**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF NEW YORK**

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| SENECA NATION OF INDIANS,<br><br>Petitioner,<br><br>v.<br><br>STATE OF NEW YORK,<br><br>Respondent. | Civil Case No. 19-cv-00735 |

**MEMORANDUM OF LAW OF RESPONDENT STATE OF NEW YORK IN OPPOSITION TO SENECA NATION'S RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT**

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Respondent, the State of New York (the "State"), by and through its undersigned counsel, respectfully submits this memorandum of law in opposition to the Rule 60(b) Motion for Relief from Judgment, dated April 23, 2021 (the "Motion," or "Mot.") [D.I. 40-1], by which Petitioner, the Seneca Nation of Indians (the "Nation," and, together with the State, the "Parties"), seeks to vacate or stay enforcement of this Court's final judgment confirming the arbitral awards (the "Awards") entered in favor of the State [D.I. Nos. 14, 15] (the "Final Judgment").

## PRELIMINARY STATEMENT

Through the Motion, the Nation mounts a collateral attack on arbitral awards issued over two years ago in an arbitration in which it fully participated, which were confirmed by this Court in the Final Judgment, and which the Second Circuit recently affirmed.

For the past two years, the Nation has sought to overturn the determination by the arbitrators (the "Panel") that it is required under the terms of its agreement with the State (the "Compact") [D.I. 2-6] to continue to share with the State a portion of its gaming revenues during the Compact's renewal period (the "Renewal Period"). The Nation first filed a petition with this Court seeking to vacate the Awards. The Nation did not challenge the merits of the Panel's determination, but asserted that the Panel's interpretation of the Compact manifestly disregarded the approval requirements of the Indian Gaming Regulatory Act ("IGRA"). This Court denied the petition, confirmed the Awards, and the Second Circuit affirmed. For its part, the Second Circuit issued a 28-page opinion after extensive briefing and an oral argument, in which it rejected all of the Nation's challenges to the Awards. The Second Circuit issued the mandate (the "Mandate") more than a month ago, after also denying a request for rehearing or reconsideration.

Rather than accept the fully-litigated outcome of the Parties' dispute, the Nation now seeks to open a new front by attacking the Awards by means of a motion to set aside the Final Judgment under Rule 60(b)(6). The Motion is procedurally barred, and this Court lacks jurisdiction to disturb the Final Judgment. In any case, there exists no basis to vacate the Final Judgment under Rule 60(b)(6).

*First*, the Motion is barred under Federal Rule of Civil Procedure Rule 81(a)(6)(B) because the Federal Arbitration Act (the "FAA") provides the exclusive grounds for challenging an arbitral award. The Nation has exhausted its statutory challenges to the Awards under the FAA and cannot now use Rule 60 to mount a collateral attack on the confirmed Awards or the Final Judgment.

*Second*, the Second Circuit issued the Mandate more than a month ago, thereby depriving this Court of jurisdiction to alter the Circuit Court's ruling. The Nation's contention that a recent letter from the Department of the Interior (the "DOI") responding to an *ex parte* request by the Nation revives the Court's jurisdiction is meritless, particularly where the allegedly "exceptional circumstances" raised by the DOI's letter are nothing more than recycled arguments made by the Nation that were already considered and rejected by the Second Circuit.

*Third*, and in any event, the Motion fails to present such extraordinary circumstances to warrant circumventing the FAA's exclusive procedures for challenging the Awards or the Final Judgment. The Motion is premised on the DOI's letter response to the Nation's extrajudicial lobbying effort, which itself circumvented both the Parties' agreed-to arbitration process and this Court as the agreed forum for enforcing the Awards. The letter merely repeats allegations and arguments previously raised by the Nation and rejected by the Panel, this Court, and the Second

Circuit. In fact, the DOI's letter is premised on a false assumption that the continued payment obligations during the Renewal Period constitute an amendment to the Compact, a position that is wrong as a matter of law and which even the Nation has disavowed. Moreover, as characterized by the Nation, the DOI's letter would reflect a total reversal from the DOI's prior expressed deference to the Parties' arbitration, further weighing against ascribing any relevance or weight to that letter under Rule 60(b)(6). The letter also in no way establishes that adverse agency action is imminent or even possible.

The Nation promised the State in the DOI-approved Compact under which the arbitration was brought that "the decision of the arbitrators shall be final, binding and non-appealable." After almost four years of proceedings, it is past time that the Nation be held to its promise and that the Awards be paid.

## BACKGROUND[1]

### I. THE DISPUTE AND ARBITRATION PROCEEDINGS

As the Court is aware, the Parties' underlying dispute relates to the renewal provision of the Class III gaming Compact that they entered into on August 18, 2002. Under the Compact, the State agreed to provide the Nation exclusive rights to operate certain gaming activities in a certain geographic area (the "Exclusivity Area") in exchange for a share of gaming revenues (the "State Contribution"), which is the only consideration the State receives under the Compact. Compact ¶ 12(b)(1). The Compact provides for an initial 14-year term and became effective on

[1] A more detailed discussion of the Parties' dispute and the arbitration proceedings leading to the issuance of the Awards was set forth in the State's *Memorandum of Law in Support of Opposition to the Petition to Vacate the Final Arbitration Award and Cross-Petition to Confirm Partial Final Award and Corrected Final Award*, dated July 12, 2019 [D.I. 9-2] ("Cross-Petition").

