To be Argued by:
GREGORY P. PHOTIADIS
(Time Requested: 20 Minutes)

APL-2013-00278
Appellate Division Docket No. CA 12-01827
Niagara County Clerk's Index No. 141212

Court of Appeals
of the
State of New York

SUE/PERIOR CONCRETE & PAVING, INC.,

Plaintiff-Respondent,

-against-

LEWISTON GOLF COURSE CORPORATION, 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,

Defendants-Appellants,

NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, NIAGARA MOHAWK POWER CORPORATION and JOHN DOE,

Defendants.

BRIEF FOR PLAINTIFF-RESPONDENT

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DISCLOSURE STATEMENT

Pursuant to 22 NYCRR § 500.1(f) Plaintiff-Respondent Sue/Perior Concrete & Paving, Inc. does not have any corporate parents or subsidiaries. It is affiliated with Man O'Trees, Inc.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Lewiston Golf Course Corporation failed to establish that it is an "arm" of the Seneca Nation of Indians (a federally recognized Indian tribe) entitled to invoke the Nation's sovereign immunity from suit.

> Answer: Yes. The Appellate Division's order should be affirmed because Lewiston Golf Course Corporation failed to establish that it is an "arm" of the tribe entitled to be cloaked with tribal sovereign immunity from suit.

2. Assuming arguendo that Lewiston Golf Course Corporation may invoke tribal immunity from suit, whether a mechanic's lien foreclosure (an *in rem* proceeding) may proceed against its real property situated within the jurisdiction of New York State.

> Answer: Yes. Although the Appellate Division did not expressly address this question, it affirmed the Supreme Court's order that correctly held the court possesses *in rem* jurisdiction over real property situated within the jurisdiction of New York State.

3. Whether a cause of action for fraud may be maintained together with a breach of contract claim.

> Answer: Yes. The Appellate Division's order should be affirmed because Sue/Perior Concrete & Paving, Inc.'s fraud cause of action is not duplicative of its breach of contract cause of action.

PRELIMINARY STATEMENT

Now over four years since completion of construction of the 18-hole golf course commonly known as Hickory Stick, located in Lewiston, New York (the "Golf Course Property"), Defendant-Appellant Lewiston Golf Course Corporation ("LGCC") continues to owe Plaintiff-Respondent Sue/Perior Concrete & Paving, Inc. ("Sue/Perior") the sum of $4,130,538.00 for constructing the golf course.

The genesis of this appeal is LGCC's claim that New York State courts have no subject matter jurisdiction over it on the premise that LGCC is immune from suit as a purported "arm" of the Seneca Nation of Indians, a federally recognized Indian tribe (listed in the Federal Register as the Seneca Nation of New York (67 F.R. 46328-01); R. 174, hereinafter referred to as the "Nation"). While LGCC contends that the burden in establishing that it is *not* cloaked with the Nation's immunity from suit rests on Sue/Perior, the lower courts correctly placed this burden on LGCC since it is not a federally recognized tribe, but rather an entity that claims to be entitled to the immunity enjoyed by a tribe. See infra, Point I. LGCC failed to satisfy this burden. See infra, Point II.

The Supreme Court and the Appellate Division both also correctly concluded that LGCC – an entity uniquely distinct from any other purported tribal entity –is not an "arm" of the Nation entitled to evade suit on sovereign immunity grounds. LGCC is subject to the jurisdiction of New York State courts because it

fails to substantially satisfy the criteria set forth by this Court in Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc., 86 N.Y.2d 553 (1995). See infra, Point II.A. Furthermore, because this lawsuit concerns non-Indian land situated within the jurisdiction of the State of New York, LGCC must not be elevated to the status of a super-sovereign, but rather should be treated like any other person, including other sovereigns, that owns land outside its sovereign territory. See infra, Point II.B.

Even if LGCC were to be considered an "arm" of the Nation, Sue/Perior is still entitled to foreclose its mechanic's lien against the Golf Course Property because New York courts have *in rem* jurisdiction over the Golf Course Property. See infra, Point III. While this is an issue of first impression in New York State, the majority of other courts to address whether there is *in rem* jurisdiction over non-sovereign land owned by a tribe has held in the affirmative.

The lower courts were also correct in holding that Sue/Perior's cause of action against LGCC for fraud may be maintained because it is not duplicative of the breach of contract cause of action since the alleged misconduct and misrepresentations subject of the fraud claim were made by LGCC after the contract was entered into. See infra, Point IV.

COUNTERSTATEMENT OF FACTS

A. The Golf Course Property

LGCC was incorporated on June 28, 2007, and thereafter submitted an Application for Authority pursuant to NY BCL § 1304 to the New York State Department of State, thus becoming a foreign corporation authorized to do business in New York State. R. 629-30. LGCC is wholly owned subsidiary of the Seneca Niagara Falls Gaming Corporation ("SNFGC"). R. 224. SNFGC is wholly owned by the Seneca Gaming Corporation ("SGC"). R. 173. The Nation wholly owns SGC. R. 172.

LGCC acquired the Golf Course Property on or about July 20, 2007 in fee from SNFGC with the intent to construct and operate an 18-hole golf course thereon. See R. 325-36. SNFGC had purchased the Golf Course Property in fee from a private party, Old Creek Development, LLC, on or about February 13, 2006. R. 337-43.

The Golf Course Property was never part of an Indian reservation and LGCC has never disputed this fact. Both the Nation and the Department of the Interior's Bureau for Indian Affairs ("BIA") have publicly conceded that the Golf Course Property is not sovereign land. R. 344-48. Specifically, BIA in August 2009 stated that the Golf Course Property is not sovereign land, and that "in order for a territory to be considered sovereign, they must be registered with us, in our

computers and the lands that are in question [the Golf Course Property] are not, meaning that they are private or public lands, and not-native." R. 345.

B. LGCC's Agreements with the NCIDA for Tax Benefits

In connection with its plans to construct a championship level golf course, LGCC's predecessor, Seneca Management Development Corporation ("SMDC"), approached the Niagara County Industrial Development Agency ("NCIDA") (named in this action as a necessary party defendant due to its leasehold interest in the Golf Course Property) in order to secure tax breaks for the purchase of approximately 250 acres of land in the Town of Lewiston, which ultimately became the Golf Course Property. R. 597. SMDC represented to the NCIDA "that the land and project would not be considered part of the native territory, but instead would remain on the tax rolls under the jurisdiction of the State of New York" and would be owned and operated "by a for profit corporation *independent* of the Seneca Nation." Id. (emphasis added). That corporation became known as LGCC. Id. at 598.

SMDC applied to the NCIDA for tax abatements and deferrals worth an estimated $1 million for the golf course project, and described itself in the application as being "[C]hartered to provide the Seneca Nation of Indians with an *independent corporation* to conduct economic development projects." R. 597,

603. When asked in the application to describe why the project was necessary and the effect it was projected to have on the company, SMDC stated that it was:

> looking to create a championship level public/semi-private golf course offering the millions of visitors of the Niagara Falls region and the patrons of the Seneca Niagara Casino & Hotel a new tourist destination project that will attract golf enthusiast from Canada and the United States and to capitalize on the growing tourist market, which will create new jobs and allow for prolonged stays in the area.

R. 597-98, 612. SMDC's application was approved on or about October 1, 2007, and the NCIDA and LGCC entered into an Agent Agreement that contemplated the negotiation and execution of a Payment-In-Lieu-of-Tax Agreement ("PILOT Agreement"), Lease and Leaseback of the Golf Course Property. R. 349-54.

On November 1, 2007, the NCIDA entered into the PILOT Agreement with LGCC. R. 355-366. The PILOT Agreement provides for LGCC to make payments in lieu of ad valorem taxes as set forth therein (a fraction of the taxes normally assessed), which includes tax benefits for "(i) the 2009/2010 School tax year through the 2013/2014 School tax year, and (ii) the 2009 County and Town tax year through the 2014 County and Town tax year." R. 357.

Also on November 1, 2007, the NCIDA and LGCC entered into a Lease Agreement (LGCC to NCIDA) and a Leaseback Agreement (NCIDA to LGCC) in connection with the PILOT Agreement. R. 367-430. The corresponding Memorandum of Lease and Memorandum of Leaseback were recorded in the

Niagara County Clerk's Office on November 27, 2007. R. 431-38. As recited in the Leaseback Agreement, the NCIDA granted to LGCC certain financial assistance with regard to the Golf Course Property. R. 391-430. Not only did such assistance include certain exemptions from real property related taxes, but also included exemptions from sales taxes. Id.

None of the documents between the NCIDA and LGCC reference or suggest that LGCC held itself out to be protected by the Nation's sovereign immunity. The PILOT Agreement provides:

> This PILOT Agreement shall be governed by, and all matters in connection herewith shall be construed and enforced in accordance with, the laws of the State of New York applicable to agreements executed and to be wholly performed therein and the parties hereto hereby agree to submit to the personal jurisdiction of the federal or state courts located in Niagara County, New York.

