UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAYUGA NATION, a federally recognized Indian Nation,

Plaintiff,

-against-

NEW YORK STATE GAMING COMMISSION, et al.,

Defendants.

5:24-CV-537
(BKS/TWD)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS NEW YORK STATE GAMING COMMISSION AND COMMISSION MEMBERS JOHN CROTTY, SYLVIA HAMER, MARTIN MACK, PETER MOSCHETTI, JR., BRIAN O'DWYER, MARISSA SHORENSTEIN AND JERRY SKURNIK'S MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6).

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Defendants New York State Gaming Commission and its members, sued in their official capacities, John Crotty, Sylvia Hamer, Martin Mack, Peter Moschetti, Jr., Brian O'Dwyer, Marissa Shorenstein, and Jerry Skurnik (collectively, "State defendants"), respectfully submit this reply memorandum of law in further support of their motion to dismiss plaintiff Cayuga Nation's amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

ARGUMENT

I. THE STATE DEFENDANTS ARE ENTITLED TO SOVEREIGN IMMUNITY PURSUANT TO THE ELEVENTH AMENDMENT

A. The Commission Is Immune from Suit for Any of the Relief Requested

In Opposition to the State defendants' Motion to Dismiss, the Nation surprisingly claims that the New York State Gaming Commission is not entitled to Eleventh Amendment sovereign immunity, even as it concedes that the Commission (1) is an arm of the State and (2) has not expressly consented to suits alleging violations of the Indian Gaming Regulatory Act ("IGRA"). *Cf.* Unkechaug Indian Nation v. N.Y. State Dep't of Env't Conservation, 677 F. Supp. 3d 137, 147 (E.D.N.Y. 2023) (outlining the circumstances that must be met to sue an arm of the State despite the Eleventh Amendment). According to the Nation, so long as it sued the individual Commission members in their official capacities, "the Commission is a proper background party that must remain in this case" despite the jurisdictional bar the Eleventh Amendment ordinarily imposes. ECF No. 42 at 20-21.[1]

The Nation is wrong. Indeed, the primary case on which the Nation relies, Malek v. N. Y. Unified Court System, No. 22CV5416HGRER, 2023 WL 2429528, at *12 (E.D.N.Y. Mar. 9,

[1] Page numbers refer to docket page numbers.

2023),[2] contradicts the Nation's understanding of sovereign immunity. In Malek, despite the plaintiff's assertion of legitimate 42 U.S.C. § 1983 claims against individual defendants, the district court concluded that sovereign immunity barred plaintiff from asserting the same claims against defendants who are considered "arms of the state," including the New York State Office of Children and Family Services and the New York State Office of the Inspector General. 2023 WL 2429528, at *12. The dismissal of State agency defendants in Malek accurately reflects the law: unless Congress has lawfully abrogated a state's sovereign immunity—which, as the Supreme Court held in Seminole Tribe v. Florida, 514 U.S. 44 (1996), Congress did not accomplish by way of the IGRA—a "plaintiff seeking prospective relief from the state must name as defendant a state official *rather than* the state or a state agency directly." Tiraco v. N. Y. State Bd. of Elections, 963 F. Supp. 2d 184, 192–93 (E.D.N.Y. 2013) (emphasis added) (citing Santiago v. N.Y. State Dep't of Corr. Servs., 945 F.2d 25, 32 (2d Cir. 1991)).

B. The Commission Members Are Not Proper Defendants

The Nation cannot evade the reach of the Eleventh Amendment by naming the Commission members as defendants in their official capacities and assert against them the same IGRA claims the Nation is barred from asserting against the Commission itself. But even if the Nation could sue Commission members on some ground, the claims it actually brought—for a declaration of past unlawful activity—cannot proceed.

1. Relief Under Ex parte Young Is Unavailable for IGRA Claims, for Which Congress Has Prescribed Remedies

The Nation contends that the Supreme Court in Seminole Tribe held only that Ex parte Young may not be used to specifically enforce 25 U.S.C. § 2710(d)(3) against state officials. ECF

[2] Appeal dismissed (2d Cir. 23-550) (Jul 7, 2023), appeal dismissed (2d Cir. 23-520) (Jul 10, 2023), appeal dismissed (2d Cir. 23-563) (Jul 10, 2023), appeal dismissed (2d Cir. 23-569) (Jul 10, 2023).

No. 42 at 14. The Nation's attempt to artificially limit Seminole Tribe's landmark holding is unavailing.

