To be Argued by:
EDMUND C. GOODMAN, ESQ.
Estimated Time for Argument:
(30 Minutes)

STATE OF NEW YORK

Court of Appeals

APL-2013-00278

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SUE/PERIOR CONCRETE & PAVING, INC.,
Plaintiff-Respondent,

vs.

LEWISTON GOLF COURSE CORPORATION,
Defendant-Appellant,

SENECA NIAGARA FALLS GAMING CORPORATION, SENECA GAMING CORPORATION, JEFFREY L. GILL, MARK I. HALFTOWN, GLORIA HERON, MAURICE A. JOHN, SR., MICHAEL L. JOHN, KAREN KARSTEN, INA K. LOCKE, ROBERT E. MELE, RICHARD K. NEPHEW, MARIBEL PRINTUP, COCHISE REDEYE, GARY SANDEN, KEVIN W. SENECA, BARRY E. SNYDER, SR., STEVE TOME, NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, NIAGARA MOHAWK POWER CORPORATION and JOHN DOE,

Defendants.

Appellate Division Docket Number: CA 12-01827.
Niagara County Index No.: 141212.

BRIEF FOR DEFENDANT-APPELLANT

PHILLIPS LYTLE LLP
MICHAEL B. POWERS, ESQ., *Of Counsel*
ALAN M. WISHNOFF, ESQ., *Of Counsel*
SEAN C. MCPHEE, ESQ., *Of Counsel*
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Telephone: (716) 847-8400
Facsimile: (716) 852-6100

HOBBS, STRAUS, DEAN & WALKER, LLP
EDMUND C. GOODMAN, ESQ., *Of Counsel*
806 S.W. Broadway
Portland, Oregon 97205
Telephone: (503) 242-1745

Attorneys for Defendant-Appellant

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BATAVIA LEGAL PRINTING, INC.— Telephone (866) 768-2100

DISCLOSURE STATEMENT

Pursuant to 22 NYCRR § 500.1(f), upon information and belief, the following are the parents, subsidiaries and affiliates of Defendant-Appellant, Lewiston Golf Course Corporation:

Parents:

Seneca Nation of Indians
Seneca Gaming Corporation
Seneca Niagara Falls Gaming Corporation

Subsidiaries:

None

Affiliates:

Seneca Erie Gaming Corporation
Seneca Territory Gaming Corporation
Seneca Catskills Gaming Corporation
Seneca Nation Capital Improvements Authority
Seneca Construction Management Corporation
Seneca Management Development Corporation
Seneca Trucking
Seneca Holdings, LLC
Seneca Broadcasting, LLC
Seneca Imports, LLC
Seneca Construction, LLC
SCMC, LLC
Seneca Telecommunications, LLC
S H Investments, LLC
Executive Protection Systems, LLC
Nexus Technology Solutions, LLC
Seneca Academy
Seneca Nation Housing Authority
Seneca Nation of Indians Economic Development Corporation
Seneca Iroquois National Museum
Seneca Nation Library
Seneca Energy

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

At stake in this appeal is the sovereign immunity of a tribal entity of the Seneca Nation of Indians ("Seneca Nation" or "the Nation"), a fundamental right that goes to the heart of the Nation's existence, its rights as a sovereign recognized by the United States government, and its ability to determine when and where it will expose its assets to suit. As cogently stated by this Court, "preserving tribal resources and tribal autonomy" through sovereign immunity "are matters of vital importance." *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, 86 N.Y.2d 553, 560 (1995). In *Ransom*, this Court, following well-established federal precedent, held that a tribe's sovereign immunity extends to tribal sub-entities that function as arms of the tribe. Defendant-Appellant, Lewiston Golf Course Corporation ("LGCC"), is just such an "arm" of the Seneca Nation that is entitled to share in the Nation's sovereign immunity. In fact, it is virtually identical in purpose and structure to two other Seneca Nation tribal entities – Seneca Gaming Corporation ("SGC") and Seneca Niagara Falls Gaming Corporation ("SNFGC") – that have consistently been held by other courts, including the United States District Court for the Western District of New York and the United States Court of Appeals for the Second Circuit, to possess sovereign immunity. Yet the two courts below have misconstrued this Court's decision in *Ransom*, and the controlling federal case law on which it is based, to find that LGCC is not shielded from unconsented suit by the Nation's sovereign immunity.

This matter arose from a dispute over a golf course construction contract entered into by Plaintiff-Respondent, Sue/Perior Concrete & Paving, Inc. ("Sue/Perior"), its joint venture partner Golf Course Construction, Inc., and LGCC. Sue/Perior alleges it is owed $4,130,538 on the construction contract and filed a lien in that amount. LGCC not only denies it owes anything but in fact asserts that it overpaid Sue/Perior by $809,251.80. However, the more fundamental issue raised on this appeal is that LGCC, as an arm of the Nation, may not be subjected to suit in New York courts without its consent because it shares the Nation's sovereign immunity.

LGCC was created by the Nation's Tribal Council – its sixteen member legislative body – to develop and operate a golf course as an amenity to the Seneca Niagara Casino and Hotel in Niagara Falls. When creating LGCC, the Tribal Council emphasized the governmental purposes to be served, stating in LGCC's Charter that "the economic success of the Nation's gaming operations is vitally important to the economy of the Nation and the general welfare of its members," and that "the Nation has found it to be in the best interests of the Nation and its gaming operations to develop and operate a golf course located in the Town of Lewiston." LGCC was thus created "in furtherance of the Nation's gaming operations" and to provide resources vital to the Seneca Nation's efforts to promote the health, education and welfare of the Seneca people.

LGCC was incorporated under the Seneca Nation's laws, and it is owned and controlled by the Seneca Nation. LGCC's Charter provides that it is a "governmental instrumentality" and "subordinate arm" of the Seneca Nation "entitled to all of the privileges and immunities of the Nation," and expressly states that LGCC is entitled "to enjoy the sovereign immunity of the Nation, to the same extent as the Nation."

LGCC, SGC and SNFGC have virtually identical Charters and LGCC, like SGC and SNFGC, is strictly controlled by the Nation in a variety of ways. Among other things, the Nation, at its sole discretion, appoints and removes members of LGCC's Board of Directors – the same Board as SGC and SNFGC. LGCC's Charter, like SGC's and SNFGC's, requires that its Board obtain approval from the Nation before undertaking many significant corporate acts, including the right to sue, be sued, consent to any court's jurisdiction, submit to alternative dispute resolution, or waive its sovereign immunity from suit. The Appellate Division offered no legally relevant basis to single out LGCC and deny it the same sovereign immunity enjoyed by its sister Seneca Nation entities under the *Ransom* analysis.

In *Ransom*, this Court, following controlling federal case law, described a multi-factor test for determining whether a tribal entity like LGCC with a degree of operational autonomy is entitled to share in the tribe's sovereign immunity. No single factor is dispositive, and the decision did not recognize any

factor as establishing a threshold. LGCC satisfies eight of the nine factors articulated in *Ransom*, including the four factors that this Court found determinative in reaching the conclusion that the tribal entity in *Ransom* shared the tribe's sovereign immunity. The Appellate Division's determination that LGCC is not entitled to sovereign immunity is contrary not only to this Court's holding in *Ransom*, but to every other case (federal and state) in which the sovereign immunity of Seneca Nation tribal entities was at issue. It is also contrary to the well-established federal common law of tribal sovereign immunity, both pre- and post-*Ransom*, including the only known decision assessing the sovereign immunity of a tribal entity operating a golf course (which held that such entity was protected by tribal sovereign immunity).

The Appellate Division's decision appears to have been erroneously based in large part upon its view of LGCC as a commercial enterprise, calling it a "regional economic engine" intended to function as a "regular business entity." It is well settled, however, that sovereign immunity protects the commercial as well as the governmental activities of a tribe. The wisdom of that precedent is demonstrated by the success of Indian tribes and nations, including the Seneca Nation, in employing such entities to generate income used to improve the health and welfare of their people. The Appellate Division also misread *Ransom's* discussion of the governmental purposes and financial interdependence factors, erroneously narrowing their scope and application.

If allowed to stand, the Appellate Division's misapplication of *Ransom* will create further confusion and commercial uncertainty, and will jeopardize essential resources of all tribes. The doctrine of tribal sovereign immunity is based on federal law and may not be diminished by state courts in this way. *See, e.g., Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998) (tribal sovereign immunity is "a matter of federal law and is not subject to diminution by the States").

LGCC respectfully requests that this Court reverse the Appellate Division and clarify that *Ransom*, and the controlling federal case law on which it is based, compel recognition of LGCC as an arm and instrumentality of the Seneca Nation protected by its sovereign immunity.

Reversal will also require this Court to address the second issue involved in this case: that such sovereign immunity bars this contract action despite its being fashioned by Sue/Perior as a mechanics' lien foreclosure. New York State's lien law is unequivocal: for a lien foreclosure action to proceed, the court must have personal jurisdiction over the property owner. There is no dispute here that LGCC holds title to the property at issue. LGCC's sovereign immunity would deprive the court of personal jurisdiction over LGCC and thus require dismissal of the lien foreclosure action. Yet the trial court, in the decision affirmed by the Appellate Division, erroneously held that sovereign immunity does not preclude jurisdiction over a lien foreclosure action.

Sue/Perior and the trial court relied on an irrelevant dichotomy between *in rem* and *in personam* actions to conclude that LGCC's sovereign immunity does not bar this action. Even if New York's lien law was not absolutely clear on the need for personal jurisdiction over the landowner (which it is), there is no support in the case law of governmental immunity (tribal or otherwise) to allow a contract action to proceed against a sovereign entity under the guise of a lien foreclosure, whether the action is purely *in rem* or otherwise. The cases cited by the trial court and by Sue/Perior in its briefs below say nothing of the kind, and an examination of those cases supports rather than undermines the common sense application of sovereign immunity to a contract action against a sovereign entity, no matter what guise that suit takes.

