UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAYUGA NATION
and JOHN DOES 1–20,

Plaintiffs,

-against-

HOWARD TANNER, Village of Union Springs Code Enforcement Officer, in his Official Capacity;
EDWARD TRUFANT, Village of Union Springs Mayor, in his Official Capacity;
CHAD HAYDEN, Village of Union Springs Attorney, in his Official Capacity;
BOARD OF TRUSTEES OF THE VILLAGE OF UNION SPRINGS, NEW YORK; and
THE VILLAGE OF UNION SPRINGS, NEW YORK

Defendants.

PROPOSED DEFENDANT-INTERVENOR'S NOTICE OF MOTION TO DISMISS

Docket No.: 5:14-cv-01317 DNH/ATB

PLEASE TAKE NOTICE, that upon the annexed Declaration of Joseph J. Heath, Esq., dated November 11, 2014, and the annexed Memorandum of Law dated November 13, 2014, and the Exhibits annexed thereto; the Proposed Defendant Intervenor, Cayuga Nation Unity Council, will move this Court, pursuant to the Federal Rule of Civil Procedure 12(b)(1), at a Motion Term to be set by the Court, before Hon. David N. Hurd, United States District Court Judge, at the Alexander Pirnie Court House, 10 Broad Street, Utica, New York, or as soon thereafter as counsel may be heard, for an Order dismissing the Complaint in its entirety due to the lack of subject matter jurisdiction because in order to address the merits of the Plaintiff's Complaint, this Court will be required to determine whether this action was authorized by the Cayuga Nation acting through its lawful government and because any ruling in this action would require

the Court to interpret Cayuga Nation law and to make a decision about the internal leadership dispute within the Cayuga Nation.

And for such other and further relief as to this court may deem just and proper.

Dated: November 12, 2014

Respectfully submitted,

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UNITED STATES DISTRICT COURT
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Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Docket No.: 5:14-cv-01317 DNH/ATB

PROPOSED DEFENDANT-INTERVENOR CAYUGA NATION UNITY COUNCIL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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The Proposed Defendant-Intervenor Cayuga Nation Unity Council submits this Memorandum of Law in support of its Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12 (b) (1), because this Court lacks subject matter jurisdiction over questions involving internal Nation leadership disputes and interpretation of Nation law.

INTRODUCTION

The Plaintiffs in this action purport to be the "Cayuga Nation" and 20 unnamed "John Does." However, neither Plaintiffs' Complaint nor their declarations show that this action was authorized by the lawful government of the Cayuga Nation. The action seeks to legitimize a gambling hall on Cayuga Nation territory that was not authorized by the lawful government of the Cayuga Nation and the operation of which violates Cayuga Nation law. Because the identity of the proper government of the Cayuga Nation under its own law is in dispute and because the authority to operate a gambling hall is also contested, any decision on the preliminary injunction motion or the merits of this action will require this Court to resolve an internal governmental dispute by interpreting Cayuga Nation law. Such matters are beyond the subject matter jurisdiction of the Court, and, as a result, this action should be dismissed.

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE THIS ACTION TURNS ON INTERNAL GOVERNMENTAL MATTERS WITHIN THE EXCLUSIVE JURISDICTION OF THE CAYUGA NATION

It is a fundamental precept that federal courts are courts of limited jurisdiction. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). Subject matter jurisdiction must be specifically authorized by statute. The burden of demonstrating that the requirements of federal subject matter jurisdiction have been met rests with Plaintiffs, as the parties seeking declaratory and injunctive relief. *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 376, 377 (1994). There is a presumption against subject matter jurisdiction. *Id.*

Plaintiffs have not met and cannot meet their burden to demonstrate subject matter jurisdiction here. This Court lacks subject matter jurisdiction for two interrelated reasons: 1) This court cannot decide whether Plaintiffs have authority to file this action without impermissibly intruding into the internal affairs of the Cayuga Nation; and 2) this Court cannot decide the Plaintiffs' authority without interpreting Cayuga Nation law, which federal law commits exclusively to the Nation itself.

A. This Action Should be Dismissed Because This Court Does Not Have Jurisdiction to Decide Whether Plaintiffs Are Authorized to File This Lawsuit on Behalf of the Cayuga Nation.

It is axiomatic that before a court may exercise jurisdiction over an action, it must determine whether the plaintiff has authority to file it. *See Pueblo of Santa Rosa v. Fall,* 273 U.S. 215 (1927) (a suit initiated by a party without authority from the named plaintiff to file it is a nullity and any judgment obtained is void). Courts lack jurisdiction over suits brought in the names of parties by persons not authorized to sue on behalf of those parties. A party whose authority is challenged has the burden of persuading the court that such authority exists. *Meredith v. Ionian Trader,* 279 F. 2d 471 (2d Cir. 1960). "A party to . . . a suit may by motion or pleading dispute the authority of the opposing party 'to act for the party in whose name he is proceeding, and, if the authority is not shown, the court will dismiss the action for want of parties before it.'" *Id.* at 474 (internal citation omitted). Only the lawful government of the Cayuga Nation can authorize the filing of a lawsuit on the Nation's behalf. *Williams v. Lee,* 358 U.S. 217 (1958). Pursuant to Cayuga Nation law, the Unity Council became the lawful government of the Cayuga Nation in 2011. *Declaration of Chief Samuel George, Bear Clan, on Behalf of the Proposed Defendant-Intervenor Unity Council* at ¶ 8, attached as Exhibit 1 (hereinafter *George Declaration*); Unity Council Resolution 001-2011, attached as Exhibit A to *Declaration of*

Heron Clan Representative Karl Hill on Behalf of Proposed Defendant-Intervenor Unity Council, which is attached to this Memorandum as Exhibit 2 (hereinafter *Hill Declaration*). The Unity Council has not authorized this suit on behalf of the Cayuga Nation. *Hill Declaration* at ¶ 7. The suit itself was filed by former leaders of the Nation in defiance of Nation law and current Nation leadership. *George Declaration* at ¶¶ 7-9; *see also*, *Declaration of Joseph J. Heath in Support of Motion to Intervene* at ¶ 24 (discussing Letter of January 29, 2014 from three members of the Unity Council to Clint Halftown, Timothy Twoguns and Gary Wheeler demanding cessation of gambling on Nation territory) (hereinafter *Heath Intervention Declaration*). As discussed below, the BIA does not recognize Plaintiffs as the lawful government of the Cayuga Nation and Plaintiffs have provided no evidence to support a claim of such recognition.

This Court cannot adjudicate Plaintiffs' claims without first determining that Plaintiffs are authorized to bring this action on behalf of the Cayuga Nation pursuant to Nation law. Under the circumstances, such a determination would violate the Nation's right to govern itself and would impermissibly intrude on the Nation's governmental decision-making. Plaintiffs lack authority under Cayuga law to file any court action in the name of the Cayuga Nation in defiance of Nation law and in defiance of the current Nation leadership. For this Court to find otherwise would require it to interpret the Cayuga Nation law governing the former leaders' removal from the Nation's Council of Chiefs. That law is beyond the jurisdiction of this or any court to review. As a result, this Court cannot establish Plaintiffs' authority and must dismiss this action.

In addition, Plaintiffs' claims depend on their contention that they, and not the current Unity Council of the Nation, have authority to manage and control the Cayuga Nation's businesses. Under Cayuga law, they have no such authority. *See Hill Declaration* at ¶ 8, and

Unity Council Consensus Decision 003-2014, attached to the Declaration as Exhibit B (relieving Clint Halftown and other key employees of their duties). That law is not open to question by outside courts. For this reason too, this action must be dismissed.

B. This Court Lacks Subject Matter Jurisdiction Over Disputes About Cayuga Nation Leadership and Interpretation of Nation Law.