It is true that in Seminole Tribe the Supreme Court recognized that an Indian tribe could not sue Florida officials to obtain the same relief it could not obtain from Florida itself, i.e., an order compelling them to negotiate a gaming compact pursuant to 25 U.S.C. § 2510(d)(3). 517 U.S. at 74, 76. But the Supreme Court's supporting reasons were simply broader than the strict confines in which the Nation attempts to place it. The Court observed that, through the IGRA, Congress created both the right the Seminole Tribe was asserting—to engage in good-faith negotiations with a state over a gaming compact—and the mechanisms to enforce that right. Id. Given that Congress had endeavored to detail the process as to how disputes of this nature are to be addressed, the Court concluded that permitting an alternative action under Ex parte Young would render those statutes superfluous. Id. at 75. In sum, Seminole Tribe establishes that the IGRA cannot be asserted in federal court against a nonconsenting state and that this jurisdictional bar cannot be overcome through the expedient of naming state officials as defendants instead of the state as an entity. See id. at 46 (the Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against States to enforce legislation enacted pursuant to the Indian Commerce Clause). The Nation has offered no convincing reason why the bar to suit established in Seminole Tribe depends on the IGRA provision the plaintiffs attempt to assert.

As discussed in the State defendants' motion to dismiss, just as in Seminole Tribe, the federal right that the Nation alleges—the right to authorize and regulate Class III gaming within the borders of its ancestral reservation—is, to the extent it exists at all, see infra Point II, entirely a creation of the IGRA. See 25 U.S.C. § 2710(d)(1). Congress has contemplated the various means by which tribes may assert their rights under the IGRA, including delineating them in a compact

with the State. As much as in Seminole Tribe, then, Ex parte Young would work an end-run around "the intricate scheme" Congress established in the IGRA. Seminole Tribe, 517 U.S. at 75.

Contrary to the Nation's assertion, see ECF No. 42 at 15, Confederated Tribes and Bands of Yakama Indian Nation v. Locke, 176 F.3d 467 (9th Cir. 1999), does not cast doubt on the State defendants' argument that Ex parte Young relief is unavailable for claims brought pursuant to the IGRA. The Ninth Circuit simply applied the settled principle that Ex parte Young does not allow retrospective relief and must be asserted against a proper defendant. Id. at 469-470. This decision was not an implied concession that there is a "proper" Ex parte Young defendant with respect to the IGRA.

2. The Claims Against the Commission Member Defendants Must be Dismissed Because the Nation Is Seeking Retrospective Relief

Even if Ex parte Young's legal fiction enabled the Nation to sue the Commission member defendants in their official capacities, the Nation's claims would still fail because the relief requested is retrospective in substance. According to the Nation, it is enough that they allege that the State defendants are "currently violating the IGRA." ECF No. 42 at 17-19. But they fail to cogently identify an ongoing violation of federal law for this Court to enjoin.

In focusing on the phrasing of their requests for relief, the Nation neglects to refute meaningfully the State defendants' argument that by operation of law, any harm the Nation alleges derived from the Commission's licensing determinations—for lottery sales agents or lottery courier services[3]—and these determinations have already been made. So however the Nation

[3] The Commission licensed Jackpocket as a lottery courier service, pursuant to 9 NYCRR Part 5014. If any claims concerning Jackpocket were allowed to proceed against the State defendants, the State defendants could readily refute the Nation's allegation that Jackpocket sells lottery tickets on the Nation's lands. See 9 NYCRR §§ 5014.11 and 5014.12 (describing activity of lottery courier services).

phrases its request for relief, an injunction against "continued operation" of the lottery is merely reversal of the Commissioner's prior determinations by another name.

II. THE NATION HAS FAILED TO STATE A CAUSE OF ACTION AGAINST THE STATE DEFENDANTS

A. The IGRA Does Not Give the Nation a Private Cause of Action to Enjoin On-Reservation Gaming

Assuming that the Nation could rely on Ex parte Young to sue the Commissioners, it has won only half the battle. The legal fiction of Ex parte Young gets a plaintiff past Eleventh Amendment sovereign immunity, allowing a federal court to exercise jurisdiction. But the plaintiff cannot avail itself of that jurisdiction unless it *also* has a private right of action under federal law. The Nation does not.

To begin, the Nation leaves the court to guess which provisions in the IGRA it would like to enforce against the State defendants. Although the heart of the Nation's lawsuit is a perceived right to regulate all Class III gaming within the borders of its ancestral reservation, in its enumerated claims, the Nation asserts merely that the State defendants violated "the IGRA," without reference to any specific subdivisions. See ECF No. 30 ¶¶ 50, 53, 60, 71, 74, 86. Even if it were permissible for the Nation to cure this defect by adding specific statutory references in its opposition papers, it has not done so. Instead, the Nation cites to several legal conclusions made in its amended complaint, including that "New York has no authority over gaming, or to conduct gaming, on the Nation's Reservation" and "[o]perating the vending machines and terminals without a compact violates IGRA." ECF No. 42 at 12; see also ECF No. 42 at 3, 18. The Court need not presume such legal conclusions to be true. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted).