While the Appellate Division did not address this issue in allowing suit to proceed, its failure to do so was based on its erroneous determination that LGCC was not protected by sovereign immunity. The trial court's decision to allow this suit to proceed even if LGCC was protected by sovereign immunity should be incorporated into this appeal so that all questions involved in LGCC's dispositive motion to dismiss can be resolved and judicial resources preserved.

STATEMENT OF FACTS

A. Formation, Structure and Operation of LGCC

LGCC was formed and structured to operate as an arm of the Seneca Nation, to further the governmental purposes of the Nation. It is identical in all

relevant respects to SGC and SNFGC, and is, like those entities, protected by the Nation's sovereign immunity from suit.

1. The Seneca Nation Of Indians

The Seneca Nation is a federally recognized Indian tribe organized most recently pursuant to the Constitution of the Seneca Nation of Indians of 1848, as amended. *See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 78 Fed. Reg. 26,384, 26,385 (May 6, 2013) (listing "entities . . . acknowledged to have the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes.") It is a sovereign entity predating the United States, *Talton v. Mayes*, 163 U.S. 376, 384-85 (1896), organized under its own Constitution and laws. (R. 312.) It provides a variety of programs and services to benefit the health, education, and welfare of its members. (R. 69-70, 72-73, 122, 458, 478.) Funding for such programs comes in part from federal appropriations, but the substantial portion of such funding comes from the Nation's commercial enterprises, and in particular its gaming and gaming-related enterprises operated by SGC, SNFGC, and LGCC. *Id.*

2. Formation And Purpose Of SGC, SNFGC, and LGCC

To carry out these federally authorized economic development activities, the Seneca Nation created, chartered, owns and controls several tribal

corporations. In August 2002, the Seneca Nation's Tribal Council granted a corporate Charter to SGC to facilitate the financing, development, construction, operation and maintenance of the gaming facilities contemplated by the Indian Gaming Regulatory Act ("IGRA") and the Nation's Class III Gaming Compact with the State of New York (a requirement of the IGRA). (R. 175-200.) Those activities are vital to the Seneca Nation's economy and the welfare of its members. (R. 164-65, 175-200.) To facilitate SGC's mission, the Nation has chartered four other sub-entities under SGC, one of which is LGCC.

The Council granted a corporate Charter to SNFGC in 2002. SNFGC was created as a subsidiary of SGC to develop, finance and operate the Seneca Nation's Class III gaming operations in Niagara County, New York pursuant to the terms of IGRA and the Compact. (R. 166-67, 201-23.)

The Council granted a corporate Charter to LGCC in 2007. LGCC was created as a subsidiary of SNFGC "in furtherance of the economic success of the Nation's gaming operations" and to complete the development of, and operate, SNFGC's golf course in Lewiston, New York as an additional amenity to SNFGC's Niagara Falls casino and hotel. (R. 168-71, 224-38.)

LGCC, like SNFGC and SGC, is indisputably a corporate entity created under the laws of the Seneca Nation. (R 13a.) All three entities are arms and instrumentalities of the Seneca Nation, owned and controlled by the Nation, and created solely to carry out activities of the Seneca Nation and generate

revenues to be used by the Nation to promote the health, education and welfare of the members of the Nation. (R 175, 201, 224). No outside entity has any stake in or control of any of these corporations. *Id.* Funding for LGCC and all Seneca Nation entities originates from the Nation and the revenues of each ultimately belong to the Nation. (R 179, 199, 205-06, 222, 226-27, 237).Their Charters are virtually identical, each providing for their creation as "governmental instrumentalities" and "subordinate arms" of the Seneca Nation "entitled to all the privileges and immunities of the Nation," including for purposes of civil and regulatory jurisdiction, and each Charter expressly provides that the entity is entitled "to enjoy the sovereign immunity of the Nation, to the same extent as the Nation." R 166-67, 186, 203, 213, 225, 231. The Seneca Nation Council resolutions creating LGCC and its sister entities, as well as their corporate Charters, each provide that:

> 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
>
> the economic success of the Nation's gaming operations is vitally important to the economy of the Nation and the general welfare of its members.

R. 164, 166, 168, 175, 201, 224.

3. LGCC And The Seneca Nation's Other Entities Operate For The Benefit Of The Seneca Nation

LGCC, SGC and SNFGC are among the most important and successful revenue-producing assets of the Seneca Nation and exist for the benefit of the Nation and the Seneca people. They are the primary means by which the Seneca Nation exercises its federally guaranteed rights to pursue economic development activities and generate critical funding to improve the health and welfare of its people. The assets and revenues of the Seneca Nation entities ultimately belong to the Nation. (R. 199, 222, 237, 306.) In fact, for the fiscal year ended September 30, 2009, SGC and its sub-entities distributed approximately $132.6 million to the Seneca Nation to be used for governmental projects such as low income housing, water, sewer and wastewater systems, two health clinics, education, governmental administrative buildings, fleet vehicle services, storage facilities, lease obligations, reinvestment into the Seneca Nation's revenue-generating instrumentalities and other governmental purposes. (R. 69-70, 72-73) (citing SGC's 10-K filed with Securities and Exchange Commission). Prior to creation of these entities and the Nation's receipt of their revenues, many of these basic health, education and other services were unaffordable and, therefore, unavailable on Seneca reservations.

4. The Seneca Nation Owns And Controls LGCC And The Other Seneca Nation Entities

The Seneca Nation created, oversees and controls LGCC and the other Seneca Nation entities. The Boards of Directors of LGCC, SGC and SNFGC are identical and are appointed by the Seneca Nation through its elected Tribal Council ("Council"). (R 13a). Directors can be removed and replaced only by the Nation. (R 13a). Each Board must be comprised by a majority of enrolled members of the Seneca Nation. (R 187, 213, 231-32). At all relevant times during this dispute, the LGCC, SGC, and SNFGC Boards were composed *entirely* of enrolled Senecas.

LGCC, like SGC and SNFGC, operates under the direct fiscal and administrative control of the Nation. For example, each entity's Charter requires that its Board obtain approval from the Nation before undertaking many significant acts, including significant expenditures of company resources or personal property (R. 181, 208, 228); adopting, amending or repealing corporate by-laws (R. 182, 209, 229); providing significant guarantees or incurring significant liabilities (R. 183, 210, 229); lending money to other Seneca Nation entities (R. 183, 210, 229); purchasing, selling, or encumbering real property (R. 183, 184, 210-11, 230); entering into financing arrangements involving bonds or other securities (R. 184, 191, 211, 214-15, 230, 232); and entering into, performing or cancelling contracts with any government or government agency. (R. 182, 209, 229.) LGCC and the other Seneca Nation entities must keep detailed corporate and financial records and submit to the Nation annually, for its approval, a statement of the entity's financial

condition for each year of operation. (R. 129-30, 141-42, 196, 218, 235.) Critically, with respect to the issues before the Court, approval of the Nation is also required before LGCC or any other Seneca Nation entity may sue, be sued, consent to any court's jurisdiction, submit to alternative dispute resolution, or waive its sovereign immunity from suit. (R. 179-80, 206-07, 227.) Simply put, the extensive approval and reporting requirements built-in to the Charters of LGCC and the other Seneca Nation entities highlight the extent to which such entities are truly "subordinate arms" of the Nation serving important governmental purposes.

B. The Underlying Mechanic's Lien

On or about July 5, 2007, LGCC, Sue/Perior, and GCCI entered into the Contract under which Sue/Perior and GCCI were to be the general contractors for the construction of the Seneca Hickory Stick Golf Course. (R. 61.) The Contract required Sue/Perior to submit monthly applications for progress payments to the golf course architect, Robert Trent Jones II, LLC ("RTJ"). RTJ reviewed these payment applications and the required back up for labor and/or materials, and either certified or rejected them. (R. 61.)

The project proceeded slowly but without major dispute until April 2009, when Sue/Perior submitted Payment Application 19, containing significant errors and exaggerations of the amounts owed to Sue/Perior, and which sought payment for work that had not been done. RTJ asked Sue/Perior to withdraw and revise Payment Application 19. (R. 62.) Rather than doing so, Sue/Perior filed a

Mechanic's Lien for the amount sought in that payment application. (R. 62.) RTJ rejected Payment Application 19 and certified for payment only the amount actually owed. (R. 62.) LGCC paid the amount certified by RTJ on July 31, 2009. (R. 62.) Sue/Perior eventually completed the work which it had not done – but for which it had improperly charged LGCC. LGCC then paid Sue/Perior for the completed work as part of Sue/Perior's Payment Application 20(3). (R. 63.) During the next nine months, Sue/Perior filed other exaggerated payment applications and another lien for work it had not done. (R. 62-65.) Sue/Perior eventually withdrew those applications and voluntarily discharged the second lien. (R. 63-66.)

Sue/Perior's third lien, which is the subject of this action, was filed February 17, 2010 ("Lien 3"). (R. 66.) After reviewing Sue/Perior's lien filing, LGCC identified numerous improper billings for materials and labor that were never provided. On June 14, 2010, LGCC provided Sue/Perior with a comprehensive report: (i) addressing each of Sue/Perior's claims; (ii) identifying the offsets and credits owed to LGCC; and (iii) demanding that Sue/Perior withdraw Lien 3, reimburse LGCC for improper charges and overpayments, complete its punch list and issue a final release. (R. 62-66.) Sue/Perior refused.

C. Plaintiff's Claims In This Action

On June 29, 2010, Sue/Perior commenced a lien foreclosure action on Lien 3, seeking $4,130,538 it claims to be owed under the Contract. (R. 76-85.) Sue/Perior sought relief only against LGCC. (R. 66.)

