UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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

RESPONDENT STATE OF NEW YORK'S RESPONSE TO PETITIONER SENECA NATION'S SECOND NOTICE OF NEW FACTUAL DEVELOPMENT IN SUPPORT OF ITS PENDING RULE 60(b) MOTION

Respondent, the State of New York (the "State"), by and through its undersigned counsel, respectfully responds to the *Second Notice of New Factual Development in Support of its Pending Rule 60(b)(6) Motion* filed by the Seneca Nation of Indians (the "Nation") [ECF 55] (the "Second Notice").[1] By the Second Notice, the Nation seeks again to supplement the record of its pending Rule 60 Motion (the "Rule 60 Motion") with a letter from the Department of the Interior (the "DOI") to the National Indian Gaming Commission (the "NIGC") dated September 15, 2021 (Second Notice Ex. A, the "DOI Letter"). DOI Letter at 3. Like the First Notice, the Second Notice is substantively without merit; the Rule 60 Motion remains deficient and should be denied.

First, notwithstanding the Nation's protestations to the contrary, the Rule 60 Motion seeks a collateral retrial of the underlying merits of the parties' dispute. The Nation agreed to and submitted to the jurisdiction of the Panel and this Court's review of the Awards, but refuses to accept the final, binding determination of the Panel, this Court, and the appeals process. It was not until after the Second Circuit rejected the Nation's challenges regarding the legality of the required payments and affirmed the Judgment that the Nation sought to end run that decision by petitioning the DOI. *See* ECF 40-7 at 2 (on March 21, 2021, after the Second Circuit's decision affirming the Judgment was issued on February 22, 2021, the Nation petitioned the DOI to "intervene in this dispute on [the Nation's] behalf"). The Nation does not—and cannot—dispute that it has unilaterally[2] and deliberately sought the intervention of the DOI, with the clear intent to

[1] Capitalized terms used but not defined herein are used as defined in the State's Response to Petitioner Seneca Nation's Notice of New Factual Development in Support of Its Pending Rule 60(b) Motion.

[2] The Nation does not dispute it solicited the intervention of the DOI *ex parte*, but contends the State refused to "engage" with the DOI, such that the Nation was somehow given license to surreptitiously pursue its lobbying campaign to collaterally attack the Judgment. This is baseless. In response to earlier efforts by the Nation to get the DOI to intervene (including in 2019 when the Nation asserted the Awards were amendments to the Compact, a position they have long abandoned), the DOI invited the parties to jointly submit any issues they needed the Secretary to

avoid the consequences of the Final Judgment and in the hope of creating a conflict between the Final Judgment and the DOI or NIGC where none can properly exist.[3] The purported "new factual developments" clearly demonstrate the Nation's efforts to delay making good on its currently outstanding obligations under the Final Judgment and the parties' agreement.

Second, the Nation's efforts to generate "new factual developments" and its efforts to characterize its Rule 60 Motion as anything other than a collateral attack on the Judgment fall flat. As explained in the State's Response, the Rule 60 Motion makes exactly the same arguments that this Court and the Second Circuit had already denied. *See* State Resp. at 5-7. It also cannot be disputed that, per the DOI-approved arbitration clause in the Compact, the parties submitted their dispute to binding arbitration and the Panel issued the Awards requiring the Nation to continue to make State Contribution payments during the Renewal Period. This Court confirmed the Awards and issued the Judgment, and the Second Circuit affirmed this Court's decision. The Nation has foregone further appeal to the Supreme Court, thus the Judgment is final and binding. Additionally, the temporary stay of the Judgment pending appeal issued by this Court has expired per its express terms. *See* ECF 35 at 8 ("[T]he judgment . . . is stayed . . . through resolution of

review. *See* ECF 2-17 (June 3, 2019 letter from the DOI to the Nation in response to the Nation's request for the Secretary to review the Awards as amendments to the Compact); ECF 40-3 (April 15, 2021 letter from the DOI to the Nation responding to a letter from the Nation seeking review of the State Contribution payments after the Second Circuit affirmed the Judgment). The State declined in deference to the parties' agreed to forum and process for resolving the dispute, which has resulted in the final and binding Judgment and leaves no need or basis for seeking any additional, extra-judicial review by the DOI.

[3] The Nation cites this Court's decision in *Citizens Against Casino Gambling In Erie Cty. v. Hogen*, (Second Notice at 3), but that case did not suggest that the NIGC can ignore a binding, final judgment or disregard prior legal determinations made by the courts. The Panel, this Court, and the Second Circuit have already determined there is nothing in IGRA or any other law that gives the DOI or NIGC authority to review the Panel's interpretation of the Compact.

appeal."). Yet, the Nation has made no effort to comply with the Judgment and continues to seek additional, extra-judicial avenues to shirk its outstanding obligations.

Third, and in any event, the DOI Letter does not constitute a "new development" that would justify setting aside the Judgment. As this Court and the Second Circuit held, the Panel properly interpreted the contractual terms of the approved Compact per the agreed to arbitration process set forth in that agreement, and nothing in IGRA provides for review of such a properly constituted arbitration panel's interpretation of the existing contractual terms of the Compact. *See, e.g.*, *Seneca Nation of Indians v. New York*, 420 F. Supp. 3d 89, 104 (W.D.N.Y. 2019) ("[T]he Nation has provided no legal authority holding that a contract interpretation resulting in an arbitration award, made pursuant to a binding arbitration provision contained in a gaming compact approved by the Secretary, constitutes an amendment to the compact subject to further Secretary approval."); *Seneca Nation of Indians v. New York*, 988 F.3d 618, 627 (2d Cir. 2021) ("IGRA simply requires secretarial approval for gaming compacts, and the regulations address amendments, not interpretations of existing contractual terms."). Furthermore, as explained in the State's Response to the First Notice [ECF 52], the NIGC Letter did not state or even intimate that the NIGC intends to take any enforcement action against the Nation. Similarly, there is nothing about the DOI Letter that presents the type of "extraordinary circumstance" that would warrant setting aside the Judgment.

For the reasons set forth in the State's Response to the Rule 60 Motion, the Court should deny the Rule 60 Motion.

Dated: October 1, 2021

Respectfully submitted,

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