R. 363. The Agent Agreement contains a governing law provision similar to that in the PILOT agreement. R. 353. The Leaseback agreement provides that it "shall be governed, construed and enforced in accordance with the laws of the State of New York for contracts to be wholly performed therein." R. 411. Moreover, the NCIDA further confirms that LGCC consistently represented itself to be a for-profit entity separate and distinct from the Nation. See R. 592-98.

C. Sue/Perior's Construction of the Golf Course

On or about August 9, 2007, Sue/Perior entered into a contract with LGCC to construct the golf course for the sum of $12,700,000 (the "Project Contract").

R. 29, 439-48. After construction was substantially underway, LGCC dictated that numerous changes and extras be made to the project, repeatedly issued conflicting directions to Sue/Perior and caused a host of delays that resulted in Sue/Perior having to work overtime, which was not permitted under the Project Contract. R. 31-39. Following LGCC's repeated payment failures, Sue/Perior filed a series of mechanic's liens against the Golf Course Property. The lien which is the subject of this action was filed on February 17, 2010 in the amount of $4,130,538, plus interest as provided by law, which sum continues to be due and owing to Sue/Perior by LGCC for the materials furnished and labor performed in connection with construction of the golf course. R. 33.

D. Sue/Perior's Lawsuit

Sue/Perior commenced this mechanic's lien foreclosure action against LGCC on June 29, 2010. R. 76-85. LGCC answered and counterclaimed for willfully exaggerated lien, fraud, breach of contract and unjust enrichment. R. 87-93. Upon receipt of LGCC's answer with counterclaims, Sue/Perior amended its complaint to add SGC, SNFGC and fifteen individuals as additional defendants, and to assert additional causes of action for breach of contract, breach of implied covenant of good faith and fair dealing, quantum meruit, promissory estoppel and fraud. R. 19-51.

E. Defendants' Dismissal Motions

All defendants (except LGCC, NCIDA and Niagara Mohawk Power Corporation) filed a motion to dismiss Sue/Perior's First Amended Complaint on December 13, 2010. R. 52-54. LGCC joined in the dismissal motion in March 2011. R. 55-57. Based on the representations made to the NCIDA in the process of LGCC's applying for and obtaining public financial assistance – that the golf course would be run as a for-profit corporation independent of the Nation – the NCIDA opposed LGCC's motion to dismiss the First Amended Complaint to the extent that LGCC was now claiming to be an arm of the Nation protected by the Nation's sovereign immunity from suit. R. 592-98.

F. Supreme Court's Order

LGCC appealed from the Supreme Court's order granted February 28, 2012 (with decision dated February 7, 2012) which, in relevant part, denied its motion to dismiss Sue/Perior's First Amended Complaint pursuant to NY CPLR 3211. R. 5-9. The Supreme Court properly denied the motion to dismiss on the ground of sovereign immunity, finding that LGCC does not qualify as an "arm" of the Nation. R. 10-18. The Supreme Court cited numerous factors weighing against "arm of the tribe" status, including the factors found by this Court to have great significance: LGCC generates its own revenue, suit against LGCC will not impact the Nation's fiscal resources, and LGCC has no power to bind or obligate the funds

of the Nation. R. 15-16. The Supreme Court also held that "an action to foreclose a mechanic's lien on real property is considered an *in rem* proceeding" and therefore properly concluded that "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.

G. Appellate Division's Order

At issue before the Appellate Division was the correctness of the Supreme Court's denial of LGCC's dismissal motion. R. 3a.[1] The Appellate Division unanimously modified the Supreme Court's order by granting that part of the dismissal motion seeking to dismiss the third cause of action for breach of the implied covenant of good faith and fair dealing and otherwise affirmed. R. 17a. In a well-reasoned opinion, the Appellate Division correctly applied this Court's holding in Ransom and, in evaluating the unique characteristics of LGCC, properly concluded that it is not an "arm" of the Nation cloaked with sovereign immunity from suit. R. 7a-17a. While not expressly opining on the issue of whether a mechanic's lien foreclosure requires *in personam* jurisdiction over the property

[1] Sue/Perior had commenced a separate action against SGC, SNFGC and various individual defendants in August 2010 for, *inter alia*, tortious interference with Sue/Perior's contract with LGCC for construction of the golf course (the "Erie County Action"). Based on the Appellate Division's October 5, 2012 decision in the Erie County Action (Sue/Perior Concrete & Paving, Inc. v. Seneca Gaming Corp., 99 A.D.3d 1203 (4th Dept. 2012)), which dismissed Sue/Perior's complaint, Sue/Perior withdrew its claims against SGC, SNFGC and the individual defendants in this action. LGCC was *not* a party in the Erie County Action.

owner, in affirming the Supreme Court's order the Appellate Division also affirmed that holding. Id.

ARGUMENT

POINT I

THE APPELLATE DIVISION PROPERLY PLACED THE BURDEN OF PROOF TO ESTABLISH THAT LGCC IS AN "ARM" OF THE NATION ON LGCC AS THE ENTITY SEEKING TO CLOAK ITSELF WITH TRIBAL IMMUNITY FROM SUIT

The Appellate Division correctly placed the burden of proof on LGCC to establish that it is an "arm" of the Nation and thus cloaked with the Nation's immunity from suit. R. 12a-13a. While it is true that a plaintiff has the initial burden of demonstrating subject matter jurisdiction over a defendant, "the burden of proof for an entity asserting immunity as an arm of a sovereign tribe is on the entity to establish that it is, in fact, an arm of the tribe." Gristede's Foods, Inc. v. Unkechuage Nation, 660 F.Supp.2d 442, 464-465 (E.D.N.Y. 2009).

The cases cited by LGCC in support of its contention that the Appellate Division should have placed the burden of proof on Sue/Perior to establish that LGCC is not an "arm" of the Nation (App. Br. at 18, Spectra Products., Inc. v. Indian River Citrus Specialties, Inc., 144 A.D.2d 832 (3d Dept. 1988) and Alvarado v. Table Mountain Rancheria, 509 F.3d 1008 (9th Cir. 2007)) are wholly inapposite. Spectra Products involved a motion to dismiss for lack of subject

matter jurisdiction based upon insufficient service of process; in fact, LGCC only selectively quotes from that case: "The burden of proving jurisdiction is on the party asserting it *and, in the face of defendant's allegations, plaintiff was obligated to come forth with definite evidentiary facts to support the out-of-State service*." (citation omitted; italics denoting portion omitted from App. Br. at 18). In the instant case, there is no question that LGCC was properly served with process. The issue in Alvarado was not whether an entity was an "arm" of the tribe, but rather whether there was subject matter jurisdiction over an Indian tribe itself. Unlike the Nation, which is a federally recognized Indian tribe (see Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 F.R. 46328-01; Seneca Nation of Indians v. State of N.Y., 26 F.Supp.2d 555, 560 (W.D.N.Y. 1998) aff'd sub nom. Seneca Nation of Indians v. New York, 178 F.3d 95 (2d Cir. 1999)), LGCC has no such recognition by law.

LGCC misses the mark in asserting that "it was Sue/Perior's burden to prove that LGCC does not possess sovereign immunity or that such immunity was clearly and expressly waived.…" App. Br. at 18. If Sue/Perior were suing the Nation, this principle would apply, but it is not – it is suing LGCC, a third-tier subsidiary of the Nation and plainly not a federally recognized Indian tribe. Gristede's Foods, supra, cited by the Appellate Division (R. 12a), and wholly ignored by LGCC on this issue, makes clear the faults in LGCC's reasoning by distinguishing a situation

where a recognized tribe itself seeks dismissal of a suit on sovereign immunity grounds (Garcia v. Akwesasne Housing Authority, 268 F.3d 76, 84-87 (2d Cir. 2001)) from a situation where an unrecognized tribe or purported "arm" of a tribe seeks immunity from suit:

> The present action is distinguished from Garcia because the parties dispute whether the Unkechuage is a "tribe" pursuant to federal law. On the issue of tribal status, it is the Unkechauge that bears the burden. *Similarly, the Poospatuck Smoke Shop must establish, by a preponderance of evidence, that it is an arm of the Unkechauge, and thus entitled to immunity.* Once the defendants' burdens are met on these preliminary issues, the plaintiff bears the burden to establish jurisdiction by showing either waiver or abrogation of immunity.

Gristede's Foods, 660 F. Supp.2d at 465 (emphasis added).

Accordingly, it was LGCC's burden to prove that it is an "arm" of the Nation entitled to invoke the Nation's immunity from suit as the Appellate Division correctly held.

POINT II

LGCC IS NOT CLOAKED WITH THE NATION'S SOVEREIGN IMMUNITY FROM SUIT

The lower courts properly determined that LGCC is not an "arm" of the Nation and therefore may not invoke the Nation's sovereign immunity from suit. LGCC's motion to dismiss for lack of subject matter jurisdiction pursuant to NY CPLR 3211(a)(2) was thus properly denied. Not only does LGCC fail the test articulated by this Court in Ransom, as determined by the lower courts, but it

cannot be elevated to a super-sovereign status and must be treated like any other land owner with respect to indisputably non-sovereign land situated within the jurisdiction of New York State.