December 9, 2002. Compact ¶¶ 4(a)-(b); 67 Fed Reg. 72,968 (Dec. 9, 2002). The Compact further provides that, if neither Party objects in writing at least 120 days before conclusion of the initial term, it automatically renews for an additional seven-year period (the "Renewal Period"). Compact ¶ 4(c)(1). Neither Party objected, and the Compact automatically renewed on December 9, 2016. *Id*. However, on March 31, 2017, the Nation informed the State for the first time that it would cease making the required State Contribution payments during the Renewal Period [D.I. 9-5]. The Nation contended that it was not bound to pay the State Contribution during the Renewal Period, but that the State was required to still provide exclusivity under the Compact within the Exclusivity Area. *Id*.

The Compact includes a broad dispute resolution provision that requires the Parties to submit any disputes to binding arbitration. Compact ¶ 14. Accordingly, as agreed to and required by the Compact, the Parties submitted the dispute to binding arbitration. After extensive briefing and a hearing where the Parties presented written and live testimony, a majority of the arbitral Panel issued a Partial Final Award in the State's favor on January 7, 2019, holding that the Nation remained obligated to make State Contribution payments during the Renewal Period and ordering specific performance of the Nation's payment obligations. Partial Final Award [D.I. 2-4] at 54. In the Partial Final Award, the Panel majority considered and rejected the Nation's argument that the Secretary had not "approved" the continued revenue sharing as allegedly required by IGRA: "[W]hile it is beyond dispute that the Panel has no legal authority to usurp the Secretary's role and enforce a Compact term that the Secretary did not approve, the Panel does have the duty and authority to determine whether the terms of the Compact already provide for revenue sharing payments upon renewal." *Id.* at 42. The Panel

further found that "renewal was part of the Compact that was reviewed and deemed approved" by the Secretary. *Id.* The Panel issued the Final Award on April 8, 2019, ordering the Nation to make outstanding State Contribution payments already due, and to resume making quarterly payments during the Renewal Period in accordance with the Compact. Final Award [D.I. 2-3] at 2.

Under the Compact, the Awards are "final, binding and non-appealable." Compact ¶ 14(i). Moreover, "[f]ailure to comply with the arbitration award within the time specified therein for compliance, or should a time not be specified, then forty-five (45) days from the date on which the arbitration award is rendered, shall be deemed a breach of the Compact." *Id.* The Parties also agreed in the Compact that this Court would have exclusive jurisdiction to enforce the Awards. *Id.*

## II. THIS COURT CONFIRMS THE AWARDS

The Nation filed its Petition to vacate the Final Award under Section 10 of the FAA on June 6, 2019 [D.I. 2-1] (the "Petition," or "Pet."). The Petition claimed not to challenge the Panel's interpretation of the Compact (*see* Pet. at 10), but asserted that the Final Award was issued in "manifest disregard" of certain IGRA provisions because the Secretary never approved payment of the State Contribution during the Renewal Period. Pet. at 23. Alternatively, the Nation requested that the Court refer to the DOI, pursuant to the primary jurisdiction doctrine, the question of whether the Secretary approved such payments. *Id.* at 24-25.

This Court denied the Petition and confirmed the Awards by its Decision and Order dated November 8, 2019 [D.I. 14] ("Dist. Op."), holding that the Awards were not issued in "manifest disregard of the law." Dist. Op. at 26. The Court rejected the Nation's central contention that

the "[Panel] majority . . . impose[d] a new revenue-sharing obligation" when interpreting the Compact, finding instead that the Panel "simply construed the [P]arties' existing, approved [C]ompact," and that "the [P]arties' existing, already-approved Compact required revenue sharing during the [R]enewal [P]eriod." Dist. Op. at 24-25. The Court also rejected the Nation's argument that the secretarial approval provisions in IGRA precluded enforcement of the Awards: "The Nation's position is premised on a proposition that it has provided no authority for—that the arbitration award is an amendment to the Compact that requires the Secretary's approval under the IGRA." *Id.* at 23.

The Court also declined to refer to the DOI the question of secretarial approval under the primary jurisdiction doctrine, holding that "[t]he arbitration question was not whether the Secretary explicitly approved State-Contribution payments during the renewal period, but rather, whether the terms of the Compact that the Secretary *did approve* provide for payment of the State Contribution during that term." *Id.* at 26-27 (emphasis in original). The Court held that the Petition did not establish that Congress had delegated to the Secretary any authority over arbitral awards pertaining to IGRA compacts. *Id.* at 27, n.12.

## III. THE SECOND CIRCUIT AFFIRMS

This Court entered the Final Judgment confirming the Awards on November 12, 2019 [D.I. 15], and the Nation appealed to the Second Circuit on March 16, 2020. *See* Brief and Special Appendix for Plaintiff-Appellant, *Seneca Nation of Indians v. New York*, No. 19-04022-cv (2d Cir. Mar. 16, 2020), Dkt. No. 36 ("App. Br."). As it had contended before this Court, the Nation argued that (a) the Panel majority acted in "manifest disregard" of IGRA when it ordered the Nation to make State Contribution payments during the Renewal Period; and (b) the Parties'

dispute should be referred to the DOI pursuant to the primary jurisdiction doctrine. App. Br. at 23. The Nation conceded that it could not re-litigate the Panel's determination that the Compact requires continued payments during the Renewal Period, and also expressly disavowed that the Awards constituted amendments to the Compact. *Id.* at 25 ("The Nation . . . did not challenge [the Panel's] interpretation in the district court, and does not do so here."); *id*. at 42 ("[T]he Nation never argued that an arbitral interpretation of a compact 'constitutes an amendment' under IGRA."); *see also* Reply Brief for Plaintiff Appellant at 2, *Seneca Nation of Indians v. New York*, No. 19-04022-cv (2d Cir. July 7, 2020), Dkt. No. 60 at ("[The Nation's] argument is not predicated on the notion that the [Panel] majority amended the Compact").