When LGCC refused to pay Sue/Perior for its improper charges, Sue/Perior amended its complaint on September 13, 2010 to add as additional defendants SGC, SNFGC and fifteen corporate Officers and Directors of LGCC, SGC and SNFGC (collectively, with LGCC, the "Nation Defendants"), none of whom were even parties to the Contract. Apparently to exert additional pressure on the Seneca Nation, Sue/Perior commenced a separate action in Supreme Court, Erie County (the "Erie County Action"), alleging "blacklisting" claims but seeking the same $4,130,538 concerning the same project and naming as defendants nearly all of the same defendants named in this action, except LGCC. (R. 67.) The Erie County Action was dismissed based on the sovereign immunity of SGC and SNFGC (which was found to protect the entities and its officers and directors from suit). *See Sue/Perior Concrete & Paving, Inc. v. Seneca Gaming Corp.*, 99 A.D.3d 1203 (4th Dep't 2012).

D. Supreme Court's Decision

On March 14, 2011, the Nation Defendants moved to dismiss Plaintiff's amended complaint based on sovereign immunity and other defenses. (R. 55-57.) By order granted February 28, 2012 and filed March 1, 2012, the trial

court (Supreme Court, Niagara County) denied the motion. (R. 11.) It held that LGCC was not protected by the Nation's sovereign immunity, and that even if it were, such immunity would not act as a bar to a mechanic's lien foreclosure action. (R. 15-16.) The Nation Defendants appealed. (R. 5-9.)

Before the appeal was argued, Sue/Perior changed course once again and withdrew its claims against all defendants except LGCC. (R. 11a.)

E. The Appellate Division's Decision

By its Opinion and Order of June 14, 2013, the Appellate Division modified Supreme Court's order by granting that part of the Nation Defendants' motion seeking to dismiss the third cause of action (alleging breach of the implied covenant of good faith and fair dealing), but otherwise affirmed. 109 A.D.3d 80 (4th Dep't 2013). (R. 7a-18a.)

The Appellate Division, while recognizing the sovereign immunity of SGC and SNFGC, misapplied the *Ransom* factors in denying sovereign immunity to LGCC, notwithstanding the common purpose, structure and control among all three. The Court found that LGCC satisfied four of the *Ransom* factors (the same number found to be determinative in *Ransom), viz.* that LGCC was organized under the Nation's law, that its governing body was comprised mainly of tribal officials, that the Nation's governing body has power to dismiss members of LGCC's governing body, and that the Nation exercises control over LGCC's administration and accounting activities. (R. 13a.) It erroneously concluded,

however, that other factors were not met, and suggested that certain of those misconstrued factors were essentially dispositive. (R. 13a-16a.)

The Appellate Division's decision appears to have been driven by its view of LGCC as a "regional economic engine" intended to function as a "regular business entity," a view based at least in part upon inferences it drew from the content of a Niagara County Industrial Development Authority ("NCIDA") Application for Assistance prepared by a predecessor in interest to LGCC months prior to LGCC's July 2007 formation. (R. 14a, 15a, 168.) This view is inconsistent with the Seneca Nation's own legislative pronouncement that LGCC is, in fact, entitled to all of the privileges and immunities of the Nation (and, in that respect, not a "regular business entity"). It is also contrary to the well-settled principle that sovereign immunity applies to commercial as well as governmental activities of a tribe, whether they are conducted on or off sovereign tribal lands. Finally, this view also misconstrues *Ransom*'s "governmental purpose" factor by inappropriately conflating the purpose of the entity with the means by which it fulfills that purpose.

The decision also appears to be based on the misconception that if a tribal entity serving a tribal purpose also provides employment or other benefits to the non-Indian community, then it is no longer a tribal entity. (R. 14a.) The Appellate Division's view finds no support in the case law and would result in a

perverse disincentive: dissuading tribes from economic ventures if those ventures might benefit the community beyond the tribal membership.

STATEMENT OF JURISDICTION

By Order dated and entered September 27, 2013, the Appellate Division, Fourth Judicial Department, granted LGCC leave to appeal its June 14, 2013 order and certified the following question: Was the order of this Court entered June 14, 2013, properly made?

QUESTIONS PRESENTED

1. Is LGCC an arm of the Seneca Nation of Indians entitled to share the Nation's sovereign immunity from suit, requiring dismissal of Plaintiff's amended complaint?

Answer of the Appellate Division: No.

2. Is LGCC's sovereign immunity a bar to a lien foreclosure action?

Answer of the Appellate Division: The Appellate Division did not address this question, but the trial court answered this question "No," and its order was affirmed.

3. Should Plaintiff's sixth cause of action for fraud be dismissed as duplicative of its breach of contract cause of action?

Answer of the Appellate Division: No.

ARGUMENT

POINT I

THE APPELLATE DIVISION MISPLACED THE BURDEN OF PROOF

As a preliminary but important issue, the Appellate Division misplaced the burden of proof, imposing upon LGCC the burden of establishing that it is a sovereign arm of the Seneca Nation. (R. 12a.) However, under New York law, the burden of proving jurisdiction over any defendant lies with the plaintiff. *Spectra Prods., Inc. v. Indian River Citrus Specialties, Inc.,* 144 A.D.2d 832, 833 (3d Dep't 1988) ("The burden of proving jurisdiction is on the party asserting it . . . ."). Tribal sovereign immunity presents a jurisdictional bar to suit against a tribal entity. *See, e.g., Alvarado v. Table Mountain Rancheria,* 509 F.3d 1008, 1015-16 (9th Cir. 2007) ("tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe"). Accordingly, it was Sue/Perior's burden to prove that LGCC does not possess sovereign immunity or that such immunity was clearly and expressly waived, and that the court therefore had jurisdiction.

POINT II

LGCC, LIKE THE OTHER SENECA NATION ENTITIES CREATED IN FURTHERANCE OF THE SENECA NATION'S GAMING OPERATIONS, POSSESSES THE NATION'S SOVEREIGN IMMUNITY AS AN ARM OF THE NATION

As this Court held in *Ransom,* "[t]hat Indian tribes possess common-law sovereign immunity from suit akin to that enjoyed by other sovereigns is part of this Nation's long-standing tradition." 86 N.Y.2d at 558 (*citing Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978) and *Patterson v. Council of Seneca Nation,* 245 N.Y. 433 (1927)). Tribal sovereign immunity is "a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998). Acknowledging the respect and protections due a sovereign Nation, this Court has opined "preserving tribal resources and tribal autonomy" through sovereign immunity "are matters of vital importance." *Ransom,* 86 N.Y.2d at 560.

Tribal business ventures, subagencies and corporate entities created or operated by an Indian Nation to further governmental objectives "may also possess attributes of tribal sovereignty, and cannot be sued absent a waiver of immunity." *Id.* at 559. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991) (sovereign immunity extends to tribal business ventures); *Pink v. Modoc Indian Health Project Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998) (finding that a subsidiary tribal entity established and controlled by several tribes is protected by sovereign immunity); *Barker v. Menominee Nation Casino,*

897 F. Supp. 389, 393 (E.D. Wis. 1995) ("[A]n action against a tribal enterprise is, in essence, an action against the tribe itself") (internal quotation marks omitted); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 358 (2d Cir. 2000) ("an agency of the Tribe . . . is entitled to benefit from the Tribe's immunity).

In *Ransom*, the seminal New York case on the issue and based upon the controlling federal case law, this Court held that a separate and autonomous tribal entity incorporated in another jurisdiction but operating for the benefit of the tribe was protected from unconsented suit by the tribe's immunity. The *Ransom* decision held "no set formula is dispositive in determining whether a particular tribal organization is an 'arm' of the tribe entitled to share the tribe's immunity from suit," and that courts must generally consider a number of factors, including whether:

- the entity is organized under the tribe's laws or constitution rather than Federal law;
- the organization's purposes are similar to or serve those of the tribal government;
- the organization's governing body is comprised mainly of tribal officials;
- the tribe has legal title or ownership of property used by the organization;
- tribal officials exercise control over the administration or accounting activities of the organization;

- the tribe's governing body has power to dismiss members of the organization's governing body;
- the corporate entity generates its own revenue;
- a suit against the corporation will impact the tribe's fiscal resources;
- the subentity has the 'power to bind or obligate the funds of the [tribe]'.

Ransom, 86 N.Y.2d. at 559 (citation omitted).

In *Ransom*, this Court determined that the tribal entity at issue possessed its parent tribe's sovereign immunity even though it satisfied only four of the nine factors articulated. Specifically, *Ransom* held that the tribal entity in that case (1) was established to enhance the health, education and welfare of the Tribe's members, a function traditionally borne by tribal government; (2) received its resources from the Tribe, and designated the Tribe as the recipient of its funds and services; (3) was governed by a body comprised of elected Chiefs of the Tribe; and (4) was subject to the direct fiscal and administrative control of the Tribe. *Id.* at 560.

All four of the factors found to be determinative for a finding of tribal entity immunity in *Ransom* are satisfied by LGCC. LGCC also meets at least four of the other *Ransom* factors. In fact, every court that has addressed this issue with respect to a Seneca Nation corporate entity – including the Fourth Department itself – has found those entities to possess sovereign immunity. *See Sue/Perior*

Concrete & Paving, Inc. v. Seneca Gaming Corp., 99 A.D.3d 1203 (4th Dep't 2012) (dismissing complaint against officers of SGC and SNFGC because they, like SGC and SNFGC, are protected by sovereign immunity); *Seneca Niagara Falls Gaming Corp. v. Klewin Bldg. Co.*, No. 4004218, 2005 WL 3510348 (Conn. Super. Ct. Nov. 30, 2005) (dismissing counterclaims against SNFGC because it possesses sovereign immunity); *Seneca Niagara v. Toohey*, No. 140634 (Sup. Ct. Niagara Cnty. Sept. 27, 2010)(SGC and SNFGC are "arms" of the Nation) (R. 480-84); *Mahiques v. County of Niagara*, No. I-2007-002572 (Sup. Ct. Erie Cnty. Aug. 9, 2007) (SGC enjoys sovereign immunity) (R. 117-20); *Lechlitner v. Seneca Alleghany [sic Allegany] Casino & Hotel, Seneca Gaming Corporation, et al.*, CV-09-688740 (Ct. Com. Pl., Cuyahoga Cnty., Ohio, May 18, 2009) (Court lacked jurisdiction over SGC due to sovereign immunity) (R. 121); *Sue/Perior Concrete & Paving, Inc. v. Seneca Gaming Corp.*, I-2010-800073 (Sup. Ct. Erie Cnty. Sept. 14, 2011)(sovereign immunity applies to SGC and SNFGC based on federal case law and *Ransom*).