On the instant appeal, LGCC now contends for the first time that "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." App. Br. at 37, fn 4 (emphasis added). As is evident from the NCIDA's opposition to LGCC's motion to dismiss on sovereign immunity grounds, nowhere in the dealings or documents between the NCIDA and LGCC was the issue of sovereign immunity ever addressed. See R. 592-630.[2] The assertion that the NCIDA negotiated a waiver of sovereign immunity presupposes that LGCC represented itself to the NCIDA as an entity cloaked with tribal sovereign immunity from suit, which the Record makes clear it did not. Id.

[2] The PILOT agreement provides: "This PILOT Agreement shall be governed by, and all matters in connection herewith shall be construed and enforced in accordance with, the laws of the State of New York applicable to agreements executed and to be wholly performed therein and the parties hereto hereby agree to submit to the personal jurisdiction of the federal or state courts located in Niagara County, New York." R. 363. The Agent Agreement contains a governing law provision similar to that in the PILOT agreement. R. 353. The Leaseback agreement provides that it "shall be governed, construed and enforced in accordance with the laws of the State of New York for contracts to be wholly performed therein." R. 411.

A. LGCC is not an "arm" of the Nation under Ransom.

This action is the first time that any court has been asked to decide whether LGCC – or any entity bearing its specific attributes – constitutes an "arm" of the tribe entitled to invoke the tribe's sovereign immunity from suit. LGCC tries to don the characteristics of the gaming entities SGC and SNFGC, but falls far short in establishing that it is an "arm" of the Nation. This Court's seminal decision in Ransom provides the framework for evaluating whether an entity constitutes an "arm" of an Indian tribe:

> Tribal subagencies and corporate entities created by the Indian Nation *to further governmental objectives, such as providing housing, health and welfare services,* may also possess attributes of tribal sovereignty, and cannot be sued absent a waiver of immunity. Although 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, courts generally consider such factors as whether: [1] the entity is organized under the tribe's laws or constitution rather than Federal law; [2] the organization's purposes are similar to or serve those of the tribal government; [3] the organization's governing body is comprised mainly of tribal officials; [4] the tribe has legal title or ownership of property used by the organization; [5] tribal officials exercise control over the administration or accounting activities of the organization; and [6] the tribe's governing body has power to dismiss members of the organization's governing body. *More importantly, courts will consider [7] whether the corporate entity generates its own revenue, [8] whether a suit against the corporation will impact the tribe's fiscal resources, and [9] whether the subentity has the "power to bind or obligate the funds of the [tribe]". 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 558-60 (emphasis added) (citations omitted).

Quite unlike LGCC, the entity involved in Ransom was a not-for-profit corporation, an educational and community fund that: was established to enhance the health, education and welfare of tribal members; received its resources from the tribe; designated the tribe as the recipient of its funds and services; required under its by-laws that its governing body may only be composed of chiefs of the tribe; and clearly provided social services on behalf of the tribe. Id. With the exception of its governing board being appointed by the Nation, however, LGCC meets none of the criteria that the entity in Ransom satisfied. While the entity in Ransom was found to be "so closely allied with and dependent upon the Tribe that it is entitled to the protection of tribal sovereign immunity" (id. at 560), a review of LGCC's attributes does not yield the same result.

The factors identified in Ransom are not exclusive, as evidenced by this Court noting that "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." Id. at 559. The Appellate Division found that LGCC did satisfy some of the factors enumerated in Ransom – it is "organized under the tribe's laws" [factor 1], its "governing body is comprised mainly of tribal officials" [factor 3], the tribe "exercise[s] control over the administration or accounting activities of [LGCC]" [factor 5], and "the tribe's governing body has the power to dismiss members" of LGCC's governing body [factor 6]. R. 13a.

These four factors are each perfunctorily satisfied merely by looking at LGCC's Charter. R. 224-38. However, satisfaction of these factors evidences nothing more than a modicum of control by the Nation over LGCC, not a close relationship with, or dependence upon, the Nation sufficient to cloak LGCC with the Nation's sovereign immunity. There appears to be no case law upholding "arm" of the tribe status where a purported tribal entity satisfied only these four factors.

More compelling and determinative of LGCC's status is the host of characteristics that heavily weigh against LGCC being deemed an "arm" of the tribe: 1) LGCC's purpose is not similar to and does not serve the Nation; 2) the Nation does not own any LGCC property; 3) LGCC generates its own revenue; 4) suit against LGCC has no impact on the Nation's fiscal resources; and 5) LGCC has no power to bind or obligate funds of the Nation. The latter three factors were held by this Court to be the most important. See Ransom, 86 N.Y.2d at 560. Each of these five factors will be addressed in turn.

1. LGCC's purpose is not similar to and does not serve the Nation.

In Ransom, this Court identified the activities of "providing housing, health and welfare services," as governmental objectives. Ransom, 86 N.Y.2d at 559. The purpose for creating the tribal entity is important in examining whether it is entitled to the tribe's immunity from suit because "it is possible to imagine

situations in which a tribal entity may engage in activities which are so far removed from tribal interests that it no longer can legitimately be seen as an extension of the tribe itself." Trudgeon v. Fantasy Springs Casino, 71 Cal.App.4th 632, 639 (1999); see, also Dixon v. Picopa Construction Co., 160 Ariz. 251, 257-59 (1989) (holding that construction company incorporated by federally recognized Indian tribe was not entitled to tribal immunity where, among other things, the company's declared purpose did not include governmental activities, it was engaged in construction activities for-profit, tribal property was insulated from the company's debts and obligations, the company's property was not held in the tribe's name, and the incident precipitating the lawsuit resulted from off-reservation activity).

Governmental objectives would logically by served by, for example, a housing authority (see Dillon v. Yankton Sioux Tribe Housing Auth., 144 F.3d 581, 583 (8th Cir. 1998) (holding housing authority constituted a tribal agency)), educational establishments (see Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d 1040, 1043 (8th Cir. 2000) (holding that college that was chartered, funded, and controlled by the tribe to provide education to tribal members on Indian land, served as an "arm" of the tribe and not as a mere business and was thus entitled to tribal sovereign immunity from suit)), and healthcare service providers (Pink v. Modoc Indian Health Project, 157 F.3d 1185, 1188 (9th Cir. 1998) (finding that

non-profit organization providing health services to tribal members acted as more than "a mere business" and thus possessed sovereign immunity from suit)).[3]

It is clear that owning and operating a golf course is not within the ambit of any governmental purpose or objective. LGCC makes an attenuated claim that it "serves the purposes" of the Nation, resting solely on the distilled fact that LGCC has the ability to make money, and could give money to the Nation. See App. Br. at 24-31. This logic is sorely far fetched. As the Appellate Division aptly noted, the record is devoid of any "evidence that the funds generated by the golf course project are earmarked for the Nation in general or its governmental programs in particular." R. 16a. Under LGCC's Charter, LGCC was created because:

> …the Nation desires to establish a separate legal entity, as a subsidiary of SNFGC, for the purposes of developing, financing, operating and conducting the business of the Lewiston Golf Course to be established in the Town of Lewiston, New York, as an amenity to Nation gaming facilities, including the Niagara Falls Gaming Facility, and further desires that such legal entity be subject to the ownership, control, operation and management of SNFGC, consistent with this Charter and the Charter of SNFGC.

R. 224.

[3] LGCC cites to Koscielak v. Stockbridge-Munsee Community, 340 Wis.2d 409 (Wis. Ct. App. 2012) for the proposition that "sovereign immunity can apply to a commercial enterprise such as a golf course" App. Br. at 29. Koscielak bears no commonality to this case beyond the fact that it concerned a golf course. The tribal defendant there, the Stockbridge–Munsee Community, "is a federally recognized Indian tribe" that "purchased the Pine Hills [golf course]." Id. at 409. The tribally chartered corporate defendant that operated the golf course was a first tier subsidiary of the tribe, wholly owned directly by the tribe. Id. Here, LGCC is the owner of the golf course, not the Nation – and unlike the entity in Koscielak, LGCC is not owned by the Nation as discussed in Point II A.2, *infra*. The defendants in Koscielak also did not apply for and obtain government assistance as did LGCC here.

LGCC's Charter also plainly states that LGCC has an "autonomous existence separate and distinct from the Nation." R. 225. Thus, the purpose for which LGCC was created has no connection to the governmental objectives of the Nation. As stated by the Appellate Division:

> In creating the LGCC, the [Nation's] Council stated that it decided to form a "separate corporation or legal entity to own and operate the Lewiston Golf Course . . . due to various legal and accounting considerations, including the status of the Lewiston Golf Course as an off-territory business venture of the Nation, subject to legal, tax and other requirements that are not applicable to the Nation's on-territory businesses." To that end, the Council "authorized and directed" LGCC to "develop and implement legitimate tax strategies to minimize any tax obligations of [LGCC], including, but not limited to, maximizing the tax savings benefits offered by the [NCIDA] and utilizing net operating losses, if any, incurred by the Company, to offset the Company's future profits." Thus, unlike the Nation itself or its closely-associated gaming entities, i.e., SNG and SNFGC, LGCC was intended to function as a regular business entity, with profits, losses, and legal and tax obligations applicable to any other business operated outside the confines of an Indian reservation by a non-native entity.