The Second Circuit affirmed this Court's decision confirming the Awards on February 22, 2021. *See* Decision and Opinion at 28, *Seneca Nation of Indians v. New York*, No. 19-04022 (2d Cir. Feb. 22, 2021), Dkt. No. 82-1 ("App. Op."). The Second Circuit agreed with this Court's determinations that the Panel majority did not manifestly disregard IGRA because the dispute was a question of contractual interpretation reserved for the Panel (App. Op. at 2), and that referral to the DOI was not appropriate because such questions of law are for the courts and not the province of agency resolution, and that deferring to the DOI would conflict with the goals of the FAA. *Id.* at 25-27. In considering whether the Panel's contract interpretation was subject to further secretarial approval, the Second Circuit found that IGRA does not impose such a requirement. *Id.* at 22 ("[N]either IGRA nor our case law contains a clear rule requiring secretarial approval of arbitral awards based on extrinsic evidence.").

The Nation applied to the Second Circuit for panel rehearing or en banc review on March 8, 2021, which was denied on April 9, 2021. *See* Decision on Request for Panel Rehearing or

Rehearing *en banc*, *Seneca Nation of Indians v. New York*, No. 19-04022-cv (2d Cir. Apr. 9, 2021), Dkt. No. 91. The Second Circuit issued its Mandate confirming the Final Judgment (and with it, the Awards) on April 16, 2021. [D.I. 38].

## IV. THE DOI DEFERS TO THE CERTAINTY OF THE PARTIES' AGREED-TO ARBITRATION

In late 2016, the Nation communicated with the DOI regarding the Parties' dispute. Mot. at 20. The DOI issued a letter dated January 19, 2017 (the "January 19 Letter") [D.I. 2-8] in response to certain *ex parte* submissions by the Nation,[2] but made clear that "th[e] letter should not be construed as[] a preliminary decision or advisory opinion regarding compacts that are not formally submitted to [the DOI] for review and approval." January 19 Letter at 1.

On December 15, 2017, after the Parties had submitted their dispute to arbitration, the DOI withdrew the January 19 Letter. [D.I. 2-12]. Then-Acting Director of the Office of Indian Gaming, Maria K. Wiseman, recognizing that the Parties were engaged in arbitration proceedings to resolve the Compact interpretation issues, withdrew the January 19 Letter because it "did not provide the certainty available to the [P]arties in arbitration proceedings." *Id*.

On April 16, 2019, after losing the arbitration but before filing the petition to vacate the Awards, the Nation wrote to the DOI requesting "review and approval" of the Awards as an "amendment" to the Compact. [D.I. 2-13]. The DOI responded on June 3, 2019 and rejected the Nation's submission as not complying with applicable regulations, stating that the DOI "t[ook] no position on th[e] question" of whether "the Arbitration Award effectively amended [the Compact] that was approved by operation of law in 2002." [D.I. 2-17 at n.1].

[2] In the January 19 Letter, the DOI responded to a letter from the Nation that was not part of the record before the Panel, this Court or the Second Circuit and which has never been disclosed by the Nation to the State.

## V. THE DOI RESPONDS TO THE NATION'S MOST RECENT *EX PARTE* REQUEST

On March 21, 2021, after the Second Circuit had affirmed the Final Judgment and while the request for rehearing was pending, and in open defiance of this Court and the Second Circuit's determinations that the DOI retained no authority regarding arbitration awards, the Nation once again approached the DOI (and President Biden), raising concerns about the State enforcing the Final Judgment. Mot. Ex. E [D.I. 40-7]. The letter was not copied to the State. *Id*. In its letter, the Nation asserted that "any exclusivity payment obligation during the Compact extension period constitutes a Compact amendment that requires Interior Department approval to be valid," notwithstanding this Court had already rejected that argument and the Nation had expressly disavowed that position before the Second Circuit. *Id.* at 2. The Nation also referenced the January 19 Letter sent by the DOI before the Parties submitted their dispute to arbitration, but failed to disclose that that letter was expressly not to be construed as a "preliminary decision or advisory opinion" [D.I. 2-8] or that it had subsequently been withdrawn by the DOI in deference to the arbitration [D.I. 2-12].[3] The Nation also alleged for the first time that "the payment provisions inherently violate federal law as an illegal 'tax, fee, charge, or other assessment' because they bear no relation to supporting gaming operations" (Mot. Ex. E (citing 25 U.S.C. § 2710(d)(4))).[4] The State was not advised of, and had no opportunity to be heard

[3] The Nation did acknowledge that the DOI had withdrawn the January 19 Letter, but the Nation represented that the withdrawal had been "for no clear reason" and did not disclose the DOI expressly stated it was withdrawing the letter in deference to the then-pending arbitration. *See* Mot. Ex. E at 3, n.6 (citing [D.I. 2-12]).

[4] The Nation has never alleged to this Court or the Second Circuit that the continued revenue sharing payments under the Compact are an "illegal tax, fee, charge, or other assessment," much less identified any legal authority to support such an allegation.

regarding, the Nation's *ex parte* submission to the DOI at the time.