More importantly, the Appellate Division's misapplication of the *Ransom* factors is at odds not only with *Ransom* itself, but also with the controlling federal law on which *Ransom* is based, and represents the improper diminution of a federal right by a state court. Federal cases decided after *Ransom* confirm the Appellate Division's error. *See, e.g., Warren v. U.S.*, 859 F. Supp. 2d 522 (W.D.N.Y. 2012), *aff'd*, 517 F. App'x 54 (2d Cir. 2013) (SGC is an entity of the

Seneca Nation and possesses the Nation's sovereign immunity from suit); *Myers v. Seneca Niagara Casino*, 488 F. Supp. 2d 166, 168 n.2 (N.D.N.Y. 2006) (dismissing suit and finding that SNFGC is a "'subordinate arm of the Nation and shall be entitled to all of the privileges and immunities of the Nation'").

A. Each Of The Four Factors That Were Found to be Determinative In *Ransom* Are Satisfied By LGCC

The correct application of *Ransom*, and the federal law on which it relies, demonstrates that LGCC is an arm and instrumentality of the Seneca Nation entitled to the protections of the Nation's sovereign immunity. LGCC satisfies the same four factors held to be determinative for a finding of immunity in *Ransom*.

1. LGCC Was Established To Enhance The Health, Education And Welfare Of The Nation's Members And Its Purposes Serve Those Of The Nation

The Appellate Division misconstrued the governmental "purposes" factor by conflating the purpose served with the means used to serve that purpose. As discussed below, the case law is uniform on the point that a tribal commercial enterprise can serve a governmental purpose and thus is protected by sovereign immunity. Moreover, the Appellate Division erroneously narrowed the "purposes" factor by deciding that if the entity serves a purpose *in addition to* serving the Seneca Nation, i.e., by creating jobs and economic opportunity for non-Nation members as well as for Nation members, that it no longer satisfies this factor. If the Appellate Division were correct, no Indian nation or Tribe could ever conduct business and retain its sovereign immunity, as its economic development activities

will almost always provide jobs and other economic benefits to the general public. Thus, the Appellate Division's reasoning on this point is contrary to *Ransom* and the common law, will result in greater confusion in application of the *Ransom* analysis, and creates a disincentive for tribes to engage in economic development that could benefit the larger community.

a. The Appellate Division Misconstrued the Governmental Purposes Factor

As a starting point, the Appellate Division misapplied the language in *Ransom* concerning the tribe's "purposes" factor, giving it an overly narrow construction to deny sovereign immunity based largely on the commercial nature of the golf course operated by LGCC. That interpretation runs afoul of *Ransom* itself as well as established federal case law holding that sovereign immunity applies to commercial as well as governmental activities of tribal entities. *See, e.g.*, *Kiowa Tribe of Okla v. Mfg Techs., Inc.*, 523 U.S. 751 (1998). Specifically, the Appellate Division applied an unwarrantedly narrow interpretation of *Ransom's* "purposes" factor, relying heavily on its view that LGGC is a commercial entity and referring to it as "a regional economic engine" "intended to function as a regular business entity" and an "independent, market-participating entity." (R. 14a-16a.) The Appellate Division then erroneously concluded that LGCC "is several steps removed from *the purposes of tribal government*." (R. 14a) (emphasis added). This reading misconstrues *Ransom*, which requires only that the

tribal entity's purpose be "similar to *or serve those of the tribal government*." *Ransom*, 86 N.Y.2d at 559 (emphasis added).

The Appellate Division misread the salient language in *Ransom*, confusing "serving" a tribal government's purposes with the *means* of furthering those purposes. Entities such as LGCC, SGC and SNFGC further housing, health, and welfare services, not by providing such services themselves, but by providing critical funding to the Nation so it can provide such services, as well as by providing for employment and economic development. The Appellate Division missed the legally critical point that, while LGCC, SGC and SNFGC may conduct different (though related) activities, they do so to further the same important governmental objectives of the Nation itself.

More specifically, LGCC was created expressly to serve the purposes of the Seneca Nation's tribal government. LGCC's Charter unequivocally states that the purposes of the Seneca Nation's tribal government are shared with and served by LGCC. Specifically, when establishing LGCC, the Nation's Council emphasized the governmental purposes being served, stating in LGCC's Charter that

> 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*; (emphasis added)

* * * *

> the economic success of the Nation's gaming operations is vitally important to the economy of the Nation and the general welfare of its members;
>
> * * * *
>
> the Nation has found it to be in the best interests of the Nation and its gaming operations to develop and operate a golf course located in the Town of Lewiston . . . .

R. 224.

These pronouncements demonstrate the unity of purpose between LGCC and the Seneca Nation, and are supported by the facts cited by the Appellate Division itself. The Appellate Division recognized that the minutes recording SGC's approval state that the gaming industry is "vitally important to the economy of the Nation and the general welfare of its members;" that "to that end" the Nation created SNFGC to run the gaming operations and created LGCC to further "the economic success of the Nation's gaming operations," *i.e.*, as an "amenity" to SNFGC's casino operations. (R. 14a.) Indeed, an entity created to further the success of a venture "vitally important to the economy of the Nation and the general welfare of its members" obviously shares the Nation's purposes.

The Appellate Division's reasoning is also contrary to the controlling federal case law upon which *Ransom* was based, as well as that which has developed post-*Ransom*. That law demonstrates that sovereign immunity extends to tribal corporations and other tribal entities, regardless of whether they are

engaged in governmental *or commercial* activities, and regardless of whether their activities are conducted on or off tribal lands.

The United States Supreme Court's decision in *Kiowa Tribe of Okla v. Mfg Techs., Inc.*, 523 U.S. 751 (1998) expressly held that the commercial nature of activities engaged by a tribe do not erode its immunity from suit. There, the Supreme Court held that the Kiowa Indian tribe was immune from a suit based on its default on a promissory note involving a commercial transaction for the purchase of stock. The Court noted that its cases "have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred . . . . [n]or have we yet drawn a distinction between governmental and commercial activities of a tribe . . . . Though respondent asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions." *Kiowa,* 523 U.S. at 754-55 (citations omitted). The *Kiowa* Court therefore concluded that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Id.* at 760.

Accordingly, sovereign immunity has been found to apply to a variety of commercial enterprises undertaken by tribes or tribal entities on or off tribal lands. For example, in *Doe v. Oneida Indian Nation of New York*, 278 A.D.2d 564, 565 (3d Dep't 2000) the Court held that "the fact that plaintiff sustained injury

at the Hotel, a commercial activity allegedly outside the Oneida Indian Reservation, provides no foundation for an exception to the sovereign immunity rule. Tribes are immune from suits arising from their commercial activities, whether conducted on or off the reservation." *See also Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) (applying sovereign immunity to tribal business venture involved in sales of cigarettes); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001) (applying sovereign immunity to tribally chartered housing entity); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1044 (8th Cir. 2000) (upholding sovereign immunity for community college chartered by tribe as a non-profit corporation); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010) (holding that tribe's sovereign immunity extends to tribe's casino and economic development authority which owns and operates casino); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008) (gaming corporation and casino immune from suit); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271, 275 (N.D.N.Y. 2000) (sovereign immunity applies to tribe and casino); *Burnham v. Pequot Pharm. Network*, No. CV 95536264, 1998 WL 345463 (Conn. Super. Ct. June 19, 1998) (holding tribal entity conducting commercial for-profit pharmaceutical business on non-tribal land protected by sovereign immunity); *Seneca Niagara Falls Gaming Corp. v. Klewin Bldg. Co.*, No. 4004218, 2005 WL 3510348, at * 1 (Conn Super. Ct. Nov. 30,

2005) ("A tribe's sovereign immunity is not limited to governmental activities, but extends to commercial activities as well."). Most recently, in *Warren v. U.S.*, 859 F. Supp. 2d 522 (W.D.N.Y. 2012), *aff'd*, 517 F. App'x 54 (2d Cir. 2013), a federal court rejected the plaintiff's argument that sovereign immunity should not apply to SGC because of the commercial nature of its activities.

The decision in *Gristede's Foods, Inc. v. Unkechuage Nation*, 660 F. Supp. 2d 442 (E.D.N.Y. 2009), which is cited by the Appellate Division, actually highlights the central flaw in its "purpose" analysis. There, the District Court stated that, in evaluating whether a tribally created entity is entitled to sovereign immunity, "[t]he question is not whether the activity 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." 660 F. Supp. 2d at 477 (alteration in original) (*quoting Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006).

Moreover, any doubt that sovereign immunity can apply to a commercial enterprise such as a golf course was recently settled in *Koscielak v. Stockbridge-Munsee Community*, 340 Wis. 2d 409, 418, 811 N.W.2d 451, 456 (Wis. Ct. App. 2012). There the Wisconsin appellate court held:

> [W]e instead follow the general rule of immunity for tribal businesses. Tribes must surmount many developmental challenges, including tribal remoteness, lack of a tax base, capital access barriers, and the paternalistic attitudes of federal policymakers. Because of these barriers ... tribal economic development—often

> in the form of tribally owned and controlled businesses—is necessary to generate revenue to support tribal government and services. Tribal immunity promotes this economic development, as well as tribal self-determination and cultural autonomy.