R. 15a.

LGCC claims to be an "amenity" of the Nation's gaming operations. App. Br. at 26.[4] There is no recognition in law that an entity which is merely an off-reservation amenity to a tribal gaming operation is entitled to share in the sovereign status of the tribe. See Breakthrough Mgmt. Grp., Inc. v. Chukchansi

[4] LGCC also contends that "it is not uncommon for Indian tribes to create golf courses as amenities to their gaming operations" and references the golf courses allegedly associated with the Turning Stone, Foxwoods and Mohegan Sun casinos. App. Br. at 31, fn 1. Such observation is irrelevant to the determination of whether an entity that is not a federally recognized Indian tribe that owns/operates a golf course shares the tribe's immunity from suit.

Gold Casino & Resort, 629 F.3d 1173, 1192 (10th Cir. 2010) (acknowledging that it "could not say that in every case, Indian gaming under the [Indian Gaming Regulatory Act] would automatically mean that all economic entities associated with gaming would be sufficiently closely related to the Tribe to share in its sovereign immunity.") As to LGCC's status as an amenity, the Appellate Division noted that:

> In creating LGCC, the Council declared that, "in furtherance of the economic success of the Nation's gaming operations, [SNFGC] has commenced development of a . . . golf course located in the Town of Lewiston, New York [, which] *will be developed and operated as an amenity to... SNFGC's casino operations*… the purpose of which amenities is to enhance the overall success and profitability of the casino's operations" (emphasis added). In that manner, the Council believed that the golf course project "may reasonably be expected to benefit, directly *or indirectly,* the Nation" (emphasis added). Thus, the Council's own statements reflect that the purpose of LGCC - to develop a golf course as an "amenity" to the Nation's gaming operations - is several steps removed from the purposes of tribal government, e.g., "promoting tribal welfare, alleviating unemployment, [and] providing money for tribal programs" (Gristede's Foods, Inc., 660 F.Supp.2d at 477; cf. Ransom, 86 N.Y.2d at 560).

R. 14a. An "amenity" to a gaming corporation is not a gaming corporation. The Indian Gaming Regulatory Act ("IGRA") provides for the creation and operation of Indian casinos to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). One of the principal purposes of the IGRA is "to ensure that the Indian tribe is the primary beneficiary of the gaming operation." Id. § 2702(2). Under the IGRA (25 U.S.C. § 2710(b)(2)(B)),

the tribe's gaming revenue is restricted to be used for no purpose other than:

(i) to fund tribal government operations or programs;
(ii) to provide for the general welfare of the Indian tribe and its members;
(iii) to promote tribal economic development;
(iv) to donate to charitable organizations; or
(v) to help fund operations of local government agencies.

Unlike SGC and SNFGC, LGCC is not subject to or regulated by the IGRA. There is no such restriction on the use of LGCC's funds generated from operating a golf course as it does not constitute "gaming" (defined in detail at 25 U.S.C. § 2703(6)-(8)) and does not take place on "Indian lands."[5]

One characteristic of LGCC that no other purported tribal entity appears to share is that LGCC sought out and obtained tax benefits related to the Golf Course Property from an industrial development agency. The NCIDA is an industrial development agency, which is defined as a public benefit corporation created for the benefit of specific municipalities. See N.Y. Gen. Mun. Law § 856(2). The Appellate Division found LGCC's own representations in connection with its public assistance transaction compelling. R. 14a ("The documents LGCC submitted to NCIDA in support of its request for tax relief and other economic assistance further indicate that the central purpose of the golf course project was

[5] The IGRA defines "Indian lands" as those within the limits of any Indian reservation and "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4). There is no question that the Golf Course Property is not "Indian land."

not to provide funds for traditional governmental programs or services but, rather, was to serve as a regional economic engine.") (citation omitted).

As observed by the Appellate Division, "[i]n the PILOT agreement, LGCC and NCIDA explicitly recognized that the purpose of the project 'is to *create or retain permanent private sector jobs in Niagara County*' (emphasis added)." R. 14a. The Appellate Division also observed that SMDC, LGCC's predecessor in interest[6], asserted in its application for assistance to the NCIDA that it was:

> looking to create a championship level public/semi-private golf course offering the millions of visitors of the Niagara Falls region and the patrons of the Seneca Niagara Casino & Hotel a new tourist destination project that will attract golf enthusiasts from Canada and the United States and to capitalize on the growing tourist market, *which will create new jobs and allow for prolonged stays in the area*" (emphasis added).

Id. The Appellate Division found that "any reference to improving the quality of life on reservation lands, creating jobs for Native Americans living on the reservation, or generating funds to support educational, social, or other government-related programs for tribal members" was "notably absent" from the record. Id.

[6] It is of no moment that SMDC, on behalf of LGCC, and not LGCC is the entity that submitted the application to the NCIDA because LGCC is the entity that ultimately entered into the Agency, PILOT and related Lease Agreements with the NCIDA and reaped the tax abatement benefits. Thus, that SMDC submitted the application for assistance to the NCIDA on behalf of LGCC – who entered into the actual agreements with the NCIDA and reaped the benefits of the transaction – is a distinction without a difference.

LGCC's agreements with the NCIDA evidence that LGCC and the Golf Course Property are subject to the taxation and jurisdiction of New York State. If they were not subject to the taxation and jurisdiction of New York State, there would have been no point in entering into the PILOT Agreement with the NCIDA, which reduced real estate taxes otherwise payable and further provided exemptions from sales and use taxes. There appears to have never been a case where a tribe or tribal entity acquires property from a private party for purely commercial purposes, enters into contracts with a municipal instrumentality for tax breaks and then claims sovereign immunity. Not only did the tax breaks obtained by LGCC relate to real property, but they also included exemptions from sales taxes. If LGCC were sovereign, it would not need to obtain an exemption from sales tax. It is absurd for LGCC now to claim that the New York State courts are without jurisdiction after LGCC has taken full advantage of the financial assistance and tax benefits provided by the NCIDA.

Accordingly, the voluntary agreements LGCC entered into with the NCIDA negate the claim that LGCC or the Golf Course Property are entitled to sovereign immunity from suit. Based on LGCC's own representations and conduct, the Appellate Division properly concluded that "this factor supports the denial of sovereign immunity to LGCC." R. 13a.

2. The Nation does not have legal title or ownership of LGCC's property.

The Appellate Division properly found that "the record establishes that LGCC, not the Nation, 'has legal title or ownership of' the golf course property." R. 14a. LGCC's claim that "the Nation ultimately owns" all of the assets of LGCC (App. Br. at 40) is simply untrue. LGCC attempts to distinguish being in "title" to the Golf Course Property and "ownership" of LGCC's assets. App. Br. at 40-41. The Nation is not now, nor has it ever been, in title to the Golf Course Property. R. 325-43. With regard to "ownership" of LGCC's assets, the Nation has never owned, and may never own even upon dissolution of LGCC, any of LGCC's assets.

Under the most elementary principles of corporate law, the Nation does not "own" any LGCC assets because "a corporation and its shareholders are distinct entities." Dole Food Co. v. Patrickson, 538 U.S. 468, 474 (2003). The Nation's corporate relationship to LGCC is even more remote because the Nation is not a shareholder of LGCC– it is a parent of a subsidiary (SGC) which in turn has a subsidiary (SNFGC) that is the shareholder of LGCC. Mere ownership of a subsidiary does not serve to create any ownership interest in entities owned by the subsidiary. Dole, 538 U.S. at 468.

Case law flowing from the interpretation of the Federal Sovereign Immunities Act of 1976, codified at 28 U.S.C. § 1602, et seq. ("FSIA") demonstrates how mere ownership of a subsidiary does not serve to create ownership in entities owned by the subsidiary. For example, in Dole, two defendants (Dead Sea Bromine Co. and Bromine Compounds, Ltd., collectively the "Dead Sea Defendants") claimed that they were cloaked with Israel's sovereign immunity from suit based on alleged status as an "agency or instrumentality" of Israel. The U.S. Supreme Court rejected the Dead Sea Defendants' claim that they were instrumentalities of a foreign state as defined by the FSIA, reasoning that:

> A corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary; and, it follows with even greater force, *the parent does not own or have legal title to the subsidiaries of the subsidiary*. See id., § 31, at 514 ("The properties of two corporations are distinct, though the same shareholders own or control both. A holding corporation does not own the subsidiary's property"). The fact that the shareholder is a foreign state does not change the analysis. See First Nat. City Bank, supra, at 626–627, 103 S.Ct. 2591 ("[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such").
>
> Applying these principles, it follows that Israel did not own a majority of shares in the Dead Sea Companies. The State of Israel owned a majority of shares, at various times, in companies one or more corporate tiers above the Dead Sea Companies, but at no time did Israel own a majority of shares in the Dead Sea Companies. Those companies were subsidiaries of other corporations.

Dole, 538 U.S. at 474-75 (emphasis added).

