IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CAYUGA NATION AND JOHN DOES 1-20, Plaintiffs, v. 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.	)	No.: 5:14-cv-1317-DNH-ATB

REPLY MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

INTRODUCTION

The Village provides no reason to deny the preliminary injunction. On the merits, it disregards statutory text, misconstrues the Supreme Court's decision in *City of Sherrill*, and utterly ignores the activities of the Oneida Nation. As to irreparable harm, the Village disregards that enforcement action against Lakeside Entertainment would deprive an Indian nation of the revenues on which its self-sufficiency hinges. Finally, any disruption flowing from the leadership dispute is just a red herring and certainly does not tip the balance of hardships, for the Village identifies absolutely no harm from gaming at Lakeside Entertainment.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

The Village's brief offers a variety of reasons why Plaintiffs supposedly are unlikely to succeed on the merits. None of these is persuasive.[1]

A. The Nation's Lands Are Gaming-Eligible.

The Village does not dispute that the Nation continues to have a federally recognized reservation. Nor does it dispute that the Nation's reservation lands are "Indian lands" under 25 U.S.C. § 2703(4) and § 2710(b)(1). Instead, the Village argues that the Nation's lands are ineligible for gaming under IGRA because they are not "within such tribe's jurisdiction." *Id.* § 2710(b)(1). The Village is incorrect. The phrase "within such tribe's jurisdiction" has a simple meaning: to be gaming-eligible, the "Indian lands" must be the tribe's *own* lands, not those of

[1] The Village also maintains that the arguments in its Cross-Motion to Dismiss warrant denial of the injunction. Village Br. 11. Plaintiffs will address these arguments in their opposition. Plaintiffs note, however, that the Bureau of Indian Affairs ("BIA") has committed to a decision regarding the Nation's leadership no later than February 20. Supp. Decl. of David W. DeBruin ("DeBruin Supp. Decl."), Ex. C. The Village's jurisdiction-based arguments provide no basis for dissolving this Court's preliminary relief before that date, for reasons Plaintiffs have explained. *See* Mem. of L. in Opp. to Mot. to Intervene at 17 n.8 (Dec. 1, 2014), ECF No. 33.

another tribe. *See* Opening Br. 13-14.[2]

Even if the phrase "within such tribe's jurisdiction" did require governmental power, as the Village suggests, the Nation would satisfy that requirement. IGRA does not require a tribe's jurisdiction to be *exclusive*. Rather, as the First Circuit has held, "concurrent jurisdiction is sufficient." *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701 (1st Cir. 1994). Moreover, the "portion of jurisdiction" that an Indian nation "possess[es] by virtue of [its] sovereign existence as a people" suffices for concurrent jurisdiction. The Village does not even mention *Narragansett*, much less distinguish it. Nor does it dispute the many respects in which the Nation in fact exercises concurrent jurisdiction over its members' activities on its reservation land. *See* Opening Br. 14-15. Indeed, the Village cites no decision in which a tribe's lands have been deemed "Indian lands," yet *not* "within such tribe's jurisdiction" under IGRA.

Instead, the Village contends that, under *City of Sherrill*, the Nation *cannot* exercise jurisdiction on its "Indian lands." Village Br. 14-15. The Village badly misconstrues *City of Sherrill*. The issue there was whether the Oneida Nation could claim a common-law *immunity* from the *state's* exercise of jurisdiction, and the Supreme Court held that it could not. The Court did not address whether the Oneida Nation had jurisdiction *concurrent* with the state to regulate the conduct of its members on its reservation land. Nor did it say anything about IGRA – or, indeed,

[2] The Village cites an opinion by the National Indian Gaming Commission ("NIGC") concerning the United Keetowah Band ("UKB"), claiming that a determination that a tribe has "jurisdiction" over lands is actually a *precondition* to a determination that those lands are "Indian lands." *See* Village Br. 13. The UKB opinion is inapposite, however. In that case, NIGC was considering an entirely different branch of the "Indian lands" definition that expressly requires the exercise of "governmental power," because it had determined that the UKB did *not* have reservation land. *See* Decl. of Cornelius D. Murray ¶ 5 & Ex. C; 25 U.S.C. § 2703(4)(B) (providing, as alternative to the reservation-land prong of the definition, that "Indian lands" include "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").

the rights that an Indian nation may possess under *any* statute.

