

"Traditionally, an amicus curiae was a non-partisan provider of legal perspective or information to the court, although amicus with partisan interests are now quite common. *Funbus Systems, Inc. v. California Public Utilities Com.*, 801 F.2d 1120, 1124-25 (9th Cir. 1986). However, an amicus curiae is not a party and has no control over the litigation and no right to institute any proceedings in it, nor can it file any pleadings or motions in the case. See, e.g., *United States v. Michigan*, 940 F.2d 143, 163-64 (6th Cir. 1991) (disapproving of the "legal mutant characterized as litigating amicus curiae" because it impinged on the inherent rights of the real parties in interest). The Tribe may participate as amicus curiae, but its participation is restricted to suggestions relative to matters apparent on the record or to matters of practice. See *Wiggins Bros., Inc. v. Dept. of Energy*, 667 F.2d 77 (Em.App. 1981). Motions to file "oppositions" to Plaintiff's briefs, and reference to the Tribe's "pleadings" indicate that the Tribe is attempting to exceed its stated role as amicus curiae. Such motions will not be considered by this Court. The Tribe's participation in this matter does not bind the Tribe to any judgment of this Court, nor is it sufficient to trigger res judicata effect. *U.S. v. Michigan*, 940 F.2d at 165; 47 Am. Jur. 2d, Judgments § 668. The only means of acquiring the status or rights of a named party is provided under the Federal Rules of Civil Procedure, including Fed.R.Civ.P. 14 and 17 through 25. *U.S. v. Michigan*, 940 F.2d at 164." *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1068 (D. Cal. 2005).

Both the Federal and the State Defendants have declined to take a position on this motion to add parties and the Seneca Nation has not yet been granted leave to appear as amicus curiae in this action. As noted in their brief although they made a motion for leave to appear as amicus curiae August 14, 2006 and a motion to withdraw their motion for leave to appear as amicus curiae on September 5, 2006 both motions have not been decided and are still sub judice.

The arguments relating to indispensable party were made in response to my misapprehension of the State Defendant's motion to dismiss. The State Defendants in their Fourth point of the Memorandum of Law in Support of their motion to dismiss requested that this action be dismissed "on the merits, on the grounds argued to, and accepted by, the state court in Warren I." (Point IV on Page 15 of the Memorandum of Defendants Pataki and Ritchko-Buley in Support of Motion to Dismiss dated May 31, 2006). As set forth in Point II of Plaintiff's Memorandum of Law in Opposition to the State Defendants' Motion to Dismiss dated October 12, 2006 on page 13 the only ground argued to and accepted by the court in Warren I was the argument that I had failed to join an indispensable party. It now appears that the State Defendants are not asserting this as a basis for their dismissal motion. In the Reply Memorandum of Defendants Pataki and Ritcko-Buley in Support of Motion to Dismiss dated November 3, 2006 in footnote 2 on Page 2 states "Several of the points in plaintiff's memorandum, such as those relating to standing and indispensable parties, do not appear to respond to arguments made by the stat defendants and so are not addressed here."

Had plaintiff been aware of the State Defendants' position that they were not raising any question relating to the proposed parties as an indispensable party Plaintiff would have opposed the Nation's motion for leave to appear as amicus curiae in the first place.

The Nation appears to want its' cake and eat it too. They want to assert their sovereign immunity and not be a party to this action and to avoid being bound by any ruling by this court while at the same time taking part in it to raise arguments and issues that are not being raised or argued by the parties.

Based on the aforementioned reasons the court should deny the Nation's request for leave to submit this brief in opposition to my motion to add parties and an order should be entered granting plaintiff leave to add the proposed parties as being unopposed.

ARGUMENT ON THE MERITS

If the court grants the Nation's request to submit the proposed brief and reach the merits of the arguments raised therein Plaintiff's motion should nonetheless be granted for the following reasons.

PLAINTIFF'S MOTION TO ADD PARTIES IS PROPERLY BEFORE THE COURT

The Nation asserts that this motion is not properly before this court since the proposed party defendants are neither necessary nor indispensable and that this motion was conditioned on the court finding that the Nation or its officers were such.

This is simply not the case. As the Notice of Motion to Add Parties clearly states this motion is based on FRCP 19 or 21.