Indian nations are "distinct, independent political communities, retaining their original natural rights" in matters of self-government. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832). Indian nations have inherent power to govern "their internal and social relations." *United States v. Kagama,* 118 U.S. 375, 381-382 (1886). They have authority to enact and enforce their own substantive law in internal matters. *See Roff v. Burney,* 168 U.S. 218 (1897). In applying these principles, the Supreme Court has acknowledged that to allow a federal court to adjudicate internal governmental disputes would "constitute[] an interference with tribal autonomy and self-government." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59 (1978). Resolution of an "intratribal dispute" in a "foreign forum" inevitably "unsettle[s] a tribal government's ability to maintain authority." *Id.* at 60.

Thus, federal law recognizes that governmental disputes within the Cayuga Nation can be resolved only by the Nation itself. Federal and state law respect and protect the right of Indian nations to determine their own leadership, through Nation law and processes. *See Kiowa Tribe v. Manufacturing Technologies, Inc.,* 523 U.S. 751 (1998); *Bowen v. Doyle*, 880 F. Supp. 99, 113 (W.D.N.Y. 1993); *Ransom v. St. Regis Mohawk Education and Community Fund, Inc.*, 86 N.Y. 2d 553 (1995). No outside entity has the right to determine the leadership of the Nation; that judgment must come from the Cayuga people acting pursuant to Cayuga Nation law. *See George Declaration* at ¶ 3 ("Under our law, no outside entity, not the courts, nor the BIA, has the right to

determine who our leaders are.") The Cayuga people have spoken and no unnamed "John Doe" or Cayuga Nation citizen may impose upon this Court to countermand their determination.

Consistent with these principles, the Second Circuit has confirmed that federal courts lack subject matter jurisdiction over disputes about internal nation leadership and interpretation of Nation law. In *Shenandoah v. Dept. of Interior*, 159 F. 3d 708, 712 (2nd Cir. 1998) the Circuit held that"the issue of Oneida leadership, which involves questions of tribal law, is not properly resolved by a federal court. *See, e.g., Runs After v. United States*, 766 F.2d 347, 351-53 (8th Cir. 1985) [and] . . . *Goodface v. Grassrope*, 706 F. 2d 335, 338-39 (8th Cir. 1983)." *Accord Kaw Nation v. Lujan*, 378 F. 3d 1139, 1142 (8th Cir. 2004) ("A dispute over the meaning of tribal law does not arise under the Constitution, laws or treaties of the United States, as required by § 1331 or § 1362. This is the essential point of opinions holding that a federal court has no jurisdiction over an intratribal dispute.") (citations and internal quotations omitted); *Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litigation*, 340 F. 3d 749, 763-64 (8th Cir. 2003).

Indeed, Plaintiffs have successfully argued in this Court that it lacks subject matter jurisdiction over internal Cayuga Nation leadership disputes. *See Cayuga Indian Nation of New York v. Clint Halftown*, No. 5:05-cv-00195-FJS-DEP (N.D. N.Y. March 31, 2005) (Scullin, Chief J.), attached as Exhibit 3. In that case, Mr. Halftown, through his attorney, Daniel French, moved to dismiss a claim seeking an injunction against Mr. Halftown's continued exercise of control over Nation accounts and records, as well as a declaratory judgment that Mr. Halftown was not an authorized leader of the Nation. *Id.* at 2. Judge Scullin properly granted Mr. Halftown's motion and dismissed the matter, ruling that courts lack jurisdiction to entertain suits involving internal governmental disputes within Indian nations. Judge Scullin noted that

"[p]laintiff has the burden of demonstrating that the Court has subject matter jurisdiction," *id.* at 4, and found further that:

> Despite Plaintiff's characterization of its allegations, Plaintiff's complaint clearly asks the Court to decide who represents the Cayuga Nation and to interpret and enforce the Council's resolutions. This is, in effect, a request for the Court to resolve a dispute involving tribal authority and tribal law. A dispute over the meaning of tribal law does not arise under the Constitution, laws or treaties of the United States. Furthermore, whether phrased in terms of jurisdiction or justiciability, federal courts have consistently held that they do not have the authority to resolve internal tribal disputes.

Id. at 5-6 (internal quotations and citations omitted).

C. Plaintiffs Cannot Establish Governmental Authority From Recognition by the United States Because the Bureau of Indians Affairs Does Not Currently Recognize any Government with Authority to Speak for the Cayuga Nation.

Plaintiffs are not currently recognized by the United States as the government of the Cayuga Nation and have provided no proof to the contrary. The letter sent by the Bureau of Indian Affairs Eastern Regional Director Franklin Keel on May 15, 2014, speaks for itself and affirms Plaintiffs' lack of recognition. Letter from Franklin Keel to Attorneys for Parties, May 15, 2014, attached as Exhibit A to *Heath Intervention Declaration* (hereinafter *Keel Letter*). That letter states that the Interior Board of Indian Appeals "made it clear throughout the [January 19, 2014] decision that the [Eastern] Region [of the BIA] is barred from issuing any decision whatsoever regarding tribal leadership during a governance dispute unless there is a matter that requires BIA action pending before the Region that triggers the need to take a position on the dispute." *Keel Letter* at 2.

Although the Plaintiffs in this action may continue to argue that the IBIA's vacatur of the August 19, 2011 BIA decision recognizing Defendant-Intervenors somehow requires that Plaintiffs be recognized, the Keel Letter explains that the Interior Board of Indian Appeals

("IBIA") has considered and rejected that argument. "The IBIA provided a crystal clear statement of its views regarding the need for BIA neutrality in its August 28th [2013] Order . . . . The Board explained that in its view, any recognition of Halftown would constitute an improper intrusion into tribal affairs." *Keel Letter* at 3, n.1.

In other litigation, the Plaintiffs have argued that the fact that Mr. Keel has decided "to maintain the status quo with respect to the Cayuga Nation's drawdown authority" for certain federal funds constitutes federal recognition of Mr. Halftown. The Plaintiffs' position is contradicted by the language of the letter:

> At this time and until the Region resolves these issues, the Region will maintain the status quo with respect to the Cayuga Nation's drawdown authority. **By doing so, the Region does not express any view recognizing either side**. . . .

Keel Letter at 3 (emphasis added). The letter furthers states that "this correspondence should not be construed as BIA taking any position on the leadership dispute within the Cayuga Nation." *Keel Letter* at 4.

The most recent publication of the Bureau of Indian Affairs *Tribal Nations Directory* confirms the position taken by former Eastern Regional Director Keel in his May 15 letter. While earlier versions of the Directory listed Mr. Halftown as federal representative for the Nation, the most current edition, published in September 2014, no longer lists Mr. Halftown and specifies no individual recognized by the Federal government as the representative of the Nation. *See* Exhibit H attached to *Heath Intervention Declaration.*

D. This Court Lacks Jurisdiction to Decide Whether Mr. Halftown's Gambling Operation is Authorized by Cayuga Nation Law and Whether it Complies with the Indian Gaming Regulatory Act.

Cayuga Nation law prohibits the Nation or its leaders from offering organized gambling on Nation territory. *Hill Declaration* at ¶¶ 12-14. The Nation's lawful government has determined that Mr. Halftown's gambling hall violates Nation law and must be shut down. *George Declaration* at ¶ 11 (referencing letter to Clint Halftown, Timothy Twoguns and Gary Wheeler directing them to cease operation of the illegal gambling hall, which is attached as Exhibit A to the declaration). They have thus notified the former leaders of this fact and directed them to cease their illegal activities. The former leaders have refused to follow this directive. By awarding the former leaders declaratory or injunctive relief in this suit, this Court would insert itself directly into the Nation's internal dispute over the illegality of this gambling venture and would facilitate the former leaders' continued violation of Cayuga Nation law.