The Oneida Nation's activities both before and after *City of Sherrill* confirm that the decision in no way undercuts the Cayuga Nation's right to game on its lands under IGRA. Since 1993, the Oneida Nation has operated a Class III gaming facility (the Turning Stone Casino Resort) on land that, until last year, was indistinguishable from the Cayuga Nation's – reservation land reacquired on the open market and not taken into trust by the United States. Neither the state nor the NIGC acted to shutter Turning Stone in the wake of *City of Sherrill*. To the contrary, the Oneidas continued to conduct gaming there under NIGC's oversight. *See* Opening Br., Ex. H (NIGC letter to counsel to New York State Governor). The Village ignores these realities.

B. 18 U.S.C. § 1166 Bars Criminal Proceedings By Local Officials.

Even if IGRA did not preempt the Village's effort to regulate the Nation's gaming, the Village would still lack authority to initiate a criminal prosecution for those activities. That is because under 18 U.S.C. § 1166, the federal government has exclusive authority to prosecute violations of state gambling laws on the Nation's reservation. *See* Opening Br. 19-21.

In response, the Village contends (Village Br. 15-16) that Section 1166 does not apply because 25 U.S.C. § 232 transfers criminal jurisdiction to the State of New York. But Section 1166 is clear: "The United States *shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws* that are made applicable under this section to Indian country, *unless an Indian tribe … has consented to the transfer to the State* of criminal jurisdiction with respect to gambling on the lands of the Indian tribe." 18 U.S.C. § 1166(d) (emphasis added).[3] The Nation has never consented to any such transfer, so the United States retains exclusive juris-

[3] The State gambling laws "made applicable under this section to Indian country," 18 U.S.C. § 1166(d), are "all State laws pertaining to the licensing, regulation, or prohibition of gambling," except as applied to gambling expressly permitted by IGRA. *Id.* § 1166(a).

diction. And to the extent that IGRA conflicts with Section 232, IGRA is the later and more specific enactment, and must control. *See Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 540 (9th Cir. 1994) (reaching same conclusion for California's analogue to Section 232).[4]

The Village's second argument (Village Br. 16-18) is that Section 1166(d) has no application because the Nation's reservation is not "Indian country." Again, the Village ignores the statute, which defines "Indian country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151(a). By definition, federally recognized reservation land is "under the jurisdiction of the United States Government." *Id.*[5] As the Supreme Court held long ago, "nothing can more appropriately be deemed 'Indian country' . . . than a tract of land . . . lawfully set apart as an Indian reservation," *Donnelly v. United States*, 228 U.S. 243, 269 (1913), and Section 1151(a) was intended to codify that holding. *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 528 & n.3, 529-30 (1998). The Second Circuit has explained: "While questions may arise as to whether nonreservation property owned by Indians is in Indian country, there are no such questions with regard to reservation land, which by its nature was set aside by Congress for Indian use under federal supervision." *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 155 (2d Cir.

[4] The legislative history cited by the Village is consistent with exclusive federal jurisdiction. It identifies two settlement acts – the Rhode Island Claim Settlement Act and the Maine Indian Claim Settlement Act – as examples of the kind of grant of authority that Congress did not intend to supersede. *See* S. Rep. No. 100-446, at 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082. These settlement acts were enacted following a settlement agreement *to which the tribes consented*, consistent with the plain language of Section 1166(d).

The Village badly mischaracterizes *United States v. Cook*, 922 F.3d 1026 (2d Cir. 1991), moreover. *Cook* held merely that in enacting Section 232, Congress did not abrogate federal criminal jurisdiction that otherwise existed. *Cook* nowhere suggested that Section 232 trumps Section 1166's federal exclusivity.

[5] The phrase "under the jurisdiction of the United States Government," 18 U.S.C. § 1151(a), makes clear that, to qualify as Indian land, reservation land must be federally recognized, and cannot merely be state-recognized.

2003), *rev'd on other grounds*, 544 U.S. 197 (2005). This Court has held that because the Nation's reservation was never disestablished, it remains Indian country. *See Cayuga Indian Nation of N.Y. v. Village of Union Springs*, 317 F. Supp. 2d 128, 137 (N.D.N.Y. 2004).