"Rule 21 states that "[p]arties may be . . . added by order of the court on motion of any party . . . at any stage of the action and on such terms as are just." Fed. R. Civ. P. 21. "In deciding whether to allow joinder, the Court is guided by the same standard of liberality afforded to motions to amend pleadings under Rule 15." Rush, 2001 U.S. Dist. LEXIS 17480, 2001 WL 1313465, at (internal quotation omitted); see Clarke v. Fonix Corp., 1999 U.S. Dist. LEXIS 2143, 1999 WL 105031, at *6 (S.D.N.Y. March 1, 1999), aff'd 199 F.3d 1321 (2d Cir. 1999)." Javier H. v. Garcia-Botello, 2006 U.S. Dist. LEXIS 75859, 7-8 (D.N.Y. 2006)

Just because a proposed party is neither necessary nor indispensable does not mean they are not proper and may be joined as a party particularly at this early stage of the action.

AMENDING THE COMPLAINT TO ADD THE PROPOSED PARTIES IS NOT FUTILE

"Notwithstanding the generally lenient standard for permitting amendments, it is also well-settled that if the amendment proposed by the moving party is futile, "it is not an abuse of discretion to deny leave to amend." *Ruffolo v. Oppenheimer & Co.*, 987 F.2d at 131. In examining whether the claims sought to be asserted in the amended pleading are futile, the court must determine whether or not the amended pleading fails to state a claim for relief or would be subject to a motion to dismiss on some other basis. See, e.g., *S.S. Silberblatt, Inc. v. East Harlem Pilot Block-Bldg. 1 Housing Dev. Fund Co., Inc.*, 608 F.2d 28, 42 (2d Cir.1979); *McNally v. Yarnall*, 764 F. Supp. 853, 855 (S.D.N.Y. 1991). Under Fed. R. Civ. P. 12(b)(6), a claim must be dismissed if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). The court must accept the factual allegations of the complaint as true and draw all reasonable inferences in favor of the non-moving party. *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 27 n.2, 97 S. Ct. 2490, 53 L. Ed. 2d 557 (1977); *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir.), cert. denied, 513 U.S. 836, 115 S. Ct. 117, 130 L. Ed. 2d 63 (1994). In order to withstand a motion under Rule 12(b)(6), the complaint "must assert a cognizable claim and allege facts that, if true, would support such a claim." *Boddie v. Schnieder*, 105 F.3d 857, 860 (2d Cir. 1997)." *Rubin v. Valicenti Advisory Servs.*, 236 F.R.D. 149, 152 (D.N.Y. 2006).

"An Indian tribe's "sovereign immunity does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him." *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 576 n.1 (10th Cir. 1984) (McKay, J., concurring). Thus, "[w]hen a complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked." *Id.* at 574; see also *Burlington N. R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 902 (9th Cir. 1991) (stating that a tribe's immunity extends to officials "acting in their representative capacity and within the scope of their valid authority")." *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006)

The proposed complaint in ¶ 56 alleges "The Defendants have and are acting contrary to constitutional right, power, privilege, or immunity and/or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right and/or without observance of procedure required by law and/or their actions were arbitrary, capricious, an abuse of discretion, and not in accordance with law." (Plaintiff's Reply Declaration Ex. "B")

As set forth in Plaintiff's Memorandum of Law in Opposition to the State Defendants' Motion to Dismiss dated October 12, 2006 and Plaintiff's Memorandum of Law in Opposition to the Federal Defendants' Motion to Dismiss dated October 12, 2006 the complaint states the necessary allegations to state a cause of action against the Defendants and proposed defendants acted beyond their authority in violation of federal law.

All four causes of action alleged in the complaint arise under federal not state law. It is for the federal court to determine whether the Governor's and State Legislature's

approval of the Tribal-State compact is sufficient for purposes of IGRA. See *Kickapoo Tribe of Indians v. Babbitt*, 827 F. Supp. 37, 44-45 (D.D.C. 1993).

A general statute presumptively governs Indian tribes and will apply to them absent some superseding indication that Congress did not intend tribes to be subject to that legislation. See *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 120, 80 S. Ct. 543, 556, 4 L. Ed. 2d 584 (1960). The leading summary of the three circumstances that may defeat the "