Id. at 418, 811 N.W.2d at 456. (Citations and internal quotation marks omitted). In *Koscielak*, as here, the Tribe chartered a "'subordinate organization and economic enterprise'" to run the golf course. *Id.* at 412, 811 N.W.2d at 453-54. Its charter stated that the entity was clothed with the Tribe's sovereign immunity, and required Tribal approval of any waiver of that immunity. Noting that "[g]enerally, a tribe's immunity 'extends to its business arms,'" the court "follow[ed] the general rule of immunity for tribal businesses" in holding that the golf course entity was cloaked with sovereign immunity. 340 Wisc. 2d at 415, 418, 811 N.W.2d at 455, 456. *Koscielak's* analysis was largely based on charter provisions virtually identical to those in LGCC's Charter:

> The case for immunity is all the stronger here because it appears the Tribe took measures to extend its immunity to Pine Hills [the golf course entity]. Section 1.5 of the Pine Hills charter specifically clothes the business and its employees with "all the privileges and immunities of the Tribe including sovereign immunity from suit in any tribal, federal or state court." Any business contracts that waived tribal immunity required approval from the Tribal Council. In light of the general rule that tribal businesses are immune from suit and the Tribe's explicit invocation of that immunity in the Pine Hills charter, we conclude the [plaintiffs'] claims were properly dismissed.

340 Wisc. 2d at 419-20, 811 N.W.2d at 457.

In sum, all courts that have addressed the issue have held that sovereign immunity extends to both commercial and governmental activities of

tribal entities, and regardless of whether the activities are conducted on or off tribal lands. The Appellate Division ignored these fundamental principles by basing its decision on the commercial nature of the golf course. In doing so, it failed to recognize that LGCC's tribally-operated golf course shares precisely the same tribal purposes as the Nation's gaming facilities and the Nation itself. As noted above, the express purpose of this "amenity," the golf course, was to "further the economic success of the Nation's gaming operations," which are of "vital importance" to the economy of the Nation and general welfare of its members.[1] In light of the controlling federal case law, the Appellate Division's misreading of the "governmental purposes" factor is an inappropriate diminution of a federal right by a state court.

b. The Appellate Division Erroneously Narrowed the Governmental Purposes to be Served Factor

The Appellate Division also erred in holding that the NCIDA application submitted by LGCC's predecessor in interest, Seneca Management Development Corporation ("SMDC") (which stated that the golf course was intended to draw patrons from a wide geographic area and would benefit the

[1] It is not uncommon for Indian nations to create golf courses as amenities to their gaming operations. *See, e.g.*, *http://turningstone.com/golf/atunyote/* regarding the "three championship courses" operated by the Oneida Nation as part of its Turning Stone Resort/Casino; *http://ww2.moheganssun.com/golf* regarding Mohegan Sun Casino's golf country club operated by the Mohegan Tribe of Connecticut; and *http://www.foxwoods.com/golf.aspx* discussing the casino golf amenity of the Mashantucket Pequot Tribe in Connecticut. Nor is the concept of operating a golf course as a governmental enterprise unique to Indian tribes: numerous governmental entities in New York operate golf courses to provide a public amenity, create jobs and support economic development.

economy of Niagara County) somehow destroyed LGCC's status as a sovereign arm of the Seneca Nation. This application, submitted by SMDC in March 2007, predated LGCC's July 2007 formation. (R. 168, 599.) Even assuming that the prior statements of one corporate entity can speak to the organizational purpose of a subsequently formed entity, the Appellate Division incorrectly reasoned that because the application indicated that the golf course would provide broader community benefits – jobs and economic development – than just those provided to the Nation, that LGCC is not serving a governmental purpose. (R. 14a.)

First, the Appellate Division does not point to any authority to support such reasoning, because none exists. The cases simply do not separate those entities that provide benefits exclusively to the tribe from those that provide benefits to both the tribe and the larger community of which it is a part. Casinos that employ non-Indians, for example, still retain their sovereign immunity. *See, e.g., Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006) (dismissing suit by terminated non-Indian casino employee on sovereign immunity grounds).

Second, maximizing the patronage of the Nation's gaming operations, including the golf course, directly serves the Nation's purpose of furthering "the economic success of the Nation's gaming operations" which is "vitally important to the economy of the Nation." (R. 175, 201, 224.) In fact, the NCIDA application specifically referred to "the patrons of the Seneca Niagara Casino & Hotel" as a target clientele of the golf course. (R. 612.) Indeed, the Nation's Niagara Falls

casino, like all Indian gaming operations, draws its patrons from the general public, yet that obviously does not destroy its sovereign immunity. Similarly, the NCIDA application's focus on the golf course's benefits to the economy of Niagara County does not change the declared purpose of the golf course to promote the welfare and prosperity of the Nation's members. (R. 224.) The golf course can and does serve the dual purpose of stimulating the County's economy (a "regional economic engine") *and* furthering the economic success of the Nation's gaming operations.

Third, the Appellate Division incorrectly characterized the NCIDA Application for Assistance as somehow representing that LGCC, an entity that did not exist when the Application for Assistance was prepared, was a non-tribal entity without immunity. Even assuming that inferences from SMDC's Application for Assistance are relevant to LGCC's formation and purpose, the NCIDA application openly disclosed that SMDC was an arm of the Seneca Nation, stating that the Seneca Nation itself owned 100% of SMDC (R. 602), that SMDC was "chartered in May 2005 by the Seneca Nation of Indians" "to provide a vehicle for economic development projects" (R. 603), that SNFGC was the present landowner of the property to be developed into a golf course (R. 606), and that funding for the project was to come from SGC. (R. 615.)[2]

[2] The Payment In Lieu of Taxes ("PILOT") agreement between NCIDA and LGCC – unlike the Contract with Sue/Perior - contains a provision whereby the parties agree to submit to the personal jurisdiction of the federal or state courts in Niagara County, New York. (R. 363.) Such

Fourth, the Appellate Division also incorrectly read the acknowledgement of LGCC's potential tax liability in the NCIDA agreements as an acknowledgement that the enterprise would lack sovereign immunity. The applicability of State regulatory and tax laws to a tribal enterprise is distinct from the question of whether the enterprise possesses immunity. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991) (holding that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes). Thus, the fact that the LGCC golf course property could be subject to taxation by the State or County does not affect LGCC's sovereign immunity from Plaintiff's suit on the Contract.

In sum, LGCC's purpose, to further the economic success of the Nation's gaming operations," which are deemed "vitally important to the economy of the Nation and general welfare of its members," is consistent with its status as an arm of the Seneca Nation entitled to share in the Nation's immunity, regardless of whether it is viewed as a "commercial" or "business" venture.

2. A Suit Against LGCC Impacts The Nation's Fiscal Resources, As The Nation Is The Recipient Of LGCC's Revenue

The Appellate Division also erred in its reading of *Ransom's* financial interconnectedness factors, and in treating such factors as a threshold or dispositive factor, to deny LGCC sovereign immunity. Such misreading is based on this

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agreement is specifically for the purpose of enforcing the terms of the PILOT agreement, and is not intended to and does not benefit third parties such as Sue/Perior.

Court's use of the phrase "[m]ore importantly…." when prefacing its discussion of the financial factors. 86 N.Y.2d at 559. But, read in context, *Ransom's* use of this phrase was not intended to establish financial interconnectedness as a threshold factor that must be met to establish immunity. Rather, the analysis indicates that such factors could, in that specific context, provide sufficient bases for a finding of immunity even if the other factors discussed were not met: "The vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe." *Ransom,* 86 N.Y.2d at 559-60. However, nothing in the *Ransom* analysis supports a reading that an attenuated financial connection (not the case here) could be a dispositive factor in determining a *lack* of immunity. As *Ransom* opined at the outset, "no set formula is dispositive." *Id.* at 559.[3]

Moreover, more recent federal cases have made clear that financial interdependence is not a threshold inquiry. *See, e.g., Breakthrough Mgmt. Grp.*

[3] Nor is such a conclusion supported by the *Altheimer* case cited in *Ransom* with respect to "whether the subentity has the 'power to bind or obligate the funds of the [tribe].'" *Id.* (alteration in original). In *Altheimer*, the Seventh Circuit acknowledged that a wholly-owned tribally chartered manufacturing corporation set up to "manufacture and market camouflage cloth and military helmets" was an arm of the tribe entitled to sovereign immunity. *Altheimer & Gray v. Sioux Mfg.Corp.*, 983 F.2d 803, 809 (7th Cir. 1993). Separately, in discussing the applicability of 25 U.S.C. § 81 to a binding letter of intent, both the Seventh Circuit and the precedent upon which it relied found the applicable tribal sub-entities to be "arms" of their respective tribes for Section 81 purposes, *notwithstanding* the belief that such tribal entities "had no power to bind or obligate the funds of the [tribe]." *Id.* at 809, *citing Pueblo of Santa Ana v. Hodel*, 663 F. Supp. 1300 (D.D.C. 1987). Thus, if anything, the quoted language from *Altheimer* stands for the proposition that financial interconnectedness can be "more important," when it supports sovereign immunity compared to other factors. Indeed, the Appellate Division's strong reliance on this factor in denying LGCC sovereign immunity, based on certain provisions found in LGCC's Charter, is misplaced. The exact same provisions are found in the Charters of SGC and SNFGC (R. 179, 206), yet the Appellate Division has recognized that those entities share in the Nation's sovereign immunity. (R. 12a).

Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1181 (10th Cir. 2010) (rejecting use of financial interdependence as a threshold or primary factor); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293-94 (10th Cir. 2008) (holding tribal entity immune without finding financial interdependence with tribe).