A host of cases addressing whether certain entities constitute "arms or instrumentalities" of foreign states have followed Dole and reach the same conclusion in evaluating the whether the foreign state "owns" the entity seeking to invoke immunity. See, e.g., Filler v. Hanvit Bank, 378 F.3d 213, 219 (2d Cir. 2004) (rejecting claim that entities were entitled to invoke South Korea's sovereign immunity based on indirect ownership, stating "Once an entity is determined to be an agency or instrumentality, it is deemed *part of* the foreign state but it does not *become* the foreign state and, therefore, cannot confer agency or instrumentality status on corporate entities further down the chain of ownership."); In re Ski Train Fire in Kaprun, Austria on November 11, 2000, 198 F.Supp.2d 420 (S.D.N.Y. 2002), aff'd sub nom. In re Ski Train Fire, 67 F.App'x 24 (2d Cir. 2003) (Austrian ski resort operator that was majority-owned by agency or instrumentality of Austria was not a "foreign state or political subdivision thereof," as would entitle it to sovereign immunity under FSIA from wrongful death suit following a ski train accident; Austrian village, arguably a political subdivision of Austria, owned only a minority of operator's shares); Ocean Line Holdings Ltd. v. China Nat. Chartering Corp., 578 F.Supp.2d 621 (S.D.N.Y. 2008) (Chinese charterer was a subsidiary of its parent company, and not owned by Chinese government, and therefore was not an instrumentality of China under the FSIA, although charterer was categorized under Chinese law as an "entity owned by the whole people,"

where charterer's articles of association stated that it was a subsidiary of its parent and detailed parent's initial capitalization of charterer, profits not retained by charterer were remitted to parent, amendments to articles had to be approved by parent, and charterer's general manager and deputy general managers were appointed and removed by parent).

Further to the point, LGCC's Charter states that in the event of dissolution or liquidation of LGCC, following satisfaction of liabilities:

> all remaining property and assets of [LGCC] shall be distributed to SNFGC or, at the Nation's direction, to one or more organizations designated pursuant to a plan of distribution, provided that, as a matter of the laws of the Nation, should any liquidation proceeds be received by the Nation from the Company, such liquidation proceeds shall be held in trust for the benefit of SNFGC and shall not be subject to the creditors of the Nation.

R. 237. Thus, there is no obligation that LGCC's assets in fact are to be distributed to the Nation upon final dissolution or liquidation since the Nation is free to distribute such assets to other organizations. The Appellate Division recognized that this charter provision is "the only alleged support for [LGCC's] assertion that the Nation 'owns all of [LGCC]'s improvements and assets, including the golf course property'" and properly concluded that this fact does not demonstrate legal title or ownership of the Golf Course Property. R. 14a-15a.

Accordingly, it follows that neither LGCC nor its assets are "owned" in any way, shape or form by the Nation. Rather, LGCC is merely a subsidiary of a

subsidiary of a subsidiary of the Nation, in which the Nation has no legal title or ownership.

3. LGCC generates its own revenue.

The Appellate Division properly held that the "financial interconnectedness factors" weigh against extending the Nation's sovereign immunity to LGCC. R. 15a. There is no question that LGCC generates its own revenue, and LGCC does not dispute this. App. Br. at 42. Instead, LGCC clutches to the attenuated reasoning that its revenues "ultimately" belong to the Nation "by virtue of the fact that LGCC is wholly-owned by the Nation…" Id. This statement is not only flawed, it is untrue. As discussed in Point II A.2 above, LGCC is not owned by the Nation. The other two financial interconnectedness factors, whether a suit against LGCC would have an impact on the Nation's fiscal resources and whether LGCC has power to bind the Nation' funds, are each separately addressed below.

4. Suit against LGCC has no impact on the Nation's fiscal resources.

"Immunity for subordinate economic entities 'directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general.'" Breakthrough Management, 629 F.3d at 1183 (quoting Allen v. Gold Country Casino, 464 F.3d 1044, 1047 (9th Cir. 2006)). Suit against LGCC patently lacks any impact on the Nation's fiscal resources. As the Appellate

Division stated "the record is devoid of evidence that a lawsuit against LGCC would adversely impact the Nation's treasury either directly or indirectly." R. 15a.

That fact is in stark contrast to those involved in Breakthrough Management, where a gaming casino operated on Indian land was required to make monthly payments to the tribe of up to $1 million and those funds were specifically earmarked and allocated as follows: 50% for tribal programs such as education, health care, cultural preservation, child care, judicial systems, and law enforcement; 15% for tribal economic development; 10% to a tribal trust fund for the economic security of tribal families; and 25% for distribution among each eligible member of the tribe. Breakthrough Management, 629 F.3d at 1192-93. The court there found the evidence showed that "the Tribe depends heavily on the Casino for revenue to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities. One hundred percent of the Casino's revenue goes to the Authority and then to the Tribe", and thus "any reduction in the Casino's revenue that could result from an adverse judgment against it would therefore reduce the Tribe's income." Id. at 1195.

Here, not only is there no obligation for LGCC to make any payment of its revenues to the Nation, but the Nation's fiscal resources are insulated from any exposure to liabilities incurred by LGCC. R. 226-27. LGCC's Charter provides

that: "No activity of [LGCC] nor any indebtedness incurred by it shall encumber, implicate or in any way involve assets of the Nation or another Nation Entity not assigned or leased in writing to [LGCC]." R. 226-27. LGCC's Charter provides further that "the Nation shall not be liable for the debts or obligations of [LGCC]…." R. 206, 227. In light of such limitations, suit against LGCC cannot impact the Nation's coffers. See Seaport Loan Products, LLC v. Lower Brule Cmty. Dev. Enter. LLC, 41 Misc. 3d 1218(A) (Sup. Ct. New York County 2013) (finding that a suit against the entity would not impact the tribe's fiscal resources because the entity's operating agreement provided that the tribe shall not be liable for any debts or losses of the Company beyond its respective Capital Contribution.)

Thus, the instant suit cannot arguably have any bearing on the Nation's fiscal resources and the Appellate Division properly concluded that this factor weighs against extending the Nation's immunity to LGCC.

5. LGCC has no power to bind or obligate the funds of the Nation.

Not only would a suit against LGCC have no bearing on the Nation's fiscal resources, LGCC has no power to bind or obligate funds of the Nation. The Appellate Division notes that under LGCC's Charter: "[LGCC] shall have no power to pledge or encumber assets of the Nation." R. 15a. The Appellate Division properly concluded that there is no evidence in the record that LGCC is obligated to the Nation and "unlike the Nation's heavily regulated gaming

operations" whose revenues are restricted for specific tribal purposes, "there is no evidence that funds generated by the golf course project are earmarked for the Nation in general or its governmental programs in particular." R. 16a. This factor therefore also weighs against extending the Nation's immunity from suit to LGCC.

B. LGCC is not entitled to super-sovereign status and must be treated like any other owner of real property subject to the jurisdiction of New York State.

The United States Supreme Court terms Indian tribes "domestic dependent nations." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991). "[B]ecause of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy." Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 890-91 (1986) (citations omitted); Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 837 (1982) (noting "the semi-autonomous status of Indian tribes"). Looking at the manner in which foreign sovereigns are treated respecting their conduct concerning real property situated outside their own sovereign land is instructive.

The FSIA contains a specific exception to the sovereign immunity enjoyed by foreign sovereigns where the dispute concerns immovable property located in the United States and codifies the principle that a foreign state is not immune from the jurisdiction of another state with respect to claims to immovable property in the

state of the forum. 28 U.S.C. § 1605(a)(4). Although Indian tribes as domestic governments are not considered "foreign states" for purposes of the FSIA (see Ingrassia v. Chicken Ranch Bingo & Casino, 676 F.Supp.2d 953 (E.D.Cal. 2009)), the notion that a quasi-sovereign should be afforded greater immunity than a foreign sovereign with respect to real property owned within the territory of another sovereign is both irrational and inequitable.

The common law also dictates that states are barred from claiming sovereignty over real property acquired outside their territories. See Georgia v. City of Chattanooga, 264 U.S. 472, 482 (1924) (holding that when Georgia purchased land in Tennessee it acted outside its sovereign territory and "consented to be sued" in the courts of Tennessee with respect to the property). "[A] state acquiring ownership of property in another state does not thereby project its sovereignty into the state where the property is situated. The public and sovereign character of the state owning property in another state ceases at the state line[.]" State v. City of Hudson, 231 Minn. 127, 130 (1950) (proceedings to enforce property taxes on portion of bridge owned by Wisconsin city but located in Minnesota). "If it were otherwise, the acquisition of land in [one State] by another State would effect a separate island of sovereignty within [the home State's] boundaries. Such possibility can find no support in the law or reason." People ex

rel. Hoagland v. Streeper, 12 Ill.2d 204, 213 (1957) (court-imposed receivership over portion of bridge owned by Missouri county but located in Illinois).