Further, this Court cannot determine whether the Class II gambling facility operated by the Plaintiffs complies with the Indian Gaming Regulatory Act (IGRA) without impermissibly resolving the internal governmental dispute within the Cayuga Nation. IGRA requires the governing body of an Indian nation that intends to conduct Class II gambling to enact an ordinance or resolution that complies with the requirements of the Act. 25 U.S.C. § 2710(b)(1)(B). The ordinance must be submitted to the Chairman of the National Indian Gaming Commission for approval, *id.*, and approval is nullified by an Indian nation's revocation of the ordinance.

Plaintiffs allege that a Class II ordinance was enacted by the Cayuga Nation in 2003. *Complaint for Declaratory and Injunctive Relief* at ¶ 24. The Complaint further alleges that the NIGC approved the ordinance, but that the Class II facility was shuttered between 2005 and

2013, and reopened thereafter. *Id.* at ¶ 27. The Unity Council contests the proposition that any valid ordinance was ever enacted, either in 2005 or in 2013. *See Hill Declaration* at ¶ 6 ("The Council of the Cayuga Nation has never authorized by consensus the operation of a Gambling Hall on Nation territory"). The Plaintiffs fail even to cite any purported consensus decision of the lawful government of the Cayuga Nation authorizing the reopening of the facility in 2013. Further, the Unity Council has expressly revoked any such ordinance by consensus and has advised NIGC of this fact. *See George Declaration* at ¶ 12.

IGRA also requires that the Indian nation seeking to operate a Class II facility must issue a license "for each place, facility, or location on Indian lands at which Class II gaming is conducted." 25 U.S.C. § 2710(b)(1)(B). Plaintiffs' complaint does not say whether any Cayuga governmental entity issued a facility license for the Class II gambling hall that is the subject of this action. The Unity Council contends no lawful Cayuga government has issued such a license and strongly opposes any such license being issue. *See Hill Declaration* at ¶ 6.

The questions of whether a valid Class II ordinance was enacted, whether the re-opening of the facility was authorized, whether a valid facility license was issued in compliance with IGRA, and whether any purported authorization by the Nation has been revoked all turn on whether a legitimate Cayuga government adhered to Cayuga law in taking those actions. The Unity Council strongly contests the actions purportedly taken by Plaintiffs with respect to the gambling hall as unauthorized and violative of Cayuga law.

Because addressing this dispute is a prerequisite to the issuance of any declaratory or injunctive relief, this Court is precluded from resolving the merits of Plaintiffs' claims. This Court lacks jurisdiction to resolve the internal dispute that is at the heart of the question of

whether the Cayuga Nation has authorized Class II gambling on Nation lands. As a result, this action should be dismissed.

II. THIS COURT LACKS JURISDICTION BECAUSE IT CANNOT DETERMINE THAT PLAINTIFFS ARE THE REAL PARTIES IN INTEREST.

Rule 17(a) of the Federal Rules of Civil Procedure requires that "an action must be prosecuted in the name of the real party in interest." Because this Court lacks jurisdiction to determine the proper Cayuga Nation leaders to sue in the name of the Nation, Plaintiffs cannot meet this requirement. They are not the real parties in interest to this suit. Rule 17 is designed to protect the fundamental principle that "an 'action must be brought by the person who, according to the governing substantive law, is entitled to enforce the right.'" *Oscar Gruss & Son, Inc. v. Hollander,* 337 F. 3d 186, 193-194 (2d Cir. 2003). *See also Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 49 (2d Cir. 2005) (holding that a Rule 17 defect may not be cured by the joinder of the real parties in interest where those parties have shown no intention to prosecute the action). The real party in interest requirement is akin to standing inasmuch as it also requires allegations that the plaintiff has been injured and that the defendant caused the injury by unlawful conduct. *Seckler v. Star Enterprise,* 124 F. 3d 1399, 1406 (11th Cir. 1997).

The Plaintiffs here cannot meet the real party in interest requirement. The Complaint is devoid of any allegation that the lawful government of the Cayuga Nation has authorized the filing of this suit. Even if Plaintiffs alleged such authority, the real party in interest requirement would not be satisfied because proposed Defendant-Intervenors contest any such allegation as contrary to Cayuga Nation law. In order to resolve that question, this Court would have to

resolve the internal leadership dispute ongoing within the Nation. Federal law prohibits such interference in the Nation's internal governmental .

CONCLUSION

For the foregoing reasons, this Court should issue an Order dismissing this Complaint in its entirety because the Court lacks subject matter jurisdiction over disputes involving internal Nation leadership issues and over the interpretation of Nation law. Further, this action should be dismissed because Plaintiffs cannot meet the real party in interest requirement.

Date: November 13, 2014

Respectfully submitted,

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Attorneys for the Cayuga Nation Unity Council

EXHIBIT 1

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DECLARATION IN SUPPORT OF MOTION TO INTERVENE and MOTION TO DISMISS

Docket No.: 5:14-cv-01317 DNH/ATB

DECLARATION OF CHIEF SAMUEL GEORGE, BEAR CLAN, ON BEHALF OF PROPOSED DEFENDANT-INTERVENOR UNITY COUNCIL

SAMUEL GEORGE, under the penalty of perjury, duly affirms, deposes and says that:

1. I am a condoled Chief for the Bear clan of the Cayuga Nation. In this capacity, I am a member of the Cayuga Nation Council, also known as the Unity Council. The Nation Council is the lawful government for the Cayuga Nation. This Declaration is based on my personal knowledge.

2. As a Chief, one of my responsibilities is to ensure that our Great Law of Peace

is followed and understood by our people and to educate clan members about the Great Law of Peace, which governs the Haudenosaunee (Six Nations) Confederacy and each of its member nations, including the Cayuga Nation.

3. Under our law, no outside entity, not the courts, nor the BIA, has the right to determine who our leaders are. The Cayuga Nation and its citizens have that exclusive right.

4. Pursuant to the Great Law, our Council makes decisions by consensus. This means that if one or more Council members opposes a decision, that decision cannot go forward until or unless we come to one mind.

5. The Council of the Cayuga Nation has never authorized by consensus the operation of a Gambling Hall on Cayuga Nation territory. There was no consensus authorizing this Gambling Hall in 2005 and no consensus authorization to reopen it in 2013. I first learned of the Gambling Hall's reopening when it was reported in the media.

6. The Council of the Cayuga Nation has never authorized by consensus the filing of a federal lawsuit in support of the Gambling Hall on Cayuga Nation territory. I first learned of this lawsuit when attorneys for the Defendants contacted my attorneys after the filing of the suit.

7. Clint Halftown has no authority to act on behalf of the Cayuga Nation, either by filing a federal lawsuit in the Nation's name or by operating a Gambling Hall in the name of the Nation on Nation territory. Likewise, Timothy Twoguns and Gary Wheeler have no such authority.

8. Heron Clan Mother Bernadette Hill removed seatwarmer Clint Halftown from the Nation Council in accordance with Haudenosaunee law. Turtle Clan mother Brenda Bennett removed Timothy Twoguns and Gary Wheeler from the Council in accordance with Haudenosaunee law.

9. Nonetheless, Mr. Halftown, Mr. Twoguns, and Mr. Wheeler (the "former leaders") continue to act as if they are lawful leaders of the Cayuga Nation.

10. The Great Law prohibits our Nation from offering organized gambling, including games of chance considered to be Class II and Class III gambling under federal law, on our Nation territory. Our law prohibits all the forms of gambling, including bingo.

11. Our Council expressly prohibited the Gambling Hall by letter to Mr. Halftown, Mr. Wheeler, and Mr. Twoguns on January 29, 2014. (Attached as Exh. A). Our letter expresses the decision of the Nation as to Cayuga Nation law on this matter and directs Mr. Halftown to cease operation of the illegal Gambling Hall. Mr. Halftown has refused to follow this directive.