It is unclear what further discussions occurred between the Nation and the DOI, but the DOI responded to the Nation's letter on April 15, 2021. Mot. Ex. A (the "DOI Letter") [D.I. 40-3]. The DOI Letter recognizes that, pursuant to 25 U.S.C. § 2710(d)(8)(C), "[t]he Compact became effective upon publication in the Federal Register" as of December 9, 2002, and also acknowledges that the fundamental bargain between the Nation and the State was that in exchange for geographic exclusivity for gaming activity the Compact required the Nation to share gaming revenue with the State. *Id.* at 1, n.2. The DOI Letter notes that all compacts and amendments are subject to review and approval by the Secretary, and in that context states that the Secretary did not specifically review revenue sharing payments for the renewal period of the Compact. The DOI observes that it was not purporting to resolve whether the Panel's determination that the Nation is required to continue to make revenue sharing payments to the State during the Renewal Period complies with IGRA, but invited the Parties' to jointly submit that question to the DOI "[i]f the [P]arties would like." *Id.* at 3. The DOI Letter does not address the DOI's prior deference to the Parties' arbitration, nor does it address the Nation's unsuccessful efforts to challenge the Awards under the exclusive procedures of the FAA, though it does acknowledge that the Parties' dispute "triggered the Compact's dispute resolution provisions that required binding arbitration." *See id.* at 1. The DOI Letter does not indicate or suggest that the DOI is contemplating initiating any agency enforcement proceeding, and does not direct or ask either Party to take any action.

## ARGUMENT

Because relief under Rule 60 has the effect of unsettling the finality of judgment—a

consideration that ranks "[v]ery high among the interests in our jurisprudential system"—the grounds for relief under Rule 60(b) are exceedingly limited. *United States v. Cirami*, 563 F.2d 26, 33 (2d Cir. 1977) ("It has become almost a judicial commonplace to say that litigation must end somewhere, and we reiterate our firm belief that courts should not encourage the reopening of final judgments or casually permit the relitigation of litigated issues out of a friendliness to claims of unfortunate failures to put in one's best case."). *See also United States v. Int'l Bd. of Teamsters*, 247 F.3d 370, 391 (2d Cir. 2001) ("A motion for relief from judgment is generally not favored."); *Metro. Estates, Inc. v. Emmons-Sheepshead Bay Dev., LLC*, 662 Fed. Appx. 100, 103 (2d Cir. 2016) ("Although Rule 60(b) 'strikes a balance between serving the ends of justice and preserving the finality of judgments[,] . . . final judgments should not be lightly reopened.'").

Accordingly, a party seeking to set aside a judgment under Rule 60(b)(6) must demonstrate "extraordinary circumstances." *See In re Terrorist Attacks on September 11, 2001 (Kingdom of Saudi Arabia)*, 741 F.3d 353, 356 (2d Cir. 2013) ("Recognizing Rule 60(b)(6)'s potentially sweeping reach, courts require the party seeking to avail itself of the Rule to demonstrate that 'extraordinary circumstances' warrant relief."); *Stevens v. Miller*, 676 F.3d 62, 67 (2d Cir. 2012); *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986) ("Since 60(b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances."). Here, the Motion is both procedurally barred and outside this Court's jurisdiction, and in any case there are no extraordinary circumstances to warrant vacatur of the Awards or Final Judgment under Rule 60(b)(6).

## I. THE MOTION IS BARRED UNDER RULE 81(A)

Relief under Rule 60 from this Court's final judgment confirming the Awards (and

denying the Nation's motion to vacate the Awards) under the FAA is barred by virtue of Rule 81. Specifically, Rule 81(a)(6)(B) provides that the Federal Rules of Civil Procedure that precede it (including Rule 60) govern proceedings under the FAA only to the extent that matters of procedure are not already provided for in the FAA. Fed. R. Civ. P. 81(a)(6)(B) ("These rules, to the extent applicable, govern proceedings under [9 U.S.C., relating to arbitration], except as th[at] law[] provide[s] other procedures."). Accordingly, where the FAA provides for specific procedures, they supersede and take precedence over any contrary procedures under the Federal Rules of Civil Procedure. 14 James Wm. Moore et al., *Moore's Federal Practice - Civil* § 81.08 (2021) ("If the Federal Arbitration Act covers a procedure, the Civil Rules do not apply.").

Section 10 of the FAA provides the specific, enumerated grounds for challenging an arbitration award, and provides the exclusive procedures for challenging or seeking to vacate arbitral awards. *See* 9 U.S.C. § 10; *see also ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98, 123 (2d Cir. 2012) ("[T]he FAA 'contains exclusive procedures for vacating arbitration awards . . . .'" (citation omitted)). Thus, pursuant to Rule 81(a)(6)(B), "Rule 60(b) is unavailable . . . in contesting the arbitrators' decision." *Chocolate Co., a Div. of World's Finest Chocolate v. Salomon, Inc.*, 748 F. Supp. 122, 125 (S.D.N.Y. 1990) (finding that Rule 60(b) cannot be used to challenge an arbitration award "[b]ecause a motion to vacate an award falls within the scope of 'matters of procedure,' and because [the FAA] explicitly provides for this relief"), *aff'd sub nom., Cook Chocolate Co. v. Salomon, Inc.*, 932 F.2d 955 (2d Cir. 1991); *see also Arrowood Indem. Co. v. Equitas Ins. Ltd.*, No. 13-cv-7680 (DLC), 2015 U.S. Dist. LEXIS 63643, at *12 (S.D.N.Y. May 14, 2015) (holding under Rule 81, "Rule 60(b) is unavailable . . . in contesting the arbitrators' decision" and collecting cases).

