IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GEORGE HENGLE, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 3:19-cv-00250
	:	
SCOTT ASNER, *et al*.,	:	
	:	
Defendants.	:	

PLAINTIFFS' RESPONSE TO AMICUS BRIEF OF TRIBAL AMICI CURIAE

Plaintiffs, George Hengle, Sherry Blackburn, Willie Rose, Elwood Bumbray, Tiffani Meyers, Steven Pike, Sue Collins, and Lawrence Mwethuku, by counsel, respectfully submit this response to the Amicus Brief (ECF No. 102) filed by the Native American Finance Officers Association, the National Congress of American Indians, the National Gaming Association, the Association on American Indian Affairs, and the National Center for American Indian Economic Development.

RESPONSE

"The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). Such briefs extend "beyond the original meaning" of the term "amicus curiae," which "means friend of the court, not friend of a party." *Id*. The Tribal Amici's brief fits this bill. It offers no unique information or perspective not covered in the 50 pages of briefing submitted by the Tribal Officials of the Habematolel Pomo of Upper Lake. Rather, it primarily regurgitates the same argument of

the Tribal Officials, attempting to bolster their extreme and incorrect legal positions under the guise of a neutral third-party organization.

For example, the Tribal Amici argue that state laws do not apply to tribally owned and operated businesses. ECF No. 102 at 9-10. This is not only redundant of the Tribal Officials' brief (ECF 65 at 14, 17-22), but it is wrong and ignores deep-rooted precedent from the Supreme Court that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973) (citing *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398 (1968)); *see also Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795 (2014) ("Unless federal law provides differently, 'Indians going beyond reservation boundaries' are subject to any generally applicable state law.") (quoting *Mescalero*, 411 U.S. at 148-49).[1] Put differently, when a tribe engages in interstate commerce, neither the Tribe's sovereignty nor its immunity provides it with a free pass to "operate outside of Indian lands without conforming their conduct in these areas to federal and state law." *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 128 (2d Cir. 2019). Because Plaintiffs already briefed this issue (ECF No. 98 at 2, 20-23, 27), they merely summarize those arguments here.

Likewise, Tribal Amici argues that only "Congress maintains exclusive authority" over "the scope of a tribe's sovereign immunity," ECF No. 102 at 8 (emphasis added), and "there is no

[1] *Organized Village of Kake v. Egan*, 369 U.S. 60, 75-76, (1962); *Tulee v. Washington*, 315 U.S. 681, 683 (1942); *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575 (1928); *Ward v. Race Horse*, 163 U.S. 504 (1896)); *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144, n. 11 (1980) (reaffirming this principle from *Mescalero Apache Tribe*); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005) (same); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 (1995) (same); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 166 (1980) ("[T]here is a significant territorial component to tribal power. Thus state taxes on the off-reservation activities of Indians are permissible[.]").

basis to craft a judicial exception to the application of sovereign immunity" to Plaintiffs' claims. *Id*. at 9. Again, this is legally incorrect. In 2014, the Supreme Court unequivocally acknowledge that "tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct." *Bay Mills*, 572 U.S. at 785. Thus, while it is true that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity,"[2] it is also true that the Supreme Court has created an exception to the coverage of tribal sovereign immunity in official capacity suits for prospective relief. *Bay Mills*, 572 U.S. at 785. Because Plaintiffs briefed this issue (ECF No. 98 at 20-25), they will not repeat those arguments here.

Additionally, the Tribal Amici argue that there is no authority or precedent relegating tribal entity contracts to a lesser enforcement under the law. ECF No. 120 at 15. Plaintiffs do not disagree with statement, but it mischaracterizes the issue before the Court and Plaintiffs' argument. Assuming the tribe has a fair and reasonable body of laws (which this one does not), it should be enforced like the laws of any other jurisdiction. By the same token, however, if a tribe's law is unfair, unreasonable, unconscionable, one-sided, or violates the public policy of another jurisdiction, then those laws should be subject to same scrutiny and potential unenforceability just like the laws of any other jurisdiction. *See* ECF 98 at 6-20 (explaining the reasons why this Tribe's choice of law is unenforceable; not that tribal law should be subject to a different standard of enforcement). In short, neither a lower nor higher standard should be applied to the enforceability of a tribal choice-of-law provision.

Finally, the Tribal Amici argue that Plaintiffs' claims "undermine Congress's federal policy of promoting tribal self-determination, strong tribal government, and tribal economic

[2] *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

development." ECF No. 102 at 13. But there is no federal policy in favor of allowing a tribe to violate state law. Instead, as explained above, "[u]nless federal law provides differently, 'Indians going beyond reservation boundaries' are subject to any generally applicable state law." *Bay Mills*, 572 U.S. at 795 (emphasis added). Were it otherwise, "the state and its citizens would seemingly be without recourse. Tribes and their officials would be free, in conducting affairs outside of reserved lands, to violate state laws with impunity." *Gingras*, 922 F.3d at 124. Such "conduct by tribes is especially fraught," *id*., and the federal policy promoting tribal self-determination and economic development does not provide a free pass to tribal governments to violate generally applicable state laws. *Bay Mills*, 572 U.S. at 795 ("True enough, a State lacks the ability to sue a tribe for illegal gaming when that activity occurs off the reservation. But a State, on its own lands, has many other powers over tribal gaming that it does not possess (absent consent) in Indian territory."). Indeed, if federal policy permitted tribes to disregard state law, there would have been no need to enact the Indian Regulatory Gaming Act. *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002) (explaining that the IGRA "seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes").

Accordingly, this Court should grant little weight to the Tribal Amici's brief, as it merely raises the same (incorrect) arguments already presented by the Tribal Officials.

Respectfully submitted,
PLAINTIFFS

By: */s/ Kristi C. Kelly*
Kristi C. Kelly, Esq., VSB #72791
Andrew J. Guzzo, Esq., VSB #82170
Casey S. Nash, Esq., VSB #84261
KELLY GUZZO, PLC
3925 Chain Bridge Road, Suite 202
Fairfax, VA 22030
(703) 424-7572 – Telephone
(703) 591-0167 – Facsimile
Email: kkelly@kellyguzzo.com
Email: aguzzo@kellyguzzo.com
Email: casey@kellyguzzo.com
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2019, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all counsel of record.

/s/ Kristi C. Kelly
Kristi C. Kelly, Esq., VSB #72791
KELLY GUZZO, PLC
3925 Chain Bridge Road, Suite 202
Fairfax, VA 22030
(703) 424-7572 – Telephone
(703) 591-0167 – Facsimile
Email: kkelly@kellyguzzo.com
Counsel for Plaintiffs