12. Therefore, our Council has revoked the Nation ordinance purportedly authorizing the Gambling Hall and has advised the National Indian Gaming Commission (NIGC) of this revocation. *See* Letter to NIGC (Attached as Exh. B). Because there is no valid authorization from the Nation for the Gambling Hall, any prior approval of the Gambling Hall by the NIGC as required pursuant to the Indian Gaming Regulatory Act has been nullified.

13. Heron clan member Clint Halftown has repeatedly violated Haudenosaunee

and Cayuga law by refusing to acknowledge his removal from the Nation Council; by purporting to represent the Nation in its dealings with the United States and the State of New York; and, most recently, by asking the federal courts to confirm his purported position as a Nation leader and to bless his illegal gambling enterprise. His operation of a Gambling Hall within the Nation's treaty-protected territory is a grave offense under our law.

14. Even if the former leaders were part of our government, there could be no consensus authorization for the operation of the Gambling Hall. They have argued to the BIA that they remain on our Council as it was comprised in 2005, with Chief William Jacobs, myself, and Chester Isaac as the other three members of the six-member Council. I have never agreed by consensus to allow gambling on our territory in violation of our law; nor to my knowledge has Chief Jacobs or Mr. Isaac.

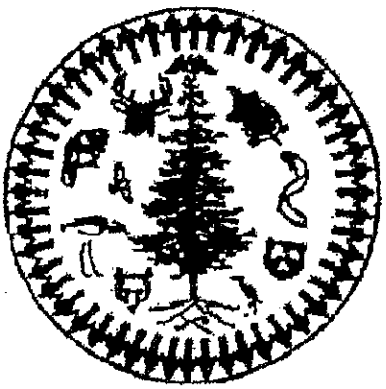
15. Even if they were still part of our government, there could be no consensus authorization for the filing of a federal lawsuit to protect the Gambling Hall. They have argued to the BIA that they remain on our Council as it was comprised in 2005, with Chief William Jacobs, myself, and Chester Isaac as the other three members of the six-member Council. I have never agreed by consensus to allow the filing of a federal lawsuit to protect the Gambling Hall being illegally operated on our territory; nor to my knowledge has Chief Jacobs or Mr. Isaac.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6 day of November, 2014

CHIEF SAMUEL GEORGE

EXHIBIT A



HAUDENOSAUNEE

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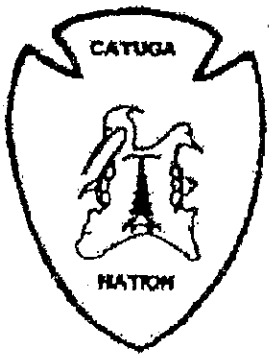

January 29, 2014

Clint Halftown
Timothy Twoguns
Gary Wheeler
PO Box 803
Seneca Falls, NY 13148

Greetings,

We write to request that you immediately cease gambling activities on Cayuga territory. Such activities violate Cayuga law and have never been authorized by any Council of the Cayuga Nation. To be clear, we – three of the six members of the 2005 Cayuga Nation Council – oppose any organized gambling on Cayuga lands. We have never authorized such activities.

In addition, we oppose your effort to have land taken into trust by the United States for gambling purposes. We are deeply concerned that your land into trust application not only seeks to continue Class II gambling on Cayuga lands, but also seeks to bring to Cayuga ancestral territory a Class III gaming facility. As half of the Cayuga Nation Council recognized by the United States in 2005, we emphatically reject any such effort. It is unauthorized and inconsistent with Cayuga Nation law.

We believe that by bringing such illegal activities to Cayuga territory, you are acting against the best interests of Cayuga Nation citizens and of generations yet to come. We support pro-Cayuga economic development initiatives that benefit our people and do not violate our law.

Oneh,

Chief William C. Jacobs
Heron Clan

Chief Samuel George
Bear Clan

Chester Isaac
Bear Clan

EXHIBIT B

CAYUGA NATION UNITY COUNCIL
POB 169
SENECA FALLS, NY 13148

315-712-4252 FAX: 315-712-4371

November 6, 2014

Jonodev Osceola Chaudhuri
Acting Chairman
National Indian Gaming Commission
90 K Street NE
Suite 200
Washington, DC 20002
Fax: (202) 632-7066

Dear Mr. Chaudhuri:

Greetings from the Cayuga Nation. I write on behalf of the Nation's lawful government, the Council of Chiefs, known as the Unity Council.

We recently learned that Clint Halftown, a former leader of the Nation, has filed a federal lawsuit seeking declaratory and injunctive relief to prevent the Village of Union Springs from enforcing state and local law against Mr. Halftown's Gambling Hall, which is located within the Cayuga Nation's Reservation territory.

Although Mr. Halftown's lawsuit claims that in 2013, the Nation authorized the reopening of the Bingo Hall, in fact the government of the Cayuga Nation has never validly authorized the reopening of this facility, which is being operated in violation of Nation law.

As memorialized in the attached letter of January 29, 2014, the Council of the Cayuga Nation finds that the Gambling Hall violates Nation law and must be closed. We advised Mr. Halftown of the Council's determination and directed that he close the Gambling Hall. He has not done so. Our January 29, 2014 letter serves also to repeal any ordinance purporting to authorize gambling on Nation lands, and as a result nullifies NIGC approval of Mr. Halftown's gambling enterprise pursuant to Section 2710(b),(1)(B) of the Indian Gaming Regulatory Act. We ask that the NIGC honor this repeal.

As you may know, the BIA determined in May of this year that it no longer recognized Mr. Halftown as the Nation's representative for purposes of government-to-government relations with the United States. *See* May 15 Letter of Eastern Regional Director Franklin Keel, attached. The BIA recognized Mr. Halftown's removal in August 2011, and while that recognition was overturned on procedural grounds by the IBIA in early 2014, the BIA is currently determining whether the requisite federal need exists to recognize our Nation's new leadership.

Regardless of who the BIA might choose to recognize as the leaders of the Nation, there has been no consensus Council approval of this Gambling Hall as required by our law. Mr. Halftown's claim to continued power rests on the contention he remains part of a six member Council that governs the Nation and that includes Chief Samuel George, Chief William Jacobs, and Chester Isaac. Half of that Council opposes the Gambling Hall and has never authorized it; as does the entire Unity Council, our Nation's lawful government.

We are deeply concerned that Mr. Halftown has misled the NIGC regarding Nation authorization for his Gambling Hall and is seeking to use the federal courts and an illicit gambling enterprise to maintain a hold on power, contrary to the will of the people of the Cayuga Nation. We respectfully request that you withdraw NIGC approval of Mr. Halftown's gambling enterprise until and unless it is validly authorized by the Cayuga Nation pursuant to Cayuga law.

Sincerely,

Karl Hill
Heron Clan Representative
Cayuga Nation Council of Chiefs

cc: Kevin Washburn, Assistant Secretary – Indian Affairs
Sarah Harris, Chief of Staff to the Assistant Secretary – Indian Affairs
Jody Cummings, Senior Counselor to the Solicitor
Bruce Maytubby, Acting Director, Eastern Regional Office, BIA
Bella Sewall Wolitz, Office of the Solicitor, Department of Interior

EXHIBIT 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAYUGA NATION
and JOHN DOES 1–20,

Plaintiffs,

-against-

HOWARD TANNER, Village of Union Springs Code Enforcement Officer, in his Official Capacity;
EDWARD TRUFANT, Village of Union Springs Mayor, in his Official Capacity;
CHAD HAYDEN, Village of Union Springs Attorney, in his Official Capacity;
BOARD OF TRUSTEES OF THE VILLAGE OF UNION SPRINGS, NEW YORK; and
THE VILLAGE OF UNION SPRINGS, NEW YORK

Defendants

DECLARATION IN SUPPORT OF MOTION TO INTERVENE and MOTION TO DISMISS

Docket #: 5:14-cv-1317 DNH/ATB

DECLARATION OF HERON CLAN REPRESENTATIVE KARL HILL ON BEHALF OF PROPOSED DEFENDANT-INTERVENOR UNITY COUNCIL

KARL HILL, under the penalty of perjury, duly affirms, deposes and says that:

1. I am a Faithkeeper and Clan Representative for the Heron clan of the Cayuga Nation. In this capacity, I am a member of the Cayuga Nation Council, also known as the Unity Council. The Nation Council is the lawful government for the Cayuga Nation. This Declaration is based on my personal knowledge.