In Georgia v. City of Chattanooga, the State of Georgia purchased land in Chattanooga, Tennessee for a railroad yard. Georgia claimed to have sovereign immunity over the land and therefore contended the City was precluded from condemning the property. 264 U.S. at 479. The Supreme Court held that "[l]and acquired by one State in another State is held subject to the laws of the latter and to all the incidents of private ownership" and therefore Georgia could claim no sovereign immunity." Id. at 480.

The situation in Georgia v. City of Chattanooga is comparable to the instant case in that LGCC (assuming arguendo that it is cloaked with the Nation's immunity), like Georgia, owns land situated outside the Nation's sovereign territory. LGCC should not be able to escape foreclosure proceedings by Sue/Perior on the premise that it is cloaked with sovereign immunity. In the context of owning the Golf Course Property, LGCC is no different than a private landowner. Just as states are not permitted to create "separate island[s] of sovereignty" by purchasing land within another sovereign's jurisdiction (People ex rel. Hoagland v. Streeper, supra at 213), tribes and tribal entities should likewise be precluded from attaining sovereignty over land purchased on the open market within the jurisdiction of another sovereign. LGCC has always considered the

Golf Course Property to be non-sovereign and consistently represented to the NCIDA that LGCC was independent from the Nation. Prior to this action, LGCC never contended that the Golf Course Property was sovereign. To the contrary, the Nation expressly referred to the Golf Course Property as being "off-territory." R. 347. The BIA likewise considered the Golf Course Property to be "not-native." R. 345.[7]

There is no precedent to suggest that an entity such as LGCC is entitled to the protection of sovereign immunity. LGCC is not engaged in gaming activities, does not operate on land within the Nation's territories, and is not owned by the Nation. Even if this Court determines that LGCC is immune from suit, Sue/Perior is still entitled to proceed against Golf Course Property pursuant to the court's *in rem* jurisdiction, as discussed in Point III below.

[7] In further support that the Golf Course Property is not property of the Nation, there is no evidence in the record that the Nation or any of its purported tribal entities acted pursuant to the Seneca Nation Settlement Act of 1990 (SNSA) (25 U.S.C. § 1774 et seq.) with respect to the Golf Course Property. Under the SNSA, the Nation may acquire land within its aboriginal area in the State or situated within or near proximity to former reservation land with funds appropriated pursuant to the SNSA. 25 U.S.C. § 1774f(c). In such instances the Nation is required to notify the Secretary of the Interior of any purchase and intent to hold land in restricted fee (id.), as was the case when the Nation purchased lands within the City of Buffalo in 2005 with the intent to create a casino thereon. See R. 270.

POINT III

EVEN IF LGCC MAY INVOKE THE NATION'S SOVEREIGN IMMUNITY FROM SUIT, THE MECHANIC'S LIEN FORECLOSURE ACTION MAY PROCEED BECAUSE NEW YORK COURTS HAVE *IN REM* JURISDICTION OVER THE GOLF COURSE PROPERTY

Although the Appellate Division did not expressly address this question, it affirmed the Supreme Court's order that correctly held that the court possesses *in rem* jurisdiction over real property situated within the jurisdiction of New York State. The instant action is one of first impression to the extent that it concerns the foreclosure of a mechanic's lien against non-sovereign real property owned by a purported tribal entity. Assuming *arguendo*, that LGCC may invoke the Nation's immunity from suit, *in rem* jurisdiction still enables the court to render a valid judgment of foreclosure because such jurisdiction exists by operation of the property's location within the territorial jurisdiction of the court. See Pennoyer v. Neff, 95 U.S. 714 (1877).

Even where a tribe itself is the owner of real property that is situated outside a tribe's sovereign territory, such property is subject to the state's *in rem* jurisdiction. There is no requirement under New York law that a court must have *in personam* jurisdiction over a landowner in order to proceed with a mechanic's lien foreclosure because it is a proceeding *in rem*. The trial court in this action

properly held, and the Appellate Division properly affirmed, that the Golf Course Property is subject to New York State court's *in rem* jurisdiction and therefore that Sue/Perior is entitled to proceed with foreclosure of its mechanic's lien against such property.

A. *In rem* jurisdiction is derived from the location of the property within the state and is distinct from *in personam* jurisdiction.

An action to enforce a mechanic's lien against real property is in the nature of a proceeding *in rem* (although, in order to recover a deficiency judgment there must be jurisdiction *in personam*). Parisi v. Hubbard, 226 A.D. 280, 283 (4th Dept. 1929); Burroughs v. Tostevan, 75 N.Y. 567 (1879); 17 Carmody-Wait 2d § 97:249. "The object and purpose of the mechanics' lien law was to protect a person who, with the consent of the owner of real property, enhanced its value by furnishing materials or performing labor in its improvement, by giving him an interest therein to the extent of the value of such material or labor." John P. Kane Co. v. Kinney, 174 N.Y. 69, 73 (1903).

In an action where the court has *in rem* jurisdiction, the court has the power to proceed with the determination of the issues and of the rights of the parties provided that the requirement of due process is met by service of the summons. Hope v. Shevill, 137 A.D. 86, 90 (2d Dept. 1910) aff'd sub nom. 204 N.Y. 563 (1912); Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957)

(named defendants outside the jurisdiction of the state who were served without the state were subject to an *in rem* judgment). It is the combination of the presence of the subject property being located within the state and proper service of the summons to satisfy due process that gives the court jurisdiction.

LGCC argues that the Supreme Court erroneously relied upon Cody v. Turn Verein of City of New York, 48 A.D. 279 (1st Dept. 1900) aff'd, 167 N.Y. 607 (1901) for the proposition that an action to foreclose a mechanic's lien is considered an *in rem* proceeding. App. Br. at 48. LGCC then goes on to rely on Cody for the proposition that *in personam* jurisdiction is required over the property owner in a mortgage foreclosure scenario. Id. However, the exact language in Cody quoted by LGCC exposes the very reason why personal jurisdiction is *not* required for an *in rem* proceeding: "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. [Cody,]48 A.D. at 280-81" App. Br. at 48-49. As highlighted by the court in Cody, personal jurisdiction is only required where the mortgagor, or lienor as in the present case, seeks to recover judgment against the property *owner personally*, which is often the case when the value of the property following the foreclosure sale is insufficient to satisfy the debt. See, e.g., Onondaga Sav. Bank v. Cale Dev. Co., Inc., 63 A.D.2d 415, 417 (4th Dept. 1978).

The Supreme Court properly relied upon Parisi v. Hubbard, 226 A.D. 280 (4th Dept. 1929) for the principle that an action to foreclose a mechanic's lien is an *in rem* proceeding. R. 16. The Fourth Department in Parisi plainly stated that a mechanic's lien foreclosure is "an equity action; one *in rem*." Id. at 283. LGCC articulates no basis whatsoever to support its contention that the trial court's reliance on Parisi was erroneous.

The distinction between *in rem* and personal jurisdiction where an Indian tribe is involved as owner of non-sovereign real property was addressed in depth by the Supreme Court of North Dakota in Cass County Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp., 643 N.W.2d 685 (N.D. 2002). In reversing the district court, Cass County held that an *in rem* action (seeking condemnation of private land purchased in fee by a tribe) does not require acquisition of personal jurisdiction over the landowner. Id. at 694. In concluding that a condemnation action was not barred by the tribe's alleged sovereign immunity from suit, the court explained that *in rem* jurisdiction can be exercised without acquiring *in personam* jurisdiction over a party because a state court's jurisdiction:

> is based on its authority over the defendant's person, the action and judgment are denominated "*in personam*" and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called "*in rem"* or "*quasi in rem."* The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.

Id. at 689 (quoting Shaffer v. Heitner, 433 U.S. 186, 199 (1977)).

LGCC tries to side-step this clear logic by asserting that a mechanic's lien foreclosure is not "purely" *in rem*. See App. Br. 48. This is a distinction without a difference because the only time that personal jurisdiction would be required in a foreclosure context as opposed to *in rem* jurisdiction is where a personal judgment is sought against the property owner.

B. Land purchased by a tribe on the open market is not sovereign and is subject to the *in rem* jurisdiction of the state in which the land is located.

Sovereign immunity is not impacted by *in rem* proceedings. Cent. Va. Cmty College v. Katz, 546 U.S. 356, 371 (2006) (finding bankruptcy court's *in rem* jurisdiction did not implicate state sovereign immunity); Smale v. Noretep, 208 P.3d 1180, 1184 (Wash. Ct. App. 2009) (tribe's dismissal motion properly denied in action to quiet title because *in rem* jurisdiction does not implicate sovereign immunity); Coastland Cor. V. N.C. Wildlife Res. Comm'n, 517 S.E.2d 661, 663 (N.C. Ct. App. 1999) (sovereign immunity does not bar *in rem* partition suit). Thus, where land is acquired by a tribe from another party, and the land is not federally recognized as Indian land, there is *in rem* jurisdiction over such land even where there is no personal jurisdiction over the tribe itself because of tribal

sovereign immunity from suit.[8] Even if the court lacked personal jurisdiction over LGCC, Sue/Perior would still be entitled to exercise its right to foreclose its mechanic's lien by way of an *in rem* proceeding against the Golf Course Property.