Contrary to the Village's argument, *City of Sherrill* did not change the rule that reservation land is Indian country. Judge Skretny in the Western District expressly recognized as much just last year: "[T]he Supreme Court did not disturb the Second Circuit's conclusion that a historic reservation that was never disestablished remains 'Indian country.'" *Citizens Against Casino Gambling in Erie Cnty. v. Stevens*, 945 F. Supp. 2d 391, 403 (W.D.N.Y. 2013). Indeed, in his dissenting opinion in *City of Sherrill*, Justice Stevens emphasized – without contradiction – that the majority did not "question[] the accuracy of [the Second Circuit's] conclusion" that the Oneida reservation was "Indian country." 544 U.S. at 223 (Stevens, J., dissenting).[6]

C. Limits on Sovereign Immunity Do Not Warrant Narrowing the Injunction.

Finally, the Village argues that the requested injunction is overbroad because tribal sovereign immunity from suit protects only the Nation, and not the individuals who operate Lakeside Entertainment. Village Br. 18-20. But Plaintiffs have not argued that sovereign immunity protects individuals – and the Village's argument ignores that sovereign immunity is merely an *alternative* basis for injunctive relief. Plaintiffs' likelihood of success on Count One – IGRA preemption – is itself a sufficient basis to grant the injunction in its entirety.

[6] The Village cites no case refusing to treat federally recognized reservation land as "Indian country." In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) (cited at Village Br. 17), the Supreme Court held that land can be "Indian country" even when it falls *outside* a reservation – there, trust land outside the reservation. *Id.* at 511. In *Venetie* (cited at Village Br. 18), the Court addressed a situation in which Congress had *revoked* the tribe's reservation. 522 U.S. at 532. And in *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.*, 89 F.3d 908 (1st Cir. 1996) (cited at Village Br. 18), the site at issue was "neither part of a formal reservation nor an allotment." *Id.* at 915.

II. ABSENT AN INJUNCTION, IRREPARABLE HARM IS IMMINENT.

Lakeside Entertainment accounts for the overwhelming majority of the Nation's revenue and is one of just two significant revenue-generating facilities operated by the Nation today. *See* 2d Supp. Decl. of Clint Halftown ("Halftown 2d Supp. Decl.") ¶ 11. Even temporary closure would irreparably damage the Nation's sovereignty and self-sufficiency, regardless of whether it could recover its full losses years later. *Id.* Moreover, the injuries threatened – destroyed goodwill, reputational harms, and a fledging business's profits – plainly support preliminary relief.

The Village's lead counterargument rests on egregious omissions. The Village complains of Plaintiffs' "unexplained" and "undue" delay in bringing suit, Village Br. 21 – yet the Village is well aware of the reason for the delay. In December 2013, after the Village vigorously threatened action, the parties entered a "standstill" agreement. That agreement provided that the Village would not initiate action against Lakeside Entertainment "without first providing advance notice of 48 hours," and that the passage of time during the agreement's pendency "shall not constitute a basis for any claim of delay in seeking a remedy from any court." DeBruin Supp. Decl. ¶¶ 2-3 & Ex. A (emphasis added). As late as October 24, 2014, the Village's outside counsel confirmed the continued existence of an agreement; reaffirmed the Village's awareness of it; and advised the Nation's counsel that the Village still intended to take no action. *Id.* ¶ 6.

That changed on October 27, however. The Village's outside counsel advised the Nation's counsel that the Village intended to proceed with enforcement following the expiration of the 48-hour notice period. *Id.* ¶ 7; Decl. of David W. DeBruin ¶ 9 (Oct. 28, 2014), ECF No. 5-5. The Nation promptly asked Village Attorney Chad Hayden to renew the standstill agreement in order to avert litigation, but he stated that he had "no response" to that inquiry. Decl. of Joshua M. Segal ¶ 7 (Oct. 28, 2014), ECF No. 5-4. Accordingly, on October 28, Plaintiffs filed this ac-

tion. The Nation's attempt to avoid suit until it had no choice should be commended, not held against it. *See Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc.*, 486 F. Supp. 414, 434-35 (S.D.N.Y. 1980) ("Parties should not be encouraged to sue before a practical need to do so has been clearly demonstrated"). Indeed, had the Nation rushed to court before an actual imminent threat of harm, its suit likely would have been dismissed as unripe.