Breakthrough Management Group, Inc. is directly on point. That case involved a lawsuit against an Indian Tribe and the Economic Development Authority it had established to operate a casino. The plaintiff argued, like Sue/Perior here, that the Authority was not a tribal entity entitled to share in the tribe's sovereign immunity because, *inter alia*, its charter provided that it was a separate entity from the tribe, and the casino's charter provided that the tribe was not liable for its actions. The District Court, applying the financial interconnectedness factors as a threshold determination and finding them not met, denied the Authority's motion to dismiss. 629 F.3d at 1177. The Tenth Circuit Court of Appeals reversed, rejecting those arguments, and expressly held that no factor – including the financial interconnectedness factor – was a dispositive or threshold factor: "Although we recognize that the financial relationship between a tribe and its economic entities is a relevant measure of the closeness of their relationship, [existing precedent] plainly demonstrates that it is *not* a dispositive inquiry." *Id.* at 1187 (emphasis in original). The Court went on to hold that the Authority and the casino had a sufficiently close relationship to the tribe to share in

its immunity. 629 F.3d at 1183. Relying on several decisions, including *Ransom*, the Court acknowledged the policies served by granting immunity to a tribe's economic entities, including "preservation of tribal cultural autonomy, preservation of tribal self-determination, and promotion of commercial dealings between Indians and non-Indians."[4] *Id.* at 1187-88 (*quoting Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 258, 772 P.2d 1104, 1111 (1989)).

In any event, *Ransom's* financial factors are satisfied in this case. LGCC is a financially intertwined arm and instrumentality of the Seneca Nation. LGCC is owned by SNFGC, which is owned by SGC. SGC in turn is owned by the Seneca Nation and SGC distributes those revenues (including revenues from SNFGC and LGCC) to the Nation. (R. 70-73) (excerpts from SEC 10K statement; (R. 199, 222, 237) (distributions to Nation upon dissolution); (R. 563-87) (Distribution Agreement regarding SGC revenues). Any impact on LGCC or its assets, therefore, directly impacts the financial resources of the Seneca Nation itself. Thus, LGCC and its assets are the Nation's resources, ultimately held for and distributed to the Nation as and when directed by the Nation. Any suit against

[4] Thus, contrary to the Appellate Division's conclusion that recognizing LGCC's sovereign immunity "would discourage non-Indians from entering into business relationships with the Nation's corporations" (R. 16a), *Breakthrough* correctly observed that immunity would actually promote such relationships. Here, the NCIDA negotiated and obtained a limited waiver of LGCC's sovereign immunity in connection with the relevant agreements between NCIDA and LGCC, each of which are governed by and enforced in accordance with the laws of the State of New York. (R. 349-430.) Similarly, Sue/Perior's principal is a sophisticated businessman who had done business with the Nation and its affiliates for many years, and was familiar with the procedure for seeking a limited waiver of sovereign immunity. He simply failed to request one.

LGCC, therefore, including resulting expenses and liabilities, necessarily impacts its ultimate owner, the Seneca Nation. The Appellate Division's focus on whether LGCC is obligated to make direct payments to the Seneca Nation (R. 16a) is an erroneous construction of this *Ransom* factor, which requires only "impact" on the Nation's "fiscal resources." That impact is evident from the interlocking financial and organizational structure of SGC, SNFGC, and LGCC with the Nation.

3. LGCC's Board Of Directors Is Appointed, Removed And Controlled By The Nation And Is Comprised Of Tribal Officials

The Seneca Nation determines, appoints and exercises exclusive control over LGCC's Board of Directors. (R. 187, 231-32.) In fact, every member of LGCC's Board is an enrolled member of the Nation, and each was appointed by, and can be removed at the discretion of, the Nation. (R. 126, 138, 153.) The Appellate Division agreed that this factor is satisfied here. (R. 13a.)

4. LGCC Is Under The Direct Fiscal And Administrative Control Of The Seneca Nation

The Appellate Division correctly found that this *Ransom* factor is satisfied as well. (R. 13a.) In addition to appointing all members of LGCC's Board, the Seneca Nation Tribal Council exercises direct control, through the reserved powers and approval rights contained in LGCC's legislatively-granted Charter and Council-approved By-Laws, over the activities of LGCC. This control includes numerous approval rights, reporting mechanisms and oversight of LGCC's financial, administrative, accounting and other activities. For example,

LGCC's Charter requires it to obtain approval of the Nation's Council before undertaking essential corporate activities, including making significant expenditures of company resources (R. 228); incurring significant liabilities (R. 229); loaning money to subsidiary entities (R. 229); purchasing real property (R. 230); issuing bonds (R. 230); consenting to the jurisdiction of any court (R. 227); agreeing to arbitration (R. 227); and, most importantly, waiving its sovereign immunity. (R. 227). LGCC's Charter also requires it to "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." R 232. In these ways, and in the Nation's inherent authority to direct LGCC and its Board by action of its Tribal Council, the Seneca Nation exercises complete and ultimate oversight and control over the revenues, assets and activities of LGCC. (R. 235-236, 237.) Here again, the Charters of SGC and SNFGC contain identical provisions relating to the Nation's control of those entities. (R. 179-81, 183, 184, 191, 206-8, 210, 211, 214.)

Because LGCC satisfies this and the other three factors that were determinative in *Ransom*, the Appellate Division's holding that LGCC does not possess sovereign immunity should be reversed.

B. LGCC Also Satisfies At Least Four Of The Other *Ransom* Factors

1. LGCC Is Organized Under The Seneca Nation's Laws

There is no dispute that LGCC is organized under tribal law, as it was formed by Tribal Council resolutions granting its corporate Charter pursuant to Seneca Nation law. (R. 168-70.) The Appellate Division agreed that this factor supporting sovereign immunity was satisfied. (R. 13a.) We note that the tribal entity at issue in *Ransom,* which was held to be immune, did not satisfy this factor. 86 N.Y.2d at 557 (tribal entity incorporated under Washington, D.C., statute).

2. The Nation's Governing Body Has Power To Dismiss Members Of LGCC's Governing Body

As discussed above, the Nation, through its elected Tribal Council, has the sole power to appoint, remove and replace members of LGCC's Board. (R. 187, 190, 232.)[5] In this way too, LGCC is treated and operates only as an arm of the Nation. The Appellate Division agreed that this factor supporting sovereign immunity was satisfied. (R. 13a.)

3. The Nation Has Legal Title Or Ownership Of The Property Used By LGCC

Notably, this Court phrased this factor as "legal title *or* ownership of property." *Ransom,* 86 N.Y.2d at 559 (emphasis added). The Seneca Nation ultimately owns all of the assets of LGCC by virtue of LGCC's status as a governmental instrumentality owned by the Seneca Nation. Thus, contrary to the

[5] The Charters of SGC and SNFGC give the Nation identical powers with respect to their Boards. (R. 187, 190, 213.)

Appellate Division's opinion, the provision in LGCC's Charter which requires that *all* of LGCC's property and assets be distributed to the SNFGC or as otherwise directed by the Nation if LGCC is dissolved or liquidated, (R. 237), is not the only provision demonstrating that the Nation owns LGCC's property. While that Charter provision does strongly support the ownership factor, the most basic support comes from the simple fact that the Seneca Nation owns LGCC's property by virtue of being the ultimate owner of the chain of tribal entities that includes LGCC. By definition, therefore, this *Ransom* factor is satisfied.

4. LGCC Has Power To Bind Or Obligate The Funds Of The Nation

The Appellate Division's holding that "LGCC does not have binding authority over the Nation's funds" (R. 15a) is only partially correct. While standard provisions in LGCC's Charter (that also appear in the Charters of SGC and SNFGC, (R. 179, 192, 195, 201, 206, 215, 218, 226-7, 233, 235)) insulate some of the Nation's funds, it does not insulate all. Also, if such language were dispositive, *Ransom* (and the myriad other federal and state cases on point) would be meaningless. *See, e.g., Breakthrough*, 629 F.3d at 1181 (sovereign immunity applies to casino whose charter provides that the Tribe is not liable for its actions); *Altheimer*, 983 F.2d at 809 (finding subordinate tribal entities were arms of the tribe entitled to immunity *notwithstanding* the fact that such tribal entities "had no power to bind or obligate the funds of the [tribe]"; see discussion at note 3, *supra*).

Notwithstanding those provisions, LGCC absolutely can, by definition, bind funds of the Nation because it can bind the revenues it produces and those revenues are ultimately funds of the Nation. The Nation's Council has acknowledged as much through the structural restraints it has built into LGCC's Charter. Specifically, because the Nation, itself, views LGCC's revenues as Nation funds and resources, it is *only* with Council approval that LGCC may make "significant expenditures," incur "significant liabilities," make "significant guarantees," lend money; obtain financing and refinancing; and mortgage or pledge assets and receipts as security for debts. (R. 229.) Each of these powers allows LGCC to bind funds that are ultimately owned by the Nation, subject to the prior consent of that owner. This *Ransom* factor is, therefore, satisfied.

5. LGCC Generates Its Own Revenues, Which Ultimately Belong to the Seneca Nation

While LGCC (like SGC, SNFGC and all other tribal entities), does generate revenues, those revenues ultimately belong to the Seneca Nation by virtue of the fact that LGCC is wholly-owned by the Nation and its revenues are therefore, part of the Nation's resources. All of LGCC's revenues must be held for, and ultimately distributed to, the Nation. (R. 70-73) (excerpts from SEC 10K statement; (R. 199, 222, 237) (distributions to Nation upon dissolution); (R. 563-87) (Distribution Agreement regarding SGC revenues). Accordingly, this *Ransom* factor supports a determination that LGCC possesses the Nation's sovereign immunity.