The U.S. Supreme Court came within arms reach of this issue in City of Sherrill, New York v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) when it held that lands purchased by a tribe on the open market were not shielded by sovereign immunity. Sherrill is instructive on the issue of whether lands owned by a tribe outside its sovereign territory are subject to foreclosure. In Sherrill, the Oneida Indian Nation (the "Oneida Nation") purchased parcels on the open market that were within the boundaries of a former reservation and argued that those lands were not taxable. Id. The Second Circuit affirmed the district court's holding that the parcels qualified as "Indian Country" because they fell within the boundaries of a reservation set aside by the 1794 Canandaigua Treaty. Oneida Indian Nation of New York v. City of Sherrill, New York, 337 F.3d 139, 146 (2d Cir. 2003). However, the U.S. Supreme Court reversed, holding instead the Oneida Nation could not "unilaterally revive its ancient sovereignty, in whole or in part, over the

[8] LGCC cites United States v. Alabama 313 U.S. 274, 282 (1941), to support its contention that suit against the land of a sovereign is a suit against the sovereign itself. App. Br. at 52. There, the United States sued Alabama to quiet title challenging the validity of tax sales of certain land, which Alabama conceded. That case is inapposite to the extent that the Court did not address, and apparently did not consider, the *in rem* nature of the proceeding in that case. Moreover, the subject land in that case was situated wholly within the territory of the United States, unlike here, where it is undisputed that the Golf Course Property is located outside the Nation's territory.

parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders." Sherrill, 544 U.S. at 203 (2005).

The Supreme Court's decision in Sherrill comports with its earlier decision in County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251 (1992) ("Yakima"), which held that *in rem* jurisdiction existed over lands owned by a tribe located in Yakima County, in the State of Washington. Id. at 256. The County levied taxes on the reservation fee lands apparently without incident until it proceeded to foreclose on parcels in which the tribe or its members had an interest. Id. The Court found that the Indian General Allotment Act granted *in rem* state jurisdiction over fee-patented lands within the reservation, as tribal reacquisition of such lands did not affect the property's alienable fee status, which subjected it to the court's *in rem* jurisdiction over real property located within the state. Id. at 265. Therefore, the Court determined that the County could impose a property tax on reservation land patented in fee. Id.

LGCC attempts to discount the import of Yakima on the basis that it did not implicate sovereign immunity, noting that the phrase "sovereign immunity" is absent from the opinion. App. Br. at 49. Conversely, and of more significance, there is no evidence in Yakima that the tribe waived its sovereign immunity. Accordingly, logic supports that because the state jurisdiction over the parcels in

question was "*in rem* rather than *in personam*" (id. at 265), the tribe's sovereign immunity from suit was irrelevant.

While the issues in Sherill and Yakima pertained to immunity of lands from taxation, it follows that if the lands are subject to taxation that they are also subject to foreclosure if the tax levied upon them is not paid. Several courts have addressed whether non-reservation land owned by a tribe located within the jurisdiction of the state is subject to an action *in rem*. While this issue has not been addressed by New York courts, other state and federal courts have ruled upon the issue and the majority have sustained *in rem* actions against real property owned by a tribe situated outside its sovereign territory. See, e.g., Cass County, supra, (condemnation action not barred by sovereign immunity); Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 130 Wash.2d 862, 873 (Wash. 1996) (state court had proper *in rem* jurisdiction in quiet title and partition action); County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251 (1992) (holding court had *in rem* jurisdiction because tribal reacquisition of lands did not affect alienable fee status); Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960) (lands purchased and owned in fee simple by Tuscarora Indian Nation were not part of a "reservation" as defined under the Federal Power Act and may be taken by eminent domain).

Although no court appears to have specifically been asked to rule on the

foreclosure of a mechanic's lien against non-sovereign land owned by a tribe, cases arising from other types of *in rem* proceedings (i.e., partition, quiet title, condemnation, tax foreclosure), where the courts sustained *in rem* jurisdiction over non-sovereign real property owned by a tribe, support that in a mechanic's lien foreclosure proceeding *in rem* jurisdiction exists over the land being foreclosed.

The issue of whether a state court's *in rem* jurisdiction exists over the non-sovereign land owned by Indian Tribes was addressed by the highest courts of two states – North Dakota and Washington – both of which sustained *in rem* jurisdiction over the subject property. See Cass County, supra; Anderson, supra. In Anderson, a lumber company brought a petition to quiet title and partition land located within the Quinault Indian reservation. The Washington Supreme Court found that under the U.S. Supreme Court's holding in Yakima, it was reasonable to conclude that the lower state court had proper *in rem* jurisdiction to quiet title and partition the subject property situated. Id. at 875-76 (stating that because its decision is based on *in rem* jurisdiction, *in personam* jurisdiction need not be considered).

LGCC cites the New Mexico Court of Appeals' (an intermediate appellate court) holding in Armijo v. Pueblo of Laguna, 247 P.3d 1119, cert denied 150 N.M. 492 (N.M. 2010) for the proposition that there is no *in rem* jurisdiction over non-sovereign land owned by a tribe. App. Br. at 53. Armijo must be rejected as

unsound as the court appears to not have even considered the existence of *in rem* jurisdiction in dismissing the action against the tribe on sovereign immunity grounds. Id. at 1123-24.

Turning to the federal courts, the United States District Court for the Eastern District of Wisconsin held in Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin, 542 F.Supp.2d 908 (E.D.Wis. 2008) ("Hobart"), that land within original boundaries of an Indian reservation, which, after being conveyed by the United States to individual tribal members in fee simple was transferred to third parties before being reacquired by the tribe, was subject to an *in rem* action for condemnation. Relying on Cass County, Yakima, and Sherrill, the Hobart court found that a tribe cannot unilaterally revive its ancient sovereignty over lands through open-market purchases from current titleholders. Hobart, 542 F.Supp.2d at 920.

Two recent cases arising from within the Second Circuit involved the issue of whether a county may foreclose its tax liens against non-sovereign lands owned by tribes. See Oneida Indian Nation of New York v. Madison County, Oneida County, N.Y., 605 F.3d 149 (2d Cir. 2010) ("Madison County I") vacated and remanded, Madison County, N.Y. v. Oneida Indian Nation of New York, 131 S. Ct. 704 (U.S. 2011), decision after remand, Oneida Indian Nation v. Madison County and Oneida County, N.Y., 665 F.3d 408 (2d Cir. 2011) ("Madison County

II"), petition for cert. pending, No. 12-604; Cayuga Indian Nation of New York v. Seneca County, New York, 890 F.Supp.2d 240 (W.D.N.Y. 2012) ("Seneca County"), appeal pending decision, (Docket No. 12-3723 2d Cir.). These two cases offer insight as to the *in rem* jurisdiction over property owned by a tribe. However, a significant difference between those cases and the instant matter is that they involved real property that the tribes claimed was within the boundaries of former reservations, and the Golf Course Property is patently *not* within the boundaries of a former reservation.

In Madison County, the district court rejected the County's effort to foreclose on properties owned by the Oneida Nation, which were formerly part of reservation lands, finding that a suit to take tribal property was not within a court's *in rem* jurisdiction. On appeal, the Second Circuit held that the Oneida Nation's sovereign immunity from suit barred the County's foreclosure action, and the U.S. Supreme Court granted certiorari on the question of "whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes." Madison County, N.Y. v. Oneida Indian Nation of New York, 131 S. Ct. at 704.

However, just before oral argument, the Oneida Nation purported to waive its sovereign immunity to tax foreclosure to avoid review of the issue by the U.S. Supreme Court, which caused the Court to vacate the Second Circuit's decision in

Madison County I. Id. The Oneida Nation's purported waiver was described as an "eleventh-hour tactical move" to "avoid review by belatedly agreeing to waive sovereign immunity." Seneca County, 890 F.Supp.2d at 244. Thus, in Madison County II, the Second Circuit had no reason to revisit its decision on sovereign immunity since the Oneida Nation had waived it.

Because the Supreme Court vacated the Madison County I decision, it has no precedential effect. See County of Los Angeles v. Davis, 440 U.S. 625, 634, n.6 (1979) (vacating court of appeals' judgment deprives that court's opinion of precedential effect); Russman v. Board of Education, 260 F.3d 114, 122 n.2 (2d Cir. 2001) (vacatur eliminates appellate precedent). Even if Madison County I did have precedential value, it should be rejected as deeply flawed in respect of its failure to address the issue of *in rem* jurisdiction. The district court below it only briefly dismissed its own ability to exercise *in rem* jurisdiction, stating that "it is of no moment that the state foreclosure suit at issue here is *in rem*. What is relevant is that the County is attempting to bring suit against the Nation. The County cannot circumvent Tribal sovereign immunity by characterizing the suit as *in rem*, when it is, in actuality, a suit to take the tribe's property." Oneida Indian Nation of New York v. Madison County, 401 F.Supp.2d 219, 229 (N.D.N.Y. 2005). This illogical conclusion, which LGCC seems to have adopted at its mantra, completely overlooks the black letter law governing a court's jurisdiction over property

located within its boundaries.