Nor is the Village correct that the harms to the Nation's sovereignty are immaterial because gaming "is not essential to the Nation's sovereignty." Village Br. 23. Congress has determined otherwise. IGRA's declared purpose is "to promote tribal economic development, tribal self-sufficiency, and strong tribal government," 25 U.S.C. § 2701(4), reflecting Congress's concern with "preserving the sovereign rights of tribal governments," S. Rep. No. 100-446, at 5 (1988), *reprinted in* 1988 U.S.C.C.AN. 3071, 3075. On Congress's invitation, the Nation has tied its self-sufficiency – and even its government's viability – to IGRA-protected gaming. There is no basis for the Village's apparent contention that it may impinge on the Nation's sovereignty as long as it pays afterward. *See Forest Cnty. Potawatomi Cmty. of Wis. v. Doyle*, 803 F. Supp. 1526, 1536-37 (W.D. Wis. 1992) (granting injunction in similar circumstances).

This Court's opinion in *Cayuga Indian Nation of New York v. Village of Union Springs*, 293 F. Supp. 2d 183 (N.D.N.Y. 2003), merely underscores the appropriateness of an injunction. There, the Nation asserted a right to renovate property without complying with local building codes. The Court deemed the infringement on the Nation's sovereignty to be "not of the level required" for irreparable harm, but only because compliance *would still have permitted the Nation to continue work. Id.* at 198. The opposite is true here. The only way for the Nation to comply with the Village's demands is to *shut down* Lakeside Entertainment completely – turning this vital source of revenue into a source of loss, with devastating consequences for the Nation's

"tribal self-sufficiency." 25 U.S.C. § 2701(4). Indeed, this Court's 2003 opinion recognized that preliminary relief *is* warranted to avoid "seizure of . . . tribal assets" or infringements that "effectively cripple[] the tribe's ability to conduct business or provide . . . services." *Cayuga Indian Nation*, 293 F. Supp. 2d at 197 (discussing *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171-72 (10th Cir. 1998), and *Winnebago Tribe of Nebraska v. Stovall*, 216 F. Supp. 2d 1226, 1233 (D. Kan. 2002)). That is this case exactly: The Village has threatened to "shut down" the facility and "seize [the facility's] electronic bingo machines." Decl. of B.J. Radford, Ex. G (Oct. 28, 2014), ECF No. 5-6. And such actions would "effectively cripple[]" the Nation by destroying its largest revenue source. *Cayuga Indian Nation*, 293 F. Supp. 2d at 197.

Irreparable harm is equally clear even if Lakeside Entertainment is viewed purely as a business. The Village labels the Nation's assertions of harm to the facility's goodwill and reputation as "conclusory," Village Br. 21-22, but it is obvious that such harm would result from the facility's indefinite shuttering. If the Village is permitted to shut down the facility based on allegations that the activities inside are categorically illegal, it is beyond question that some customers will not return, but instead will choose to game elsewhere in the area. *See Davids v. Coyhis*, 857 F. Supp. 641, 647 (E.D. Wis. 1994) (granting injunction to protect an IGRA-protected facility because the "erosion in public confidence increases with each day the Casino remains closed, and will be difficult to reestablish even when the Casino opens").[7] Moreover, during the facility's closure – which could last years – the Nation would lose opportunities to develop relationships with countless new customers. Such harms will inevitably be "difficult to quantify," *Metso Minerals, Inc. v. Powerscreen Int'l Distrib. Ltd.*, 788 F. Supp. 2d 71, 74-75 (E.D.N.Y.

[7] The assertion that the Nation "operates the only class II gaming facility in the Village," Village Br. 21-22, is immaterial. The Turning Stone Casino Resort is less than an hour and a half from Union Springs. And only weeks ago, a State panel recommended approval of a "Las Vegas-style resort casino" in Tyre, just twenty minutes away. DeBruin Supp. Decl. Ex. D.

2011), especially because Lakeside Entertainment is a new business. *See Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 436 (2d Cir. 1993) (calculation of lost profits "highly speculative" because plaintiff "lacks a track record from which to extrapolate").[8] Preliminary relief is necessary to "avoid the unfairness of denying an injunction . . . on the ground that money damages are available, only to confront the plaintiff at a trial on the merits with the rule that damages must be based on more than speculation," *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 38 (2d Cir. 1995).[9]

III. THE BALANCE OF HARDSHIPS FAVORS PLAINTIFFS.

The Village maintains that, even if Plaintiffs are likely to prevail on the merits, the balance of hardships somehow disfavors an injunction. That contention lacks merit.