Here, the Nation cannot use Rule 60 to mount a collateral attack on the now confirmed Awards or the Final Judgment, because it has already availed itself of the procedures under Section 10 of the FAA and exhausted its statutory challenges to the Awards. The Parties agreed to binding arbitration to resolve their dispute, and agreed that any arbitral award would be "final, binding, and non-appealable." Compact ¶ 14; Pet. at 7. The Nation fully participated in the arbitration, and has never disputed it is bound by the Awards. Mot. at 8 ("[N]othing set forth below seeks to challenge the merits of the [P]anel majority's decision."). Further, there is no dispute that the Parties agreed this Court would have exclusive jurisdiction to enforce any arbitral award. Compact ¶ 14(i); *see also* Nation Answer to Cross-Petition [D.I. 14] at ¶ 11. Nor is there any dispute that the Nation has fully availed itself of the procedures and remedies under the FAA to challenge the Awards. The Nation petitioned this Court for vacatur of the Awards under Section 10 of the FAA, appealed the Court's determination to the Second Circuit and then sought reconsideration or rehearing of the Second Circuit's affirmance. Having thoroughly exhausted its right to challenge the Awards under the FAA, the Nation is bound by the Awards and the Final Judgment, and Rule 81 forecloses any application for further relief under Rule 60 seeking to contest the Awards. *See Bridgeport Rolling Mills Co. v. Brown*, 314 F.2d 885, 886 (2d Cir. 1963) (denying a Rule 60(b)(2) motion to vacate a labor arbitration award); *see also Lafarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1339 (9th Cir. 1986) (where "direct attack of the award pursuant to [S]ection 10 of the [FAA] is foreclosed," a Rule 60(b) movant "may not . . . collaterally attack the award under the guise of a motion to set aside the judgment confirming the award.").

The Nation's reliance on *City of Duluth v. Fond du Lac Band of Lake Superior*

*Chippewa*, 785 F.3d 1207 (8th Cir. 2015), is misplaced because that case did not involve the interplay between Rule 60 and the FAA. In that case, the Band sought declaratory relief regarding whether a joint venture with the City complied with the newly enacted IGRA. *Id.* at 1209. The district court referred the matter to the National Indian Gaming Commission ("NIGC"), which held that the agreement violated IGRA. *Id.* The parties negotiated a new contract that was approved by the NIGC and incorporated into a consent decree entered by the district court. *Id.* When the NIGC subsequently determined that the new arrangement did not comply with IGRA, the Band obtained Rule 60 relief because consent decrees can be modified if they become impermissible under federal law. *Id.* at 1210-11.

The decision in *City of Duluth* has no application here. *First*, under Rule 81(a)(6)(B), Rule 60 is unavailable. *City of Duluth* did not involve an arbitration subject to the FAA, much less an effort to use Rule 60 to vacate a confirmed arbitral award in contravention of the FAA's exclusive procedures. *Second*, the Final Judgment and the Awards—entered in an arbitration agreed to by the Parties under a Compact approved by the DOI—are not subject to modification like a consent decree. *Third*, unlike in *City of Duluth*, the NIGC has not made any determination that the Panel's interpretation of the Compact to require the Nation to continue sharing gaming revenue during the Renewal Period violates IGRA (nor could it). On the contrary, this Court and the Second Circuit have already determined that there is no violation of IGRA.[5]

[5] The other cases cited by the Nation are similarly inapposite. The Nation cites both *Standard Oil Co. v. United States* and *DeWeerth v. Baldinger* to argue that the Court has jurisdiction over the Motion because the DOI Letter constitutes a "later event." Mot. at 20. However, *DeWeerth* makes clear that, in the absence of a bona fide "*Standard Oil* situation,"—i.e., something that was "not previously considered by the appellate court"—the district court does not have jurisdiction to set aside a judgment. *DeWeerth v. Baldinger*, 38 F.3d 1266, 1270 (2d Cir. 1994).

## II. THE SECOND CIRCUIT'S MANDATE DEPRIVES THIS COURT OF JURISDICTION

This Court also lacks jurisdiction because the Second Circuit has issued the Mandate. The issuance of the appellate mandate generally terminates the jurisdiction of both the circuit court and district court. *See, e.g.*, *Eutectic Corp. v. Metco, Inc.*, 597 F.2d 32, 34 (2d Cir. 1979) ("The court of appeals' rulings are the law of the case, and the district court is bound to follow them; it has no jurisdiction to review or alter them."); *Fine v. Bellefonte Underwriters Ins. Co.*, 758 F.2d 50, 52 (2d Cir. 1985) (determining that "the district judge correctly found that it had no jurisdiction to review an appellate court's decision" by considering a Rule 60(b) motion). While courts can consider Rule 60 motions after issuance of the mandate in very limited circumstances if the movant establishes an extraordinary subsequent occurrence (*see, e.g.*, *Standard Oil*, 429 U.S. at 18), that narrow exception does not apply where, as here, the grounds for Rule 60 relief were considered in the appellate proceedings. *See, e.g.*, *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) ("The mandate rule . . . forecloses relitigation of issues expressly or *impliedly* decided by the appellate court.'" (emphasis in original)). Here, the Second Circuit's ruling affirming this Court is the law of the case, and this Court has no jurisdiction to review the circuit court's decision.

The Nation's contention that the DOI Letter is a "later event" that revives the Court's jurisdiction to grant relief under Rule 60(b) is without merit. Mot. at 20 (citing *DeWeerth*, 38 F.3d at 1270 (stating that "a district court may consider a Rule 60(b) motion when 'later events' arise that were not previously considered by the appellate court")). The relevant issues were

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As set forth in Part II, *infra*, the DOI Letter does not give rise to a *Standard Oil* situation.

already considered by the Second Circuit. *See, e.g.*, *Rousset v. Atmel Corp.*, 690 Fed. Appx. 748, 751 (2d Cir. 2017) (affirming the district court's holding that it was foreclosed from considering a Rule 60(b) motion where the appellate mandate "clearly encompassed the arguments made in the Rule 60(b) motion made before the district court"); *Picarella v. HSBC Sec. (USA) Inc.*, No. 14-CV-4463 (ALC), 2018 U.S. Dist. LEXIS 109417 (S.D.N.Y. June 28, 2018) (denying a Rule 60(b) motion upon determining that the movant previously litigated the claims raised in the motion in his appeal to the Second Circuit).