6. The Nation Expressly Intended to Cloak LGCC With Its Sovereign Immunity

Finally, the Appellate Division noted that other courts have relied on additional factors including "whether the tribe intended to cloak the entities with sovereign immunity." (R. 12a.) That intention could not have been expressed more clearly than in LGCC's Charter, which provides that LGCC "shall be entitled to all of the privileges and immunities of the Nation" and that LGCC shall "enjoy the sovereign immunity of the Nation, to the same extent as the Nation." (R. 225, 231.)

In sum, each of the factors that this Court found to support the tribal entity's sovereign immunity in *Ransom* is satisfied here. In addition, four of the other factors are satisfied (as is the additional factor, the Nation/tribe's intent, found important by other courts). Even the Appellate Division acknowledged that four of the *Ransom* factors are satisfied, including two of the four found to be determinative for the decision in *Ransom*. The Order denying sovereign immunity to LGCC is, therefore, inconsistent with *Ransom*, all of the federal case law which has addressed questions of a tribal entity's sovereign immunity, every other decision applying the *Ransom* analysis to the Seneca Nation's tribal corporations, and the only decision addressing a tribal entity's golf course business venture.

The Appellate Division's decision, therefore, is likely to generate confusion and further misapplication of the tribal entity sovereign immunity test, and operate to the detriment of tribes whose reliance on and protection by such

immunity is critically important for sustaining their government operations and funding, and it should be reversed.

POINT III

LGCC'S SOVEREIGN STATUS IS A BAR TO A MECHANIC'S LIEN FORECLOSURE ACTION IN NEW YORK

The trial court erroneously accepted Sue/Perior's argument that even a sovereign entity can be subjected to the jurisdiction of New York's courts and forced to litigate a construction contract dispute whenever that dispute is fashioned as a mechanic's lien foreclosure rather than a claim for breach of contract. The trial court incorrectly reasoned:

> [A]n action to foreclose a mechanic's lien on real property is considered an *in rem* proceeding. Therefore, the issue of sovereign immunity does not impact at all the lien foreclosure claim since personal jurisdiction over the owners of the golf course (LGCC) is not necessary in the context of such relief.

R. 16. (internal citations omitted).

While not specifically addressing this issue, the Appellate Division, in affirming the trial court's decision, left this part of the trial court's ruling intact and the issue is therefore properly before this Court on this appeal.[6]

[6] *See, e.g., Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Town of Huntington*, 97 N.Y.2d 86, 92-94 (2001) (reversing Appellate Division and finding that Board's denial of application was arbitrary as a matter of law, a question that Appellate Division had not considered); *N.Y. State Ass'n of Criminal Def. Lawyers v. Kaye*, 96 N.Y.2d 512, 516 (2001) (addressing and deciding merits of petition despite the fact that Appellate Division affirmed dismissal of petition solely upon lack of standing without addressing the merits).

The trial court's erroneous conclusion would effectively allow any party to a construction contract dispute to circumvent sovereign immunity through a mechanic's lien foreclosure action, when it could not do so through a breach of contract action. In so holding, the trial court ignored all fundamental precepts of sovereign immunity as well as the New York Lien Law itself.

First, "[m]echanic's liens have their derivation entirely in statutory law, existing neither at common law nor in equity. Thus, the applicable statutes must be examined." *Umbaugh Builders, Inc. v. Parr Co. of Suffolk, Inc.*, 86 Misc. 2d 1036, 1037, 385 N.Y.S.2d 698, 700 (Sup. Ct. Suffolk Cnty. 1976). An examination of the relevant statute makes clear that New York law *does* require a court to have personal jurisdiction over all "necessary parties" to a lien foreclosure action, and the owner of the property is specifically denominated as one of those necessary parties. *See* New York Lien Law §44(3). *See also Parisi v. Hubbard*, 226 A.D. 280, 282 (4th Dep't 1929); *Spitz v. M. Brooks & Son, Inc.*, 210 A.D. 438, 440 (1st Dep't 1924). Because LGCC is the owner of the property at issue, and therefore a "necessary party" as defined by the New York Lien Law, Plaintiff's suit cannot proceed where the entity, like LGCC, possesses sovereign immunity.

Second, binding precedent of the United States Supreme Court provides that a suit against a sovereign entity's property is a suit against the sovereign entity itself and is, therefore, barred by sovereign immunity. *United States v. Alabama*, 313 U.S. 274, 282 (1941). None of the authority cited by

Plaintiff or the trial court contravenes this basic point, nor could it, as tribal sovereign immunity is "a matter of federal law and is not subject to diminution by the States." *Kiowa*, 523 U.S. at 756.

A. New York Law Requires Personal Jurisdiction Over The Owner Of The Property Which Is Subject To The Lien Foreclosure

Sovereign immunity presents a bar to jurisdiction over LGCC. *See, e.g., Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir. 2007) (sovereign immunity is a jurisdictional bar). As a matter of New York law, that jurisdictional bar prohibits the court from proceeding with a lien foreclosure action involving LGCC's property. It is fundamental that no party can be joined in any action unless the Court has personal jurisdiction over it. N.Y. CPLR 3211(a)(2) (McKinney 2005 & Supp. 2012). It is equally clear that New York Lien Law § 44(3) provides that the owner of the real property at issue in any lien foreclosure action is a "necessary party" to that action:

> In an action in a court of record to enforce a lien against real property . . . . the following are necessary parties defendant: . . . .
>
> (3) All persons appearing by the records in the office of the [C]ounty clerk or register to be owners of such real property or any part thereof.

N.Y. Lien Law § 44 (McKinney 2007 & Supp. 2013).

It is thus well-settled in New York that no judgment can be rendered in a lien foreclosure proceeding concerning real property without the owner of that

property being made a party to the action. *Harlem Plumbing Supply Co. v. Handelsman*, 40 A.D.2d 768, 768 (1st Dep't 1972) (holding that "the owner of the property is a necessary party defendant, although the prior owners are not"); *Parisi v. Hubbard*, 226 A.D. 280, 282 (4th Dep't 1929) (holding that any party with a property interest in the subject property is a necessary party to a lien foreclosure action); *Spitz v. M. Brooks & Son, Inc.*, 210 A.D. 438, 440 (1st Dep't 1924) (holding that failure to join the owner of the property as a party was fatal to plaintiff's lien foreclosure action). *See also Dime Sav. Bank of N.Y. v. Johneas*, 172 A.D.2d 1082, 1083 (4th Dep't 1991) (holding that the landowners under the §44(3) statutory scheme were "indispensable" parties).

The trial court's conclusory statement on this point is contrary to long established New York statutory and common law. The fact that the statute that authorizes this action requires joinder of the owner of record should end the analysis and require dismissal, since LGCC cannot be joined due to its sovereign immunity. Yet the trial court, and Sue/Perior in its briefing below, erroneously attempt characterize this case as turning on an inapposite and false dichotomy between *in rem* and *in personam* actions. Yet even the cases they cite do not support their conclusions.

For example, the North Dakota Supreme Court case upon which the trial court relied, *Cass County Joint Water Resource District v. 1.43 Acres of Land in Highland Township*, 2002 N.D. 83, 643 N.W.2d 685 (N.D. 2002), held that a

tribe's immunity was not a bar to a *condemnation* action (as distinct from a lien foreclosure action) because such an action "is purely *in rem*, and does not require acquisition of *in personam* jurisdiction over the owners of the land." 2002 N.D. 83 at ¶20, 643 N.W.2d at 694 (emphasis added). The court, quoting from *Shaffer v. Heitner*, 433 U.S. 186 (1977), distinguished between purely *in rem* suits and other actions, and, notably, opined that tribal sovereign immunity would bar any case requiring *in personam* jurisdiction. 2002 N.D. 83 at ¶¶ 2-15, 643 N.W.2d at 688-91. The present case, a lien foreclosure action under New York Lien Law §44(3), requires *in personam* jurisdiction over the landowners. *See also Parisi v. Hubbard*, 226 A.D. at 282. Thus, under the analysis in *Cass County*, this case cannot proceed.

The trial court also erroneously relied upon *Cody v. Turn Verein of City of New York*, 48 A.D. 279 (1st Dep't 1900), *aff'd*, 167 N.Y. 607 (1901) for the proposition that a lien foreclosure action on a mechanic's lien is a purely *in rem* proceeding. *Cody*, however, holds to the contrary - *i.e.*, that a mechanic's lien foreclosure may have an *in rem* character, but is not purely an *in rem* proceeding. *Id.* at 281. Moreover, *Cody* did not involve a question whether necessary parties were properly joined or subject to personal jurisdiction. In fact, *Cody* acknowledged that personal jurisdiction was required over the debtor: "the action proceeds *in rem* against the mortgaged property and *in personam* against the debtor

on the bond and any others who have assumed the debt." 48 A.D. at 280-81 (emphasis added).

The trial court also erroneously cited *Parisi v. Hubbard*, 226 A.D. 280 (4th Dep't 1929) for the proposition that an action to foreclose a mechanic's lien on real property is considered an *in rem* proceeding. In deciding that case, the court held that parties with an interest in real property are necessary parties to a lien foreclosure action. *Id.* at 281. They must, therefore, be joined in the action. N.Y. Lien Law § 44(3) (McKinney 2007 & Supp. 2013).

Sue/Perior argued below that *in rem* jurisdiction exists over tribal lands, relying on *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). Sue/Perior's reliance on *Yakima* is simply wrong. *Yakima* involved a tribal challenge to a County's taxing authority under a federal statutory scheme (the General Allotment Act), posing issues of federal statutory interpretation and tax jurisdiction. It did not involve an assertion of or any ruling on tribal sovereign immunity (the phrase "sovereign immunity" is nowhere to be found in the opinion). Further, *Yakima* involved the more complex question of whether a governmental entity can enforce a tax lien against tribally-owned property, not the straightforward issue here, where a private party is inappropriately attempting to use a mechanic's lien to drag an otherwise immune tribal entity into state court.