2. Pursuant to Cayuga Nation law, the Unity Council became the lawful government of the Cayuga Nation in 2011, when all three clans and all three Clan Mothers agreed upon the new Council. *See* Unity Council Resolution 001-2011 (Attached as Exh. A).

3. As a Clan Representative, one my responsibilities is to ensure that our Great Law of Peace is followed and understood by our people and to educate clan members about the Great Law of Peace, which governs the Haudenosaunee (Six Nations) Confederacy and each of its member nations, including the Cayuga Nation.

4. Under our law, no outside entity, not the courts, nor the BIA, has the right to determine who our leaders are. The Cayuga Nation and its citizens have that exclusive right.

5. Pursuant to the Great Law, our Council makes decisions by consensus. This means that if one or more Council members oppose a decision, that decision cannot go forward until or unless we come to one mind.

6. The Council of the Cayuga Nation has never authorized by consensus the operation of a Gambling Hall on Cayuga Nation territory. There was no consensus authorizing this Gambling Hall in 2005 and no consensus authorization to reopen it in 2013. I first learned of the Gambling Hall's reopening when it was reported in the media.

7. The Council of the Cayuga Nation has never authorized by consensus the filing of a federal lawsuit in support of the Gambling Hall on Cayuga Nation territory. I first learned of this lawsuit when attorneys for the Defendants contacted my attorneys after the filing of the suit.

8. Clint Halftown has no authority to manage or control the Cayuga Nation businesses, as he was removed from any business related position of authority. *See* Consensus Decision 003-2014, which relieved him and other "key employees" of their duties within the Nation enterprises. (Attached as Exh. B).

9. Clint Halftown has no authority to act on behalf of the Cayuga Nation, either by filing a federal lawsuit in the Nation's name or by operating a Gambling Hall in the name of the Nation on Nation territory. Likewise, Timothy Twoguns and Gary Wheeler have no such

authority.

10. Heron Clan Mother Bernadette Hill removed seatwarmer Clint Halftown from the Nation Council in accordance with Haudenosaunee law in 2005. Turtle Clan mother Brenda Bennett removed Timothy Twoguns and Gary Wheeler from the Council in accordance with Haudenosaunee law. These removals were affirmed by the Nation's Clan Mothers and Council in 2011. *See* Exh. A.

11. Nonetheless, Mr. Halftown, Mr. Twoguns, and Mr. Wheeler (the former leaders) continue to act as if they are lawful leaders of the Cayuga Nation.

12. The Great Law prohibits our Nation from offering organized gambling, including games of chance considered to be Class II and Class III gambling under federal law, on our Nation territory. Our law prohibits all the forms of gambling, including bingo.

13. Our Council expressly prohibited the Gambling Hall by letter to Mr. Halftown, Mr. Wheeler, and Mr. Twoguns on January 29, 2014. Our letter expresses the decision of the Nation as to Cayuga Nation law on this matter and directs Mr. Halftown to cease operation of the illegal Gambling Hall. Mr. Halftown has refused to follow this directive.

14. Therefore, our Council has revoked the Nation ordinance purportedly authorizing the Gambling Hall and has advised the National Indian Gaming Commission (NIGC) of this revocation. Because there is no valid authorization from the Nation for the Gambling Hall, any prior approval of the Gambling Hall by the NIGC as required pursuant to the Indian Gaming Regulatory Act has been nullified.

15. Heron clan member Clint Halftown has repeatedly violated Haudenosaunee and Cayuga law by refusing to acknowledge his removal from the Nation Council; by purporting to represent the Nation in its dealings with the United States and the State of New York; and, most

recently, by asking the federal courts to confirm his purported position as a Nation leader and to bless his illegal gambling enterprise. His operation of a Gambling Hall within the Nation's treaty-protected territory is a grave offense under our law.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 13 day of November, 2014

HERON CLAN REPRESENTATIVE KARL HILL

EXHIBIT A

HAUDENOSAUNEE
CAYUGA NATION
P. O. Box 116
Akron, New York 14001
Telephone: (716) 542-2285
Facsimile: (716) 706-1221

CAYUGA NATION
RESOLUTION 11-001

CAYUGA NATION COMPOSITION AND FEDERAL RECOGNITION

WHEREAS, on June 1, 2011 in accordance with Cayuga Nation customs, laws and traditions; it has become necessary to reflect the following changes to the Cayuga Nation Council;

WHEREAS, the composition of the Cayuga Nation Council is comprised of the following: Sachem Chief-William C. Jacobs; Clan Mother- Bernadette Hill; Faithkeeper-Karl Hill; and Faithkeeper-Tammy VanAernam; Seatwarmer-Dan Hill, for the Heron Clan; and Sachem Chief-Samuel George; Clan Mother-Inez Jimerson; Faithkeeper-Alan George; Faithkeeper-Pamela Isaac; and Representative-Chester Isaac, for the Bear Clan; and Representative-Justin Bennett; Representative-Samuel Campbell; and Clan Mother-Brenda Bennett, for the Turtle Clan.

THEREFORE BE IT NOW RESOLVED, that Clint Halftown, Federally Recognized Representative and Timothy Twoguns, Alternate Federally Recognized Representative, both of the Cayuga Nation, are no longer duly recognized as the authorized Bureau of Indian Affairs (BIA) Representative and Alternate.

WHEREAS, Clint Halftown is no longer recognized as the Heron Clan Representative; Clan Mother-Bernadette Hill has appointed Karl Hill, currently serving as a Faithkeeper, as the duly recognized Heron Clan Representative.

THEREFORE BE IT NOW RESOLVED, that Sachem Chief, William C. Jacobs and Sachem Chief Samuel George are now recognized as the Federally Recognized Representative and the

Federally Recognized Alternate, for the Bureau of Indian Affairs (BIA) and all other federal, state and local entities.

Oneh,

Cayuga Nation Council

William C. Jacobs – Sachem Chief , Heron Clan, Federally Recognized Representative

Samuel George – Sachem Chief, Bear Clan Alternate Federally Recognized Representative

Justin Bennett -Turtle Clan Representative

Samuel Campbell - Turtle Clan Representative

Chester Isaac-Bear Clan Representative

Karl Hill – Faithkeeper, Heron Clan Representative

EXHIBIT B

CD 003-2014
Cayuga Nation Enterprises and Businesses

CAYUGA NATION UNITY COUNCIL

CONSENSUS DECISION

CD 003-2014

THE CAYUGA NATION UNITY COUNCIL FINDS AS FOLLOWS:

1. On June 1st, 2011, in accordance with Cayuga Law and the Great Law of Peace the Cayuga Nation Council composition was changed and the Consensus Decision Making Process was reaffirmed to govern the internal and external affairs of the Cayuga Nation and its Enterprises and businesses;

2. The Cayuga Nation Enterprises and businesses, are a matter of internal exclusivity to the Cayuga Nation, governed only by the Cayuga Nation Council and not by any outside foreign entity, specifically the State of New York and the Federal Government of the United States of America;

3. The revenues of the Cayuga Nation Enterprises and its businesses are deposited into bank account(s) of which Clint Halftown has signature authority. The Council also acknowledges and recognizes the possiblity of others who may have signature authority to the Cayuga Nation Enterprise and business bank account(s);

4. Clint Halftown has held and continues to hold himself out as an Executive Officer or any equivalent position responsible for the overall management and operations of the all the Cayuga Nation Enterprises and businesses.