Still, even if the relevant subdivisions could be located through cross-references elsewhere in the complaint, the Nation has not explained how those subdivisions provide it with a private

cause of action. Rather, the Nation contends, the IGRA does not expressly prohibit a private right to an action. ECF No. 42 at 23. The Nation's reasoning is backwards—the Nation must prove that the statute *does* provide for a private right of action. Where a statute does not do so explicitly, courts "begin with the presumption that Congress did not intend one." Bellikoff v. Eaton Vance Corp., 481 F.3d 110, 116 (2d Cir. 2007). This presumption "places a heavy burden on the plaintiffs to demonstrate otherwise." Id., citing Olmsted v. Pruco Life Ins. Co. of N.J., 283 F.3d 429, 433 (2d Cir. 2002). And as the State defendants explained in their motion to dismiss, courts have strictly construed the IGRA to allow only the causes of action that Congress unequivocally set forth in the text. ECF No. 37-1 at 18-20.

The Nation's only response is that courts have been more generous recognizing statutory causes of action for declaratory and injunctive relief than for damages. ECF No. 42 at 18-19. But when asserting a statutory right, the statute must allow for a private cause of action regardless of whether a plaintiff seeks declaratory and injunctive relief. See Boylan v. Sogou Inc., No. 21 CIV. 2041 (PGG), 2021 WL 4198254, at *12 (S.D.N.Y. Sept. 13, 2021). Indeed, in some of the cases the State defendants cited, and which the Nation now claims are inapposite, the plaintiffs' claims for injunctive relief were dismissed alongside their claims for damages. See, e.g., Alabama v. PCI Gaming Auth., 801 F.3d 1278, 1293-1300 (11th Cir. 2015); Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 63 F.3d 1030, 1049 (11th Cir. 1995).

The Nation further contends that so long as it seeks to enjoin an ongoing violation of federal law, *i.e.*, that it satisfies the Ex parte Young criteria, it may proceed in federal court with claims to enforce any provision of the IGRA that it believes to be a source of rights. The problem for the Nation is that "*Ex parte Young* by itself does not create such a cause of action. Put another way, *Ex parte Young* provides a path around sovereign immunity *if* the plaintiff already has a cause of

action from somewhere else." Michigan Corr. Org. v. Michigan Dep't of Corr., 774 F.3d 895, 905 (6th Cir. 2014) (emphasis in original); see also Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin., 603 F.3d 365, 392–93 (7th Cir. 2010).

On the Nation's strained reasoning to the contrary, so long as the defendant is a state official, the entire body of settled law requiring a private cause of action ceases to matter. Decisions from the Second Circuit and others make clear that this is not the case. See, e.g., George v. Evans, 311 F. App'x 426, 428-29 (2d Cir. 2009); Freeman v. Town of Irondequoit, 652 F. Supp. 3d 362, 368 (W.D.N.Y. 2023), aff'd, No. 23-112, 2023 WL 7013409 (2d Cir. Oct. 25, 2023); Everson v. Onondaga Cnty., No. 523CV00707TJMTWD, 2023 WL 5759179, at *3 (N.D.N.Y. Sept. 5, 2023), report and recommendation adopted, 2023 WL 7013386 (N.D.N.Y. Oct. 24, 2023).

Simply put, if the Nation cannot identify language in the IGRA that confers upon it a private right of action to enforce the rights they assert—and it has not—it cannot rely on Ex parte Young as a source of substantive rights.

Nor can the Nation rely on federal preemption as the source of an enforceable substantive right. ECF No. 42 at 25-26. Federal preemption has its origins in the Constitution's Supremacy Clause. But "the Supremacy Clause is not the source of any federal rights and certainly does not create a cause of action. It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 325 (2015). To be sure, the Supremacy Clause remains available to any Indian tribe aggrieved by the enforcement of a state or local law against it that conflicts with the IGRA. See Cayuga Nation v. Tanner, 6 F.4th 361, 380 (2d Cir. 2021). But the Nation here does not identify a law that is preventing the tribe from engaging in activity the IGRA permits the tribe to conduct. The Supremacy Clause is not a substitute for a

statutory cause of action that would allow the Nation to use a federal court to enforce the IGRA by preventing someone from engaging in non-Indian gaming activity. The IGRA gives no such authority to a tribe. See Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 795 (2014) ("Everything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands").