Specifically, the Second Circuit considered the Nation's arguments regarding the "exceptional circumstances" purportedly raised by the DOI Letter. The Nation alleges the DOI Letter indicates "serious concerns about the legality" of the required revenue sharing payments during the Renewal Period, and that the issue should be submitted to the DOI for resolution. Pet. at 13. But those were the same arguments that the Nation raised in its appeal. The Nation repeatedly asserted that the Panel's determination was inconsistent with the governing statute and that the Parties' dispute should be submitted to the DOI. App. Br. at 24-25; 48-51. The Second Circuit considered and rejected both of those arguments. App. Op. at 22:6-7, 24:15-18, 25:1-2 ("[N]either IGRA nor our case law contains a clear rule requiring secretarial approval of arbitral awards based on extrinsic evidence. . . . [E]ven if we were to agree with the Nation that there would have been some value in the [P]anel seeking secretarial review after determining that the agreement was ambiguous, the [P]anel's decision to continue its assessment and determine the proper meaning of ambiguous text was not . . . in manifest disregard of governing law."); *id.* at 25:15-16 ("In this case, referral [to the DOI] would have been inappropriate and would have clashed with the goals of the FAA.").

The Nation asserts that the Second Circuit did not consider whether the Secretary had approved the disputed payments and only reviewed the contract interpretation by the Panel. Mot. at 19-20. But the Nation cannot dispute that it argued to the Second Circuit that the Secretary had not expressly approved the continued revenue sharing payments during the Renewal Period, and sought to rely on that allegation as a basis to vacate the Awards. App. Br. at 37 ("The payment obligation was never in fact considered and approved by the Secretary as required by IGRA."). The Second Circuit considered that argument but ultimately determined that, even in the absence of express Secretary consideration of the continued payments, there was nothing in the law that requires the Secretary to approve an arbitrator's enforcement of its interpretation of an ambiguous contract term. App. Op. at 19-20. Furthermore, as the Second Circuit recognized, the question of whether the Secretary approved the payment obligations during the Renewal Period and the interpretation of the Compact cannot be separated in the way the Nation suggests. *Id.* at 27. Indeed, the court held that "[w]hile in the first instance DOI exercised broad discretion to approve or reject the Compact, IGRA does not provide for subsequent agency review upon an arbitrator's determination that a party is required to make further payments under an existing compact." *Id.* Thus, the Second Circuit clearly considered the question of whether the Secretary specifically considered and approved the disputed payments and rejected the Nation's argument that the absence of such review provided grounds to vacate the Awards on the basis of manifest disregard of the law.

Similarly, this Court and the Second Circuit have already considered and rejected the Nation's request to submit the Parties' dispute to the DOI. In the Motion, the Nation contends that the Final Judgment should be stayed or vacated so that the Secretary can "pass upon the

legality of the renewal period [payment] obligation." Mot. at 13. But this is just a repackaging of the Nation's argument that the Parties' dispute should be referred to the DOI. App. Br. at 48. As the Second Circuit ruled, such a referral is inappropriate and would clash with the goals of the FAA. App. Op. at 25-26. The Parties agreed to binding arbitration and agreed to this Court's enforcement of the Awards, and there is no basis to disregard the Mandate to allow the Nation to re-litigate the question of whether the Nation should be permitted to circumvent the FAA by seeking the intervention of the DOI.

## III. NO EXTRAORDINARY CIRCUMSTANCES WARRANT VACATING THE FINAL JUDGMENT

Even if the Motion were to be considered on its merits, it fails to present such extraordinary circumstances or extreme hardship as to warrant vacating this Court's Final Judgment. Under Fed. R. Civ. P. 60(b)(6), establishing the requisite extraordinary circumstances or extreme hardship is an exceedingly high bar, and generally requires showing "'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (finding extraordinary circumstances where habeas petitioner "may have been sentenced to death in part because of his race"); *see also Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 757 (2d Cir. 1986) (denying Rule 60(b)(6) relief on the grounds that a change in decisional law does not constitute an extraordinary circumstance). Furthermore, "[t]he potentially unfavorable consequences that result from an adverse judgment properly arrived at do not, without more, constitute 'exceptional circumstances.'" *Chiulli v. I.R.S.*, No. 03 Civ. 6670 (HBP), 2006 U.S. Dist. LEXIS 76778, at *9 (S.D.N.Y. Oct. 20, 2006). The Nation argues that the DOI Letter presents extraordinary circumstances and undue hardship because "(1) 'the Secretary did not review or otherwise

analyze any revenue sharing payments for the seven-year [R]enewal [P]eriod of the Compact'; (2) the Department accordingly 'cannot provide any certainty that the extension of revenue sharing into the seven-year [R]enewal [P]eriod complies with the requirements of IGRA'; and (3) that [the Secretary] 'caution[s] the [P]arties about their reliance on the terms because [the DOI has] not determined that they are lawful.'" Mot. at 8. The Nation's arguments are without merit.