5. Mr. Halftown is also joined with "key employees" that assist in the management and operation of the Cayuga Nation Enterprises and businesses. These "key employees" are: BJ Radford, Victoria Hess, Irene Jimerson, Gerald Jimerson Sr., Timothy Twoguns, Gary Wheeler, Dick Lynch, Patti Costello, Seth Halftown and Lee Halftown

THEREFORE, THE UNITY COUNCIL ADOPTS THE FOLLOWING CONSENSUS DECISION EFFECTIVE IMMEDIATELY:

A. Clint Halftown and all other designees to Cayuga Nation Enterprise and business funds shall no longer have signature authority on any and all bank account(s) associated with Cayuga Nation Enterprises and businesses.

B. All "key employees" are hereby laid off due to reorganzation of the Cayuga Nation Enterprises and businesses and are eligible for unemployment benefits.

C. Clint Halftown shall cease and desist and be removed from all managerial and operational activity associated with his self-appointed position as an Executive Officer or any equivalent position responsible for the Cayuga Nation Enterprises and business and is hereby placed on "Investigation and Adminstrative Leave" without pay until a full

investigation of his activities associated with the Cayuga Nation Enterprises and businesses has been completed and a final decision is made on his employment by the Cayuga Nation Council.

D. A full and complete forensic audit shall be conducted on the Cayuga Nation Enterprises and businesses immediately following the removal of Clint Halftown and lay off of "key employees".

Oneh,

CAYUGA NATION UNITY COUNCIL

Dated: 1-15 2014

William C. Jacobs-Sachem Chief,
Heron Clan, Federally Recognized Rep.

Samuel George- Sachem Chief, Bear Clan
Alternate Federally Recognized Rep.

Justin Bennett-Turtle Clan Representative

Samuel Campbell-Turtle Clan Representative

Chester Isaac-Bear Clan Representative

Karl Hill-Faithkeeper, Heron Clan Representative

EXHIBIT 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CAYUGA INDIAN NATION OF NEW YORK,

Plaintiff,

v.

5:05-CV-195
(FJS/DEP)

CLINT HALFTOWN, SHARON L. LeROY, and ANITA THOMPSON,

Defendants.

APPEARANCES

OF COUNSEL

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Suite 209
109 South Warren Street
Syracuse, New York 13202
Attorneys for Respondents Daniel J. French and Green & Seifter, Attorneys, PLLC

EDWARD Z. MENKIN, ESQ.

SCULLIN, Chief Judge

MEMORANDUM-DECISION AND ORDER

I. BACKGROUND

Plaintiff bring this action seeking a declaratory judgment that Defendant Halftown is not an authorized representative of the Cayuga Indian Nation of New York ("Nation")[1] and further seeking an injunction requiring Defendants to surrender the Nation's books and records and to provide an accounting.

Plaintiff's complaint alleges the following facts: that, on November 14, 2004, the Cayuga Nation Council of Chiefs, Representatives and Clan Mothers ("Council"), adopted a resolution authorizing Defendant Halftown to enter into an agreement ("Settlement Agreement") with the State of New York to settle *Cayuga Indian Nation of N.Y. v. Pataki*, 5:80-cv-930-NPM (N.D.N.Y. filed Nov. 19, 1980) ("Land Claim Litigation"); that, on November 17, 2004, Defendant Halftown, as a duly authorized representative, executed the Settlement Agreement on behalf of the Nation; and that, thereafter, on December 31, 2004, and January 18 and 19, 2005, Defendant Halftown wrote letters to Governor Pataki in an attempt to repudiate the Settlement Agreement.

Plaintiff's complaint also asserts that on February 7, 2005, the Council adopted a resolution revoking all authority that it had previously given Defendant Halftown and removing Defendant LeRoy as Secretary and Treasurer of the Nation. Finally, the complaint alleges that Plaintiff has discovered that Defendants LeRoy and Thompson[2] were paid grossly exaggerated salaries, that some of the Nation's business records are missing, and that Defendants Halftown and LeRoy misallocated federal funds that had been designated for the Nation.

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[1] Since the parties disagree as to whether Plaintiff properly represents the Nation, the Court will distinguish between Plaintiff and the Nation as appropriate.

[2] Plaintiff alleges that Defendant Thompson is the Nation's former office administator.

Presently before the Court are (1) Plaintiff's motion for a preliminary injunction[3] and (2) Plaintiff's application for an order to disqualify Daniel J. French, Esq. and Green & Seifter, Attonerys, PLLC (collectively "Respondents") as attorneys for Defendants pursuant to DR 9-101(B), 18 U.S.C. § 207(a), and/or DR 5-107(A)(1).

II. DISCUSSION

A. Preliminary injunction standard

Generally, "[t]o obtain a preliminary injunction the moving party must show, first, irreparable injury, and, second, either (a) likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships decidedly tipping in the movant's favor." *Green Party of N.Y. State v. N.Y. State Bd. of Elections*, 389 F.3d 411, 418 (2d Cir. 2004) (citation omitted). However, when a party seeks a preliminary injunction that alters the status quo, it "must show a '"substantial" likelihood' of success." *Id.* (quotation

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[3] Plaintiff specifically seeks an order enjoining Defendants

> (a) from entering the Nation's offices; (b) from interfering with the audit of R.A. Mercer; (c) from denying access to the Nation's books and records to R.A. Mercer; (d) from the management and operation of the Nation's businesses, including all check writing authority; (e) from interfering with R.A. Mercer's oversight of the Nation's business ventures, including its selection of appropriate signatories to all checks issued by the Nation; (f) from interfering with the settlement entered into between the Nation and the State of New York; or (g) from acting on behalf of the Nation or its business . . . .

See Dkt. No. 9 at 2. Although not included in the ultimate order portion of the proposed injunction, Plaintiff also seeks an order authorizing "R.A. Mercer" to oversee the Nation's businesses and to select appropriate signatories. *See id.* at 1. It appears that both sides recognize R.A. Mercer & Co. P.C. as the Nation's accountant at least for the purpose of certain audits.

omitted).

The likelihood that Plaintiff will succeed on the merits depends, as an initial matter, on whether this Court has jurisdiction over this action. "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (quotation omitted). Without subject matter jurisdiction, the Court has no power to pronounce on the merits of this action. *See id.* at 101-02.

Plaintiff has the burden of demonstrating that the Court has subject matter jurisdiction. *See Shenandoah v. Halbritter*, 366 F.3d 89, 91 (2d Cir. 2004) (citation omitted). Plaintiff alleges that this Court has jurisdiction under 28 U.S.C. §§ 1331, 1337, 1362, 1367, 2201, 2202. Section 1337 creates jurisdiction for actions arising under commerce and antitrust regulations, none of which Plaintiff has identified as being involved in this case. Section 1367 creates supplemental jurisdiction, which depends upon the Court first having original jurisdiction. Sections 2201 and 2201 create declaratory and auxiliary remedies; they do not create bases of jurisdiction.

That leaves § 1331[4] and/or § 1362 as a basis for the Court's subject matter jurisdiction over this matter.[5] Under either provision, the Court only has jurisdiction if the matter at issue arises under federal law. A case arises under federal law "only when a federal question is

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[4] Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

[5] Section 1362 provides that "[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362.

presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citation omitted). Plaintiff contends that its complaint presents a federal question because it concerns the Settlement Agreement.