Initially, the Village asserts that Plaintiffs "would not suffer any hardship" from Lakeside Entertainment's closure "because they would be restored to the same position they were in . . . nine years ago." Village Br. 23. That assertion is nonsensical. The loss of a decade's progress is a *massive* hardship, especially because – as explained above – revenues from Lakeside Entertainment are so vital to the Nation today.

Alternatively, the Village claims that the balance of hardships favors it because "violence and lawlessness" related to the Nation's leadership dispute have "threaten[ed] the welfare and

---

[8] Not one of the Village's cited cases involved a *shutdown* of the plaintiff's business. *See Shepard Industries, Inc. v. 135 East 57th Street, LLC*, No. 97 Civ. 8447, 1999 WL 728641, at *8 (S.D.N.Y Sept. 17, 1999) ("Plaintiff has not alleged that it faces imminent financial ruin, and . . . Plaintiff's damages would be easily calculable at trial."); *Litho Prestige v. News Am. Publ'g, Inc.*, 652 F. Supp. 804, 807-08 (S.D.N.Y. 1986) (no irreparable harm from "a four percent business loss"); *Caldwell Mfg. Co. N. Am., LLC v. Amesbury Grp., Inc.*, No. 11-cv-6183T, 2011 WL 3555833, at *5 (W.D.N.Y. Aug. 11, 2011) (no irreparable harm from "the mere fact that the parties are direct competitors").

[9] There is no merit to the contention that the Nation's lease expenses cannot support an injunction because they are supposedly "self-inflicted." Village Br. 22. Those expenses are obligations that the Nation has undertaken *in order to exercise its federally protected rights*.

safety of [Village] citizens." Village Br. 24. That assertion is no basis to deny the injunction. First, not a single one of the incidents identified by the Village involved the gaming facility. *See* Trufant Decl. ¶¶ 11-17. Instead, they have occurred at other locations where the "Unity Council" has lawlessly seized Nation properties by force. For purposes of this lawsuit, any disruption flowing from the leadership dispute is just a red herring. Indeed, the Village does not identify a single harm resulting from continued gaming at Lakeside Entertainment.

Second, even setting aside the absence of any such harm, the Nation should not be penalized for the disruptions resulting from the leadership dispute. Since April 28, when the Unity Council began its campaign to seize Nation-owned properties, the Nation has consistently sought peaceful resolution of the matter. Mr. Halftown, Mr. Twoguns, and Mr. Wheeler have repeatedly sought the assistance of state courts, whose intercession the Unity Council has managed to thwart – with some assistance from the Village. *See* DeBruin Supp. Decl. Ex. C (letter from Defendant Hayden providing opinion regarding Lakeside Entertainment to support Unity Council opposition to injunctive relief from Fourth Department); *see also* Decl. of Joseph J. Heath ¶ 27 (Nov. 13, 2014), ECF No. 27-8 (claiming "cooperative and productive" interactions with the Village). The Nation has also pleaded for law enforcement to intervene, generally to no avail. *See* Halftown 2d Supp. Decl. ¶ 4. And the Nation has urged BIA to reach a prompt leadership decision to provide clarity and guidance to state and local law enforcement; now, BIA has promised a decision by February 20. DeBruin Supp. Decl. Ex. C. Particularly with a leadership decision so close, the disruptions that regrettably have resulted from the Nation's leadership dispute provide no reason to deny the preliminary injunction.

CONCLUSION

The motion for a preliminary injunction should be granted.

Respectfully submitted,

Dated: January 9, 2015

/s/ John G. Powers

John G. Powers (Bar No. 508934)
Hancock Estabrook LLP
1500 AXA Tower I
100 Madison Street
Syracuse, New York 13202
(315) 565-4500

David W. DeBruin (*pro hac vice*)
Joshua M. Segal (*pro hac vice*)
Matthew E. Price (*pro hac vice*)
Jenner & Block LLP
1099 New York Ave., N.W.
Washington, DC 20001