*First*, the Parties agreed to arbitrate and agreed the Awards would be "final, binding and non-appealable" and enforceable in this Court, and the Nation cannot circumvent that agreed-to process and forum under the guise of seeking "certainty" from the DOI. As both this Court and the Second Circuit confirmed, the Secretary does not have authority to weigh in on a contract interpretation dispute that has been submitted to binding arbitration, much less interfere with the enforceability of an arbitration award issued per the terms of an approved compact. Dist. Op. at 23-24; App. Op. at 18-19; *see also Fulton Cogeneration Assocs. v. Niagara Mohawk Power Corp.*, 84 F.3d 91, 97 (2d Cir. 1996) ("Even if [the agency] could exercise proper jurisdiction over this case, however, we would nevertheless find the primary jurisdiction doctrine inappropriate because the issues of contract interpretation here are neither beyond the conventional expertise of judges nor within the special competence of the [agency]."). Indeed, the DOI previously made clear that it deferred to the "certainty" of the Parties' agreed arbitration process. [D.I. 2-12] (withdrawing the January 19 Letter because it "did not provide the certainty available to the [P]arties in the arbitration proceedings"). The FAA provides the exclusive means for raising any purported issues with the Awards, and now that the Nation has exhausted its challenges to the Awards under the FAA, it cannot collaterally attack the Awards under the

guise of a motion filed under Rule 60(b)(6) or manufacture "exceptional circumstances" by seeking to refer the Parties' dispute to the DOI.

*Second*, the DOI Letter is premised on an erroneous assumption that renders it meaningless. The Nation argued to the DOI that the continued payment obligations during the Renewal Period constituted an amendment to the Compact and the DOI Letter is premised on that assumption. Mot. Ex. E at 2 ("The Nation asserts [] that any exclusivity payment obligation during the Compact extension period constitutes a Compact amendment that requires Interior Department approval"); Mot. Ex. A at 2 (responding to the Nation's letter and noting that amendments are subject to review and approval by the Secretary). But the Nation expressly disavowed before the Second Circuit the contention that the Awards constitute an amendment to the Compact that required approval by the Secretary. App. Br. at 42 ("[T]he Nation never argued that an arbitral interpretation of a compact 'constitutes an amendment' under IGRA"); App. Op. at 19 (recognizing that the Nation disavowed the argument that the Awards are an amendment). The Nation cannot now change its position in an effort to collaterally attack the Awards. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("'The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.'"); *Intellivision v. Microsoft Corp.*, 484 F. Appx. 616, 620 (2d Cir. 2012) ("[J]udicial estoppel 'prevents a party from asserting a factual position clearly inconsistent with a position previously advanced by that party and adopted by the court in some manner"). In any event, the Panel's contract interpretation did not create a new term or constitute an amendment as a matter of law, as this Court and the Second Circuit have already recognized. Dist. Op. at 24 ("[T]he majority did not impose a new revenue-sharing

obligation as the Nation contends."); App. Op. at 20 (finding that "since the Nation acknowledges that the [A]ward is not an amendment and acknowledges that it is bound by the [P]anel's holding that the renewal term itself required payments, the provision of the Compact that it challenges can only be the renewal term and that term . . . has already been deemed approved by the Secretary."). Accordingly, the DOI Letter responds to a purported amendment to the Compact where there has been no such amendment and therefore the letter is not even applicable, much less does it establish exceptional circumstances under Rule 60(b)(6). That the DOI Letter relies on that erroneous assumption at all reflects the Nation's lack of candor with the DOI regarding this Court's and the Second Circuit's denial of the amendment theory and the Nation's express abandonment of that theory before the Second Circuit.

*Third*, the Panel majority, this Court and the Second Circuit have already determined there is nothing in IGRA or any other law that requires the Secretary to review or approve the Panel's interpretation of the Compact to require the Nation to continue making the revenue sharing payments during the extension period.[6] The Motion and the DOI Letter both selectively quote provisions of IGRA to create the impression the DOI has the authority to modify effective compacts based on IGRA's "deemed-approval" provision. 25 U.S.C. § 2710(d)(8)(C). However, Section 2710(d)(8)(C) simply provides that compacts go into effect "to the extent the

[6] *See* Partial Final Award at 42 ("[W]hile it is beyond dispute that the Panel has no legal authority to usurp the Secretary's role and enforce a Compact term that the Secretary did not approve, the Panel does have the duty and authority to determine whether the terms of the Compact already provide for revenue sharing payments upon renewal."); Dist. Op. at 23 ("The Nation's position is premised on a proposition that it has provided no authority for—that the arbitration award is an amendment to the Compact that requires the Secretary's approval under the IGRA."); App. Op. at 22:6-7 ("[N]either IGRA nor our case law contains a clear rule requiring secretarial approval of arbitral awards based on extrinsic evidence.").

compact is consistent with the provisions of this chapter" if the Secretary does not deny approval within 45 days of submission. As the Second Circuit held, neither IGRA nor any other law requires secretarial approval of arbitral awards based on interpreting and enforcing the terms of an approved compact, nor is there any basis to allege that the Panel's reliance on extrinsic evidence transformed the Panel's contract interpretation into a new term requiring approval under IGRA. App. Op. at 20-21. Furthermore, the Nation's new allegation made for the first time in its letter to the DOI that the continued revenue sharing payments "violate federal law as an illegal 'tax, fee, charge, or other assessment'" is baseless. The Nation has never alleged (let alone proven) that IGRA prohibited the Parties from agreeing in the Compact to continue the payment obligation upon renewal of the term of the Compact (as indeed the Panel found they had agreed), and this reckless charge does nothing to alter the landscape.[7]