Contrary to Plaintiff's contention, this action does not arise under the Settlement Agreement. Plaintiff essentially claims that Defendant Halftown has misrepresented his authority as a representative of the Nation and that Defendants have prevented access to the Nation's offices and business records and have misappropriated the Nation's funds. The relief that Plaintiff seeks – a declaration that Defendant Halftown is not an authorized representative of the Nation and an order requiring Defendants to surrender the Nation's books and records to and provide an accounting – neither touches upon the legitimacy or execution of the Settlement Agreement nor arises from an interpretation of the Settlement Agreement or any provision of federal law.[6]

Despite Plaintiff's characterizations of its allegations, Plaintiff's complaint clearly asks the Court to decide who represents the Cayuga Nation and to interpret and enforce the Council's

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[6] Furthermore, although the Settlement Agreement does provide that

> [a]ny action brought by any Party arising from, relating to, or seeking to enforce this Agreement, or any of the terms therein, the Federal Settlement Litigation, or the State Settlement Litigation shall be brought in the United States District Court for the Northern District of New York, and the Parties expressly consent to the jurisdiction and venue in such court over such actions . . . .

See Dkt. No. 11 at Exhibit "I" at 22, it is not yet in effect. Specifically, the Agreement provides that it "shall not take effect or be binding upon the Parties, and shall not become effective, until all the following actions have been performed and completed . . . ." *See id.* at 6. Two of those actions are the New York State Legislature's and the United States Congress' enactment of certain legislation. *See id.* Neither legislative body has enacted any such legislation.

resolutions. This is, in effect, a request for the Court to resolve a dispute involving tribal authority and tribal law. "A dispute over the meaning of tribal law does not 'arise under the Constitution, laws, or treaties of the United States' . . . ." *Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139, 1143 (10th Cir. 2004) (internal citations omitted); *accord Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 712-13 (2d Cir. 1998) (citations omitted). Furthermore, whether phrased in terms of jurisdiction or justiciability, federal courts have consistently held that they do not have the authority to resolve internal tribal disputes.[7]

Finally, insofar as Plaintiff seeks review of the Bureau of Indian Affairs' ("BIA") determination that Defendant Halftown is the Nation's representative for dealings with the federal government,[8] Plaintiff faces at least two jurisdictional hurdles. First, Plaintiff has not named the Secretary of the Interior as a Defendant. Second, Plaintiff has not exhausted its administrative remedies. "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . ." 5 U.S.C. § 704. "No decision, which at the time of its rendition is subject to appeal to a superior authority

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[7] *See, e.g., In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003) (citation omitted) ("Jurisdiction to resolve internal tribal disputes, interpret tribal constitutions and laws, and issue tribal membership determinations lies with Indian tribes and not in the district courts."); *Crowe v. E. Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1233 (4th Cir. 1974) (citations omitted); *Motah v. U.S.*, 402 F.2d 1, 1 (10th Cir. 1968) (citations omitted) ("The action stems from an internal controversy among Indians over tribal government, a subject not within the jurisdiction of the court as a federal question."); *Quair v. Sisco*, No. CVF025891RDCDLB, 2004 WL 3214396, *29 (E.D. Cal. July 26, 2004) (quotation omitted); *Barnes v. White*, 494 F. Supp. 194, 200 (N.D.N.Y. 1980) ("[P]laintiffs' complaint stems from an intratribal dispute which federal policy dictates should be handled within the Tribe and not by this Court.").

[8] *See* Dkt. No. 32 at 3 (March 17, 2005 letter from the Regional Director of the BIA stating that the BIA recognizes Defendant Halftown as the Nation's representative in its intergovernmental relationship with the federal government).

in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. § 704 . . . ." 25 C.F.R. § 2.6(a) (2005); *see also Shenandoah*, 159 F.3d at 712-13 (citations omitted).[9]

For the above-stated reasons, the Court finds that Plaintiff cannot show a likelihood of success of the merits because the Court is without jurisdiction to entertain this action. Accordingly, the Court denies Plaintiff's motion for a preliminary injunction.[10]

B. Plaintiff's application for an order to disqualify Respondents as counsel for Defendants

Plaintiff contends that Respondent French, while serving as the United States Attorney for the Northern District of New York, participated personally and substantially in the Land Claim Litigation. Plaintiff also speculates that Respondent French gained confidential

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[9] Although neither party refers to it, 25 U.S.C. § 233 is at least arguably relevant to this action. Section 233 provides, in pertinent part, that

> [t]he courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State . . . .

25 U.S.C. § 233. However, § 233 is inapplicable for at least two reason. First, § 233 concerns state-court jurisdiction; nothing in this statute creates "grounds for this Court to exercise federal question jurisdiction over this action or overrule[s] the existing limits on federal jurisdiction." *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 304 (N.D.N.Y. 2003). Second, " the Nation's rights to self-government and exclusive jurisdiction over its internal affairs are treaty rights and cannot be abrogated absent a 'clear and plain' showing that Congress intended to interfere with those rights," and such a showing has not been made. *Bowen v. Doyle*, 880 F. Supp. 99, 116 (W.D.N.Y. 1995).

[10] As the Court noted at oral argument, based upon the Court's finding that it lacks jurisdiction, a motion to dismiss this action is in order.

information in the course of that participation that he can now use to the Nation's disadvantage and that, therefore, the Court should disqualify him and his firm from representing Defendants in this action.

In support of its contention, Plaintiff has submitted two affidavits. Martin R. Gold, a member of Sonnenschein Nath & Rosenthal, LLP, apparently served as one of the Nation's counsel during the Land Claim Litigation. He states, in pertinent part, that

> 5. Mr. French personally appeared in Judge McCurn's courtroom during jury selection, at which time the Justice Department attorneys introduced him to me, and I participated in discussions with him and the Justice Department attorneys concerning strategy in jury selection. Mr. French discussed with us his views on the jury pool, and their potential predispositions.
>
> 6. Toward the end of the jury trial, I recall working with the Justice Department attorneys in a conference room in the United States Attorney's office at which time Mr. French entered the room and discussed the case. I do not recall the specific discussion, but it related to the status of the proceedings, with which he expressed familiarity.
>
> 7. In addition, I recall instances during the trials in which the Justice Department attorneys mentioned to me that they had discussed one or another issue with Mr. French.

See Affidavit of Martin R. Gold, sworn to March 8, 2005, at ¶¶ 5-7. Plaintiff's counsel, Raymond J. Heslin, was trial counsel during the Land Claim Litigation and states, in pertinent part, that "[d]uring the several hearings and trials in Syracuse, I met with Mr. French and other attorneys of the United States Attorney's Office and discussed substantive aspects of the case on several occasions in the United States Attorney's Office and over lunch in the cafeteria. . . ." *See* Affidavit of Raymond J. Heslin, sworn to February 28, 2005, at ¶ 7.

In response to Plaintiff's contentions, Respondent French states, in pertinent part, that

> [c]ontrary to what plaintiffs' purported counsel have represented or intimated to the Court, I did not . . . have a "personal and substantial

> involvement" in the litigation of the Land Claim; indeed, I had virtually no involvement. I did not share or learn any confidences of the Cayuga Indian Nation (despite the litigation reality that the Nation and the United States were united in interest as parties), nor did I participate in strategy discussions or decisions engaged in by the representatives of the United States Department of Justice who were actually litigating the matter. I do not recall any lunch much less a lunch-time conversation with Mr. Heslin on any subject related to the Land Claim case and I absolutely deny ever engaging in what he has characterized as "substantive discussions" with him or anyone else about the Land Claim matter.

See Affidavit of Daniel J. French, sworn to March 3, 2005, at ¶ 5.