B. The IGRA Does Not Regulate State-Operated Lotteries

The Nation further argues that the IGRA governs all gaming activity on Indian lands, not just Indian gaming on Indian Lands. ECF No. 42 at 25-30. At the outset, the Nation misconstrues the State defendants' position. The State defendants do not argue that the IGRA is limited to Indian gaming on Indian lands, only that it does not apply to State-operated gaming.

Unsurprisingly, the Nation relies heavily on Coeur d'Alene Tribe v. Idaho, 842 F. Supp. 1268 (D. Idaho 1994), aff'd on other grounds, 51 F.3d 876 (9th Cir. 1995) (per curiam), which held that absent a gaming compact, "neither the Tribe nor any non-tribal entity, including the State of Idaho, may conduct Class III gaming on the reservation." Id. at 1282. The State defendants already explained why this conclusion and the district court's supporting reasoning—which of course is not binding authority on this Court—was unpersuasive in light of the IGRA's purpose and history. See ECF No. 37-1 at 24. The Nation declines to confront, much less refute, this argument.

Further, although the Nation stresses that the authority the State defendants cite (the district court order in Yakama Indian Nation) was never adopted by the Ninth Circuit—which instead relied on the very sovereign immunity grounds the State defendants raise in Point I—the same can be said of Cour d'Alene, which the Ninth Circuit likewise affirmed on other grounds. 51 F.3d 876 (9th Cir. 1995) (per curiam). And in a battle between the two district court orders, Yakama offers

a more thorough analysis of the IGRA's application and intent, and therefore stands out as more convincing.

Similarly misplaced is the Nation's reliance upon Cayuga Nation v. Tanner, 6 F.4th 361 (2d Cir. 2021). The facts in Tanner were that a municipality was attempting to regulate the Nation's conduct of bingo gaming on tribal land (which the IGRA classifies as Class II gaming, which a tribe may conduct without a compact with a state). Thus, even accepting for the sake of argument the discredited premise that preemption alone can create a private right of action, Tanner stands for the principle that a State or local attempt to regulate *Class II Indian gaming* on Indian land is preempted. It says nothing about the IGRA's application to State-operated gambling. Indeed, the legislative history of the IGRA is particularly instructive as to whether references to "gaming" means "Indian gaming" or any gaming (including State-operated gaming). As more fully discussed in the State defendants' motion to dismiss (ECF No. 23-2 at 19-25), the structure of the IGRA and the legislative history supports the State defendants' interpretation (and the District Court's analysis in Yakama Indian Nation) that the "IGRA's regulatory scheme appears inconsistent with an intent to regulate State-operated gaming activity." Confederated Tribes & Bands of Yakama Indian Nation v. Lowry, 1996 U.S. Dist. LEXIS 21609, at *16, No. CY-95-3077-AAM (E.D. Wash. Dec. 19, 1996).

Lastly, the Nation's response to the State defendants' reliance on 18 U.S.C. § 1166 is unpersuasive. The Nation overlooks that § 1166—a criminal statute that was also enacted as part of the IGRA—actually *helps* Indian tribes, because it allows the United States to enforce state anti-gambling laws on Indian lands in order to protect a tribe from private gambling the tribe has not authorized, pursuant to a compact. See 18 U.S.C. § 1166(a), (d); see also Michigan v. Bay Mills Indian Cmty, 572 U.S. at 793 n.5 (recognizing that section 1166 gives the federal government

exclusive jurisdiction over criminal prosecutions for violating state anti-gambling laws for activity that is not covered by a nation-state compact). The Nation's concern that instead of stopping private gaming on Indian lands, the State could license the private actor, is unfounded. A private actor could not lawfully engage in Class III gaming under the IGRA unless authorized to do so by a tribal-state compact, but the IGRA provides the mechanism by which a tribe may seek such a compact. Any other tribal enforcement mechanism of the IGRA would need to be grounded in the language of the statute. A private actor is not entitled to sovereign immunity, which the IGRA's legislative history demonstrates was a key consideration in the law's drafting and ultimate enactment. If anything, the Nation, by acknowledging that it relies on Ex parte Young as the source of its right to sue (ECF No. 42 at 18), invites a paradoxical interpretation of the IGRA to permit expansive liability against states that are entitled to sovereign immunity, while closing the door to tribal enforcement of liability against private actors that engage in the same conduct. Congress could not have intended such an affront to federalism.

CONCLUSION

The State defendants respectfully request that the Court dismiss the Nation's amended complaint, with prejudice, and grant such other and further relief as the Court deems just and equitable.

Dated: Syracuse, New York
September 20, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 20, 2024, she filed the State defendants' reply memorandum of law by electronically filing with the Clerk of the Court herein, using the CM/ECF system, which is understood to have sent notification of such filing electronically to the following:

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