In fact, to the extent that *Yakima* is at all relevant here, the decision actually supports LGCC. In *Yakima*, the Yakima Indian Nation had sued to challenge the County's authority to assess both an *ad valorem* tax on land owned by the Nation and an excise tax on the sale of the land. The Court, while noting that the applicable federal statutory law gave the County authority to levy and enforce the *ad valorem* tax because the tax arose on and solely burdened the land by operation of law, it invalidated the application of the excise tax because it involved activity related to the land but not the land itself. The Court held that even though Washington law provided a lien foreclosure remedy for failure to pay excise taxes, such an *in rem* remedy did not suffice to give the County tax authority, because – as here – the ultimate burden would fall upon the Tribe and not merely the land:

> A lien upon real estate to satisfy a tax does not convert the tax into a tax upon real estate-otherwise all sorts of state taxation of reservation-Indian activities could be validated (even the cigarette sales tax disallowed in *Moe*) by merely making the unpaid tax assessable against the taxpayer's fee-patented real estate . . . . The excise tax remains a tax upon the Indian's activity of selling the land, and thus is void, whatever means may be devised for its collection.

502 U.S. at 269. A mechanic's lien, like the tax lien for excise taxes, is a remedy for activity *related* to the land – a construction contract dispute – but it does not arise from the land itself. Even though the State has enacted the mechanic's lien foreclosure as a remedy for certain construction contract disputes, the ultimate

burden – as with the excise tax in *Yakima* – falls on the tribal entity, and thus would be barred under the reasoning in *Yakima*.

We also note that the Second Circuit has held that governmental tax lien foreclosure actions are barred by tribal sovereign immunity. *Oneida Indian Nation of N.Y. v. Madison Cnty. & Oneida Cnty.*, 605 F.3d 149 (2d Cir. 2010), *vacated on other grounds by Madison Cnty., N.Y. v. Oneida Indian Nation of N.Y.*, 131 S. Ct. 704 (2011); *see also* decision on remand, *Oneida Indian Nation of N.Y. v. Madison Cnty.*, 665 F.3d 408 (2d Cir. 2011). Although the Second Circuit's decision was vacated on other grounds, its analysis of sovereign immunity with relation to tribal immunity from governmental tax liens is still sound and, in fact, was recently applied in *Cayuga Indian Nation of New York v. Seneca County, New York*, 890 F. Supp. 2d 240 (W.D.N.Y. 2012). Again, the present case involves an even more straightforward issue, in which the dispute is not over enforceability of a tax lien, but whether a private party can avoid tribal sovereign immunity in a contract dispute by use of a mechanic's lien.

But, more to the point, whether or not a lien foreclosure action is *in rem*, *in personam*, or some combination of both, there is no avoiding the requirement under New York law that all necessary parties must be joined in such an action. N.Y. Lien Law § 44 (McKinney 2007 & Supp. 2013). Here, LGCC, as owner of the subject property (R. 325-36), obviously has "rights in the property" and, as such, is, by definition, a necessary party to this action. *Parisi v. Hubbard*,

226 A.D. 280, 282 (4th Dep't 1929). Because LGCC's sovereign immunity exempts it from the jurisdiction of New York courts, the trial court's holding that "sovereign immunity does not impact at all the lien foreclosure claim" (R. 16) was error and the Appellate Division's implicit affirmation of that decision should be reversed.

B. A Suit Against The Land Of A Sovereign Entity Is A Suit Against The Sovereign Entity Itself

United States Supreme Court precedent and decisions of other courts are consistent with New York's requirement that a court have personal jurisdiction over all necessary parties to a lien foreclosure action where the sovereign immunity of a party is at issue. As the United States Supreme Court has held, a suit against the land of a sovereign entity is a suit against the sovereign entity itself. *See United States v. Alabama*, 313 U.S. 274, 282 (1941). The sovereign's immunity from suit extends to property in the sovereign's possession. *See California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506 (1998) ("the Eleventh Amendment bars federal jurisdiction over general title disputes relating to state property interests"); *United States v. Lewis Cnty.*, 175 F.3d 671 (9th Cir. 1999) (tax lien foreclosure of federal property impermissible without express waiver of sovereign immunity). Because "Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers" (*Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 356 (2d Cir. 2000)), it makes no difference whether a

lien foreclosure action is directed exclusively at property or at the actual alleged debtor. In either case, LGCC would still be immune from this suit.

In a recent case enjoining an attempt by Seneca County to foreclose a tax lien on non-reservation tribal land, the Western District of New York – citing Second Circuit and United States Supreme Court precedent – expressly rejected "the proposition that tribal sovereign immunity from suit is inapplicable to *in rem* proceedings." *Cayuga Indian Nation of New York v. Seneca County*, 890 F. Supp. 2d at 247.

Similarly, in *Armijo v. Pueblo of Laguna*, 149 N.M. 234, 240-41, 247 P.3d 1119, 1125-26 (N.M. Ct. App. 2010), *cert. denied*, 150 N.M. 492, 263 P.3d 269 (N.M. 2010), the New Mexico Supreme Court dismissed a quiet title action involving a tribe's lands on the ground that the tribe was an indispensable party that could not be joined because it was immune from suit. That the suit was a quiet title action involving non-reservation land was not relevant to the court because the locus of the tribe's activity or its land cannot determine the applicability of its tribal sovereign immunity.

Here, Sue/Perior's lien foreclosure action is not merely a suit against the land, but against LGCC itself to collect money alleged to be owed under the Contract. In fact, the lien aspect of this case is an illusion, as the real (and only) legal issue is whether Sue/Perior or LGCC breached the Contract. Sue/Perior has simply brought a contract action against an entity protected by sovereign immunity

under the guise of a lien foreclosure proceeding in hopes of avoiding the immunity to which this sovereign entity is entitled. Accordingly, the trial court erred in deciding that sovereign immunity does not apply in a lien foreclosure action.

POINT IV

SUE/PERIOR'S FRAUD CLAIM MUST BE DISMISSED BECAUSE IT DOES NOT EXIST SEPARATELY FROM ITS BREACH OF CONTRACT CLAIM

It is settled law across New York that "no cause of action for fraud lies where . . . the only fraud charged relates to a breach of contract." *Deering v. Karin*, 285 A.D.2d 977, 978 (4th Dep't 2001) (internal quotation mark omitted). Absent a legal duty owed to the plaintiff by the defendant, independent of that encompassed by the contract, a plaintiff's cause of action for fraud cannot exist. *See Rich v. Orlando*, 108 A.D.3d 1039 (4th Dep't 2013); *Egan v. N.Y. Care Plus Ins. Co.*, 277 A.D.2d 652, 653 (3d Dep't 2000); A*.L. Eastmond & Sons, Inc. v. Keevily, Spero-Whitelaw, Inc.*, 107 A.D.3d 503 (1st Dep't 2013); *Williams Oil Co. v. Randy Luce E-Z Mart One, LLC*, 302 A.D.2d 736, 739 (3d Dep't 2003); *Non-Linear Trading Co. v. Braddis Assocs., Inc.*, 243 A.D.2d 107, 118 (1st Dep't 1998).

Where a fraud claim has no existence separate from the alleged breach of contract, it must be dismissed. *Freyne v. Xerox Corp.*, 98 A.D.2d 965, 965 (4th Dep't 1983) (holding that "alleged fraudulent representations are, in essence, restatements of plaintiff's contract cause of action and do not state separate causes

of action in fraud") *citing Charles v. Onondaga Cmty. Coll.*, 69 A.D.2d 144, 148-49 (4th Dep't 1979). Indeed, general allegations that a defendant entered into a contract with the intent not to perform are insufficient to support a fraud claim. *N.Y. Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 318 (1995).

The Appellate Division, however, erroneously concluded that Sue/Perior stated a cause of action for fraudulent inducement, holding that "on this record, it cannot be determined whether the fraud cause of action is merely duplicative of the breach of contract cause of action." (R. 17a.) This is simply not so. The allegations Plaintiff cites in support of its fraud claim all relate solely to the alleged breach of the Contract. (R. 37-40.)

For example, Sue/Perior alleged that its fraud claim is based on obligations allegedly undertaken by LGCC "under the Project Contract" (R. 38.) and that LGCC misrepresented that it would pay for work allegedly undertaken by Sue/Perior because of changes to the Contract (R. 38). Not once does Sue/Perior allege that LGCC committed any tortious act separate and distinct from LGCC's alleged breach of the Contract. Moreover, Sue/Perior alleges that LGCC's fraud relates to representations made "throughout the course of the Project" regarding "extra work performed because of changed conditions." (R. 38). Obviously, LGCC could not have made misrepresentations to induce Sue/Perior to enter into the Contract concerning changed conditions that had not yet occurred, and were

not even alleged to have occurred until months and years after the Contract was executed.

Sue/Perior has alleged only that LGCC promised to pay for certain work and failed to do so. If such allegations were sufficient to state a fraudulent inducement claim, then virtually every breach of contract case could (and likely would) include a parallel fraudulent inducement claim. That obviously is not (and should not be) the law of New York.

CONCLUSION

For the foregoing reasons, this Court should modify the order of the Appellate Division and grant judgment dismissing Plaintiff's complaint against LGCC in its entirety.

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PHILLIPS LYTLE LLP

By:_____
Michael B. Powers
Sean C. McPhee
Alan M. Wishnoff
One Canalside
125 Main Street
Buffalo, New York 14203
Telephone No. (716) 847-8400

-and-

HOBBS STRAUS DEAN & WALKER LLP
Edmund C. Goodman
806 S.W. Broadway, Suite 900
Portland, OR 97205
Telephone No. (503) 242-1745

Attorneys for Defendant-Appellant
Lewiston Golf Course Corporation

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