Plaintiff argues that the Court should disqualify Respondents under a federal criminal statute[11] and under two provisions of the Disciplinary Rules of the Code of Professional Responsibility.[12] Although the Code of Professional Responsibility does not bind federal courts,

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[11] 18 U.S.C. § 207(a)(1) provides, in pertinent part, that

> [p]ermanent restrictions on representation on particular matters.—Any person who is an officer or employee . . . of the executive branch of the United States . . . and who, after the termination of his or her service or employment with the United States . . . knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States . . . on behalf of any other person (except the United States . . .) in connection with a particular *matter*—
>
> (A) in which the United States . . . is a party or has a direct and substantial interest,
>
> (B) in which the person *participated personally and substantially* as such officer or employee, and
>
> (C) which involved a specific party or specific parties at the time of such participation,
>
> shall be punished as provided in section 216 of this title.

18 U.S.C. § 207(a)(1) (emphasis added).

[12] DR 9-101(B) provides, in pertinent part, that

> [e]xcept as law may otherwise explicitly permit:

(continued...)

they

often look to it for guidance in deciding motions to disqualify. *See Guerrilla Girls, Inc. v. Kaz*, No. 03 Civ. 4619(LLS), 2004 WL 2238510, *2 (S.D.N.Y. Oct. 4, 2004) (citing cases).

"The objective of the disqualification rule is to 'preserve the integrity of the adversary process' . . . ." *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 791 (2d Cir. 1983) (internal citation omitted).

"[D]isqualification has been ordered only in essentially two kinds of cases:

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[12](...continued)

1. A lawyer shall not represent a private client in connection with a *matter* in which the lawyer *participated personally and substantially* as a public officer or employee, and no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
   a. The disqualified lawyer is effectively screened from any participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom; and
   b. There are no other circumstances in the particular representation that create an appearance of impropriety.
2. A lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer may knowingly undertake or continue representation in the matter only if the disqualified lawyer is effectively screened from any participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom.

* * *

N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.45(b) (2004) (emphasis added). DR 5-107(A) provides, in pertinent part, that "[e]xcept with the consent of the client after full disclosure a lawyer shall not: 1. Accept compensation for legal services from one other than the client. . . ." N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.26(a) (2004).

> (1) where an attorney's conflict of interests in violation of Canons 5 and 9 of the Code . . . undermines the court's confidence in the vigor of the attorney's representation of his client, . . . or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation. . . ."

Bobal v. Rensselaer Polytechnic Inst., 916 F.2d 759, 764-65 (2d Cir. 1990) (quotation omitted). "[U]nless an attorney's conduct tends to 'taint the underlying trial,' . . . by disturbing the balance of the presentations in one of [these] two ways . . . , courts should be quite hesitant to disqualify an attorney." *Bd. of Educ. of City of N.Y. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979). (internal citation omitted).

The Court has before it conflicting affidavits. Regardless, even if the facts asserted in Plaintiff's supporting affidavits are true, they do not demonstrate that Respondent French participated substantially in the Land Claim Litigation. Furthermore, even if Respondent French had participated substantially in the Land Claim Litigation, that would only disqualify him as counsel for Defendants if the instant action involved the same matter as the Land Claim Litigation, which the Court has already found it does not. Accordingly, because Plaintiff's submissions do not satisfy the standard for disqualification, the Court denies without prejudice Plaintiff's application for an order to disqualify Respondents as counsel for Defendants.

III. CONCLUSION

After carefully considering the file in this matter, the parties' submissions and oral arguments, and the applicable law, and for the reasons stated herein as well as at oral argument, the Court hereby

ORDERS that Plaintiff's motion for a preliminary injunction is **DENIED**; and the Court

further

ORDERS that Plaintiff's application for an order disqualifying Respondents as attorneys for Defendants is **DENIED.**

IT IS SO ORDERED.

Dated: March 31, 2005
Syracuse, New York

Frederick J. Scullin, Jr.
Chief United States District Court Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAYUGA NATION
and JOHN DOES 1–20,

Plaintiffs,

-against-

HOWARD TANNER, Village of Union Springs Code Enforcement Officer, in his Official Capacity;
EDWARD TRUFANT, Village of Union Spring Mayor, in his Official Capacity;
CHAD HAYDEN, Village of Union Springs Attorney, in his Official Capacity;
BOARD OF TRUSTEES OF THE VILLAGE OF UNION SPRINGS, NEW YORK; and
THE VILLAGE OF UNION SPRINGS, NEW YORK,

Defendants.

DECLARATION IN SUPPORT OF DEFENDANT-INTERVENOR'S MOTION TO DISMISS

Docket No.: 5:14-cv-01317 DNH/ATB

DECLARATION OF JOSEPH J. HEATH ON BEHALF OF PROPOSED DEFENDANT-INTERVENOR CAYUGA NATION UNITY COUNCIL

JOSEPH J. HEATH, ESQ., under the penalty of perjury, hereby declares:

1. I am an attorney duly licensed to practice law in the Courts of the State of New York and I have been so licensed since 1975. I have been admitted to practice in the United States District Court for the Northern District of New York since 1976. I make this Declaration in Support of the Motion by the Proposed Defendant Intervenor Cayuga Nation Unity Council to Dismiss the Complaint herein in its entirety, pursuant to Rule 12(b)(1). I make these statements based on my personal knowledge.

2. The Plaintiffs in this action purport to be the "Cayuga Nation" and 20 unnamed "John Doe" plaintiffs. However, this action was not authorized by the lawful government of the Cayuga Nation.

3. This action also violates the law of the Cayuga Nation because it seeks to advance the pro-gambling agenda of a former Nation leader, contrary to the Nation's laws, and is based on the incorrect claim that the Nation has authorized the Gambling Hall that is the subject of the action.

4. Any decision on the merits of this action will embroil the Court in the ongoing internal leadership dispute of the Nation, and require the Court to make decisions that interpret Cayuga Nation law and procedures. Both of these matters are outside the subject matter jurisdiction of the Court.

5. Any ruling in this action would require the Court to determine if the persons who authorized the action are lawful leaders of the Nation, and whether such authorization was consistent with Cayuga Nation law.

6. The Nation is governed by a six member Council and any decision to file a lawsuit on behalf of the Nation requires a consensus approval decision by all six members. None of the six members of the current Unity Council approved the filing of this action.

7. The Complaint and its voluminous supporting papers are silent on this issue of authorization.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated: November 11, 2014

JOSEPH J. HEATH (Bar Roll No. 505660)
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Fax: 315/475-2465
E-mail: jheath@atsny.com
Counsel for the Unity Council of the Cayuga Nation

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAYUGA NATION
and JOHN DOES 1–20,

Plaintiffs,

-against-

HOWARD TANNER, Village of Union Springs Code Enforcement Officer, in his Official Capacity;
EDWARD TRUFANT, Village of Union Springs Mayor, in his Official Capacity;
CHAD HAYDEN, Village of Union Springs Attorney, in his Official Capacity;
BOARD OF TRUSTEES OF THE VILLAGE OF UNION SPRINGS, NEW YORK; and
THE VILLAGE OF UNION SPRINGS, NEW YORK

Defendants.

DECLARATION OF SERVICE

Docket No.: 5:14-cv-01317 DNH/ATB

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States of America, over the age of 18 years, and not a party to the above-entitled action. My business address is 2030 Addison Street, Suite 410, Berkeley, California, 94704.

On November 13, 2014, I electronically filed on behalf of the Proposed Intervenor the Cayuga Nation Unity Counsel following documents in Cayuga Nation, et al. v. Howard Tanner, et al., Docket No. 5:14-cv-01317-DNH-ATB:

1) **PROPOSED DEFENDANT-INTERVENOR'S NOTICE OF MOTION TO DISMISS**
2) **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**
3) **DECLARATION IN SUPPORT OF DEFENDANT-INTERVENOR'S MOTION TO DISMISS**
4) **DECLARATION OF SERVICE**

by using the CM/ECF system, which generated and transmitted a notice of electronic filing to the registered parties in the above-entitled case.

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on November 13, 2014, at Berkeley, California.

Martha Morales