104297, at \*7 (W.D. Okla. 2011) (Dkt. 119, p. 2-3), for the proposition that a civil case "has nothing to do with the reach of federal criminal laws of general applicability." However, the Williams quote was describing another decision, Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173 (10<sup>th</sup> Cir. 2010), which recognized several factors to be considered in determining whether a subordinate financial entity should be cloaked in the sovereign immunity enjoyed by an Indian tribe.<sup>2</sup> As Judge McCarthy does not disagree with the premise of subordinate tribal entities receiving

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<sup>1</sup> As previously noted by defendant, "Indian tribes possess common-law sovereign immunity from suit akin to that enjoyed by other sovereigns." *See generally* Kiowa Tribe of Oklahoma v. Manufacturing Tech., 523 U.S. 751, 754 (1998); Oklahoma Tax Commn. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991). Tribes enjoy this common-law sovereign immunity "because they are sovereigns pre-dating the constitution, and immunity is thought necessary to preserve autonomous tribal existence." United States v. State of Oregon, 657 F.2d 1009, 1013 (9th Cir. 1981); *see also* United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512-13 (1940); Turner v. United States, 248 U.S. 354, 357-58 (1919). Since autonomous tribal existence is of national importance, "the United States Supreme Court has repeatedly stated that a waiver of tribal sovereign immunity 'cannot be implied but must be unequivocally expressed.'" Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc., 86 N.Y.2d 553, 560-61 (1995), *quoting* United States v. King, 395 U.S. 1, 4 (1969). "[W]aivers of tribal sovereign immunity 'must be traceable to an official government action . . . that expressly and unequivocally waives immunity or empowers particular officers to waive immunity,'" and the waivers "are to be strictly construed in favor of the tribe." *Id.* Further, "[t]ribal subagencies and corporate entities created by [an] Indian Nation . . . may also possess attributes of tribal sovereignty, and cannot be sued absent a waiver of immunity." *Id.* at 558-559.

<sup>2</sup> The Breakthrough court considered these factors to be relevant: (1) the financial entities' method of creation; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) whether the tribe intended for the entities to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entities. *Id.* at 1181.

sovereign immunity, a detailed discussion of the Breakthrough factors is unnecessary here. However, the conclusion in the Report that a civil case can never inform “the reach of federal criminal laws of general applicability” (*id.* at 2-3) should be rejected here.

It is undisputed that the Seneca Nation of Indians (“SNI”) is a federally recognized Indian Tribe that enjoys sovereign immunity. Since the SGC is a corporate entity created and wholly owned by the SNI, it also enjoys sovereign immunity. Though tribal sovereign immunity does not extend to all individuals within an Indian Tribe or a tribal corporation, it does extend “to *individual tribal officials* acting in their representative capacity and within the scope of their authority.”<sup>3</sup>

Judge McCarthy disagreed with the government that individuals are not subject to the protections of sovereign immunity when acting as tribal officers (Dkt. 119, p. 3). *See Puyallup Tribe, Inc. v. Department of Game of State of Washington*, 433 U.S. 165, 171-172 (1977). A limitation here, however, is that the officer must be acting within the legitimate scope of his official capacity. *Gristede's Foods, Inc. v. Unkechauge Nation*, 2006 U.S. Dist. LEXIS 98321, at \*27 (E.D.N.Y. 2006), *citing Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004). While Judge McCarthy points to the allegations in the Indictment wherein defendant purportedly failed to disclose his financial interest in the land transaction at issue to the Seneca Nation, the SGC or the SNFGC (Dkt. 119, p. 3, citing Dkt. 1, p. 13, ¶36), defendant was still a member of the board of directors of the SGC, a tribal entity, at the relevant times in this matter.<sup>4</sup> Regarding the acquisition of

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<sup>3</sup> *Romanella v. Hayward*, 933 F.Supp. 163, 167 (D. Conn. 1996) *affd.* 114 F.3d 15 (2d Cir. 1997)(emphasis added).

<sup>4</sup> As a member of the board, Mr. Mitchell’s duties included promoting the business interests of the SGC and the SNFGC, which had the *authority* to “purchase, receive, take by grant, devise, bequest or otherwise, lease or otherwise acquire, own, hold, improve, employ, use, and otherwise

real property on behalf of the SNI, the SGC, and the SNFGC, the government in its Indictment alleges that Mr. Mitchell was acting “as an agent of the SNI, SGC, and SNFGC.”<sup>5</sup> Thus, any alleged misconduct is inherently tied to Mr. Mitchell in his official capacity.

Further, the “scheming to steal” allegations against defendant (Dkt. 119, p. 3) should not be deemed as existing outside defendant’s “official *capacity*” (emphasis added) for purposes of determining the scope of sovereign immunity. While the Sue / Perior Concrete decision did note that the Complaint failed to allege that defendants “personally profited or benefitted” (Dkt. 119, p. 4, citing 99 A.D.3d at 1204), the court also recognized that an individual tribal official will *only* be stripped of tribal immunity when he or she “acts ‘manifestly or palpably beyond his authority.’”<sup>6</sup> Under the circumstances, defendant submits that the government has failed to establish this.

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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.” *See* SGC and SNFGC Charters, common Art. 8(d)(xv).

<sup>5</sup> Indictment, pg. 4, ¶ 8.

<sup>6</sup> *See again* Sue/Perior Concrete & Paving, Inc., 99 A.D.3d at 1204; *see also* Bassett v. Mashantucket Pequot Museum & Research Ctr., Inc., 221 F.Supp.2d 271, 280 (D. Conn. 2002); Doe v. Phillips, 81 F.3d 1204, 1209–1211 (2d Cir. 1996).

WHEREFORE, the defendant respectfully objects to Judge McCarthy's Report (Dkt. 119), and requests that the Indictment be dismissed as set out above.

DATED: January 25, 2013  
Buffalo, New York

Respectfully submitted,

s/Paul J. Cambria, Jr.  
PAUL J. CAMBRIA, JR., ESQ.

BARRY N. COVERT, ESQ.  
TIMOTHY P. MURPHY, ESQ.  
Attorneys for Defendant  
BERGAL L. MITCHELL  
Office and Post Office Address  
42 Delaware Avenue - Suite 300  
Buffalo, New York 14202  
Phone: (716) 849-1333  
Fax: (716) 855-1580 (*not for service*)  
E-Mail: [pcambria@lgaw.com](mailto:pcambria@lgaw.com)

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***CERTIFICATE OF SERVICE***

I hereby certify that on 1-25-2013, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system.

I also hereby certify that on 1-25-2013 a copy of the foregoing was also delivered to the following via CM/ECF:

TO: ANTHONY M. BRUCE  
ASSISTANT UNITED STATES ATTORNEY

And I hereby certify that on 01-25-2013 a copy of the foregoing was delivered to the following non-CM/ECF participant via email:

ZENAIDA PIOTROWICZ  
UNITED STATES PROBATION OFFICER  
Zenaida\_Piotrowicz@nywp.uscourts.gov

Dated: Buffalo, New York  
January 25, 2013

/s/ Claire Grundtisch  
CLAIRE GRUNDTISCH