*Fourth*, it is misleading for the Nation to argue that the DOI Letter is extraordinary because it did not determine that the continued revenue sharing payments are lawful. The question of whether such revenue sharing payments during the Renewal Period are lawful was not before the DOI, nor would it properly be. That question was properly submitted to the Parties' agreed-to arbitration and addressed by the Panel, and was also subject to the Nation's challenges pursuant to the exclusive provisions of the FAA before this Court and the Second Circuit. The Nation also mischaracterizes the DOI Letter, which does not purport to make any

[7] The Nation highlights the extra-statutory requirement that the Secretary review revenue sharing provisions in IGRA compacts with "great scrutiny," but that is not at issue or relevant here. Mot. at 9. The Parties agreed to submit their revenue-sharing dispute to arbitration, and the Panel majority considered all the evidence submitted by the Parties in making its determination, including the Parties' fundamental bargain consisting of the State providing geographic exclusivity in exchange for the Nation making revenue sharing payments during the Renewal Period. Compact ¶ 14; Partial Final Award at 44.

determination regarding whether the continued revenue sharing payments are unlawful or suggest that the Awards or Final Judgment cannot be enforced. On the contrary, the DOI Letter expressly declines to take a position on the legal merits of the Parties' dispute. Mot. Ex. A at 2 ("[W]e cannot provide certainty that the extension of revenue sharing into the seven-year renewal period complies with the requirements of IGRA."). The DOI also does not direct or ask the Parties to take any action, and expressly leaves it to the Parties whether to seek further input from the DOI (*id.* at 3), which, of course, is unnecessary because the Parties' dispute has been properly resolved through the agreed-to arbitration as reflected in the Final Judgment.

*Fifth*, the DOI Letter is not a definitive or authoritative agency enactment. *See, e.g.*, *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 227-28 (2d Cir. 2002) (holding that the Secretary of Labor's view constituted an "informal opinion" that is not entitled to deference). The DOI Letter is a response to an *ex parte* submission made by the Nation to which the State had no opportunity to respond and which, as noted, erroneously assumes there has been an amendment to the Compact. Furthermore, the Nation's characterization of the DOI Letter would reflect an about-face from the DOI's prior express deference to the Parties' arbitration, further weighing against giving the letter any weight. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."); *New York City Health & Hosp. Corp. v. Perales*, 954 F.2d 854, 861 (2d Cir. 1992) ("[W]here the Secretary's policy is inconsistent with an earlier policy, that inconsistency is a ground for rejecting a claim for deference.").

*Sixth*, the alleged harm is entirely speculative. The Nation alleges that it may suffer

undue hardship in the form of lost gaming income should the NIGC issue a closure order for violating IGRA. Mot. at 13-17. As this Court and the Second Circuit have already confirmed, there is no basis under the law to find the Awards violate IGRA. Nor does the DOI Letter suggest otherwise. In addition to wrongly assuming the Awards amended the Compact, the Letter does not purport to provide any definitive ruling and simply invites the Parties to submit any unresolved issues to the DOI if they so wish. The Motion seeks to raise the specter of the NIGC bringing an enforcement action that could result in the closure of the Nation's gaming facilities, but the DOI Letter does not even refer to such an enforcement action, let alone indicate that such action is anticipated or even possible.[8] Mot. at 14. Thus, any alleged harm is entirely speculative and hypothetical financial hardship is not a basis for relief under Rule 60(b)(6). *See Eastern Sav. Bank, FSB v. Springer*, No. 11-CV-4431 (ERK), 2015 U.S. Dist. LEXIS 194355, at *21 (E.D.N.Y. Jan. 30, 2015) ("Difficult economic conditions are not, however, the sort of extraordinary circumstances or undue hardship contemplated under Rule 60(b)(6).").

*Seventh*, the timing of the Motion and the Nation's petition to the DOI also weighs against granting the requested relief. The Nation has spent the last two years fully availing itself

[8] Oddly, the Nation asserts that any enforcement action by the NIGC would not conflict with the Panel's determination, this Court's ruling or the Second Circuit's decision. Mot. at 17, n.7. This would plainly not be the case. While there is no basis for the NIGC to dispute the Panel's interpretation of the Compact as requiring the Nation to continue making the revenue sharing payments during the Renewal Period, any NIGC action to the contrary would run directly counter to—and clearly undermine—the certainty and finality of the arbitration process and goals of the FAA. The Nation has identified no legal authority for the proposition that the NIGC can unilaterally void a valid, final, and binding judgment of a United States District Court. Further, the Parties would have any number of avenues to contest any such overstep by the NIGC, including seeking judicial relief or exercising their rights under the NICG's own procedures (which include the ability to seek review or pursue an administrative appeal). *See* 25 C.F.R. §§ 573.4; 584.

of all of its statutory appeal options to challenge the Awards, requiring the State and the courts to expend considerable effort and resources to adjudicate the Nation's challenges. It was only after exhausting its statutory challenges and having all of its arguments rejected by this Court and the Second Circuit that the Nation lobbied the DOI to intervene and filed the Motion. The Nation suggests it has been consistent and refers to its prior efforts to enlist the DOI's intervention, but that only highlights how the Nation has been seeking to engineer an end run around the Parties' agreed-to arbitration process. Particularly under these circumstances, the Nation should not be able to use Rule 60 as an escape hatch to evade the appellate process and undermine the finality provided by the Second Circuit's decision affirming the Final Judgment.

## CONCLUSION

In light of the foregoing, the Court should deny the Motion and grant such other relief as it deems just and proper.

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Respectfully submitted,

*/s/ Gregory M. Starner*

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