In the other recent case stemming from within the Second Circuit, Seneca County, the district court granted the Cayuga Indian Nation's petition for an injunction of tax foreclosure proceedings against real property owned by the tribe. The five disputed parcels of real property involved in Seneca County are located within the boundaries of the former Cayuga Reservation. Id. at 241. Over two centuries ago, the tribe sold large portions of the reservation lands to New York State, which were later sold to third parties. Some 200 years later the tribe purchased the parcels on the open market. Id. The tribe contends that the sales of the property by the tribe to the state were "illegal and void *ab initio*, since they did not comply with the requirements of the Non–Intercourse Act, 25 U.S.C. § 177 and claims that therefore, that the entire 64,000–acre Cayuga Reservation remains intact." Id. The County claims that the original sovereign nature of the land was extinguished and that the tax foreclosure proceeding should be maintained on the grounds that *in rem* jurisdiction exists over the subject parcels. Id. at 242.

The district court in Seneca County, like the court in Madison County I, erred by declining to recognize the *in rem* jurisdiction over the non-reservation real property owned by the tribe. The decision in Seneca County improperly relied on the Madison County I decision, which as described above is without precedential effect after being vacated by the U.S. Supreme Court. "The County's appeal in

that case (which includes the question of whether tribal sovereign immunity from suit applies to *in rem* proceedings) was heard by the Second Circuit on January 7, 2014 and is currently pending decision (Docket No. 12-3723).

Unlike the properties at issue in Sherrill, Madison County and Seneca County, the Golf Course Property here was never within the boundaries of a former reservation. Thus, there is no ancient sovereignty to even attempt to revive and apply. Nonetheless, the reasoning advanced in Sherrill offers sound guidance that an *in rem* proceeding should be sustained against non-reservation lands because if a tribe "may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." Sherrill, 544 U.S. at 220.

If the unprecedented theories advanced by LGCC as to how tribal immunity from suit is determined respecting non-reservation lands, then tribes would be empowered to purchase any land on the open market – take for example, the Plaza Hotel or Campbell Island[9] – and declare it sovereign by mere operation of ownership, thus evading the state's *in rem* jurisdiction. Detrimental consequences would follow – the State would be deprived of any ability to enforce collection of taxes via foreclosure on such properties. A remote tribal subsidiary could engage

[9] A 97 acre island located in the Hudson River, listed for sale for $559,000. Available at http://www.privateislandsonline.com/islands/campbell-island.

contractors to improve the property, then claim sovereign immunity from suit and effectively leave the contractor without a remedy – as transpired in this case. Such an unprecedented arrangement would serve to frustrate, if not evade, the tax law, lien law and public policy of the State of New York. Accordingly, the Supreme Court's holding that foreclosure of Sue/Perior's mechanic's lien may proceed even if LGCC is determined to be cloaked with the Nation's immunity from suit because the foreclosure is a proceeding *in rem*, as affirmed by the Appellate Division, was correct and should be affirmed.

C. New York law does not require *in personam* jurisdiction over all necessary parties defendant to sustain an action to foreclose a mechanic's lien.

LGCC claims that New York law requires a court to have "personal jurisdiction" over all necessary parties to a mechanic's lien foreclosure action. App. Br. at 46-47. LGCC is wrong – it conflates being named a party in an action with the concept of the court having jurisdiction over a party. Nowhere in the New York Lien Law, or in cases interpreting it, does there exist a requirement that a court must obtain "personal jurisdiction" over the necessary party defendant. See N.Y. Lien Law § 40 et seq.

New York Lien Law Section 44(3) in relevant part requires that "in an action in a court of record to enforce a lien against real property or a public improvement, the following are necessary parties defendant:…all persons appearing by the

records in the office of the county clerk or register to be owners of such real property or any part thereof." The clear intent of this statute in identifying necessary parties defendant is to ensure that due process is met and notice is given because it is an action *in rem*. Should a plaintiff seek to recover a deficiency judgment against a party defendant, *in personam* jurisdiction is required. See Parisi, supra.

The intent of the statute is bolstered by the fact that dismissal of a lien foreclosure action on the basis of failure to name a necessary party is limited to those parties who have not been served. See W. J. Plander Block, Inc. v. Mussler, 27 Misc.2d 591, 592 (Sup. Ct. 1961) ("even as to persons who are necessary parties, it is they who have not been served who may complain, not those who have been served"); L. Davidson, Inc. v. Bellows, 254 App.Div. 703 (2d Dept. 1938) (dismissed for failure to timely serve necessary party owner); Martens v. O'Neill, 131 App.Div. 123 (2d Dept. 1909) (same). LGCC does not challenge service of process in this case, nor could it, since Sue/Perior effected service of process on the Secretary of State as LGCC's registered agent by operation of LGCC having registered to do business in New York State.

Even if more than service of process were required upon a necessary party defendant in a mechanic's lien foreclosure action, where jurisdiction cannot be obtained over a necessary party, dismissal is not automatic – the court must apply

the discretionary factors in NY CPLR 1001(b) to determine whether the action may proceed without the necessary party:

1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;

2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;

3. whether and by whom prejudice might have been avoided or may in the future be avoided;

4. the feasibility of a protective provision by order of the court or in the judgment; and

5. whether an effective judgment may be rendered in the absence of the person who is not joined.

Thus, dismissal of an action is not dictated solely by absence of a necessary party (Airco Alloys Division, Airco, Inc. v. Niagara Mohawk Power Corp., 65 A.D.2d 378 (4th Dept. 1978)) and NY CPLR 1001(b) evidences that it is for the court to determine whether "justice requires" that the action proceed in the absence of a necessary party.

Here, if Sue/Perior's mechanic's lien foreclosure action is dismissed and LGCC is determined to be cloaked with the Nation's sovereign immunity, Sue/Perior will be left without a remedy. On the other hand, an effective judgment of foreclosure against the land can certainly be rendered in light of the court's *in rem* jurisdiction, which will allow Sue/Perior to be compensated from the sale proceeds of the Golf Course Property. LGCC cannot claim prejudice with respect

to the lien foreclosure because it is undisputed that due process requirements have been satisfied via service of process and LGCC has been given the opportunity to defend against the *in rem* proceeding should it so choose.

LGCC is a necessary party defendant under N.Y. Lien Law Section 44(3) and has been properly served in this action. Even if there were no personal jurisdiction over LGCC, because the mechanic's lien foreclosure proceeding is *in rem*, Sue/Perior is entitled to foreclose its lien against the Golf Course Property. Thus, the Supreme Court properly held, and Appellate Division properly affirmed, that the courts of New York State have *in rem* jurisdiction over the Golf Course Property and thus the denial of LGCC's motion to dismiss was proper.

POINT IV

SUE/PERIOR'S CAUSE OF ACTION FOR FRAUD IS NOT DUPLICATIVE OF ITS BREACH OF CONTRACT CAUSE OF ACTION

The lower courts properly denied that branch of LGCC's motion seeking dismissal of Sue/Perior's sixth cause of action for fraud. LGCC's contention that Sue/Perior's fraud claim based on fraud is duplicative of its breach of contract claim set forth in the second cause of action is without merit. A fraud claim should only be dismissed as duplicative or redundant "when it merely restates a breach of contract claim, *i.e.*, when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract." First Bank of Ams. v.

Motor Car Funding, 257 A.D.2d 287, 291 (1st Dept. 1999). By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of contract. Id.

In Eagle Comtronics v. Pico Prods., 256 A.D.2d 1202, 1203 (4th Dept. 1998), the court held that the complaint sufficiently stated a cause of action for fraud which was not duplicative or redundant of its breach of contract cause of action. The court reasoned that the plaintiff did not merely allege that the defendant entered into the contract while misrepresenting its intent to perform as agreed, but alleged that, after the contract was entered into, defendant repeatedly misrepresented or hid existing facts and therefore that the fraud claim "allege[d] wrongful conduct and injurious consequences discrete from those underlying the breach of contract cause of action." Id.

The First Amended Complaint makes clear that LGCC's conduct alleged as grounds for the fraud claim goes well above and beyond a breach of contract claim: LGCC intentionally failed to disclose that it lacked means to perform the contract; LGCC made material misrepresentations to Sue/Perior to induce it to perform changes and extras; LGCC made material misrepresentations to Sue/Perior that it would be compensated for changed conditions and extra work dictated by LGCC where LGCC had no intention of doing so. R. 37-39. By contrast, the breach of contract cause of action alleged concerns the straightforward non-

payment under the Project Contract. Thus, Sue/Perior's claim for fraud alleges misconduct well beyond LGCC's insincerity in its promise to perform under the Project Contract.

Given that this litigation remains in the early and pre-discovery phase of litigation, Sue/Perior is entitled to maintain its fraud claim against LGCC. Accordingly, the Supreme Court properly held, and Appellate Division properly affirmed, the denial of LGCC's motion to dismiss Sue/Perior's fraud cause of action.

CONCLUSION

For the above reasons, Sue/Perior respectfully requests that this Court affirm the Order of the Appellate Division in all respects.

Dated: Buffalo, New York
February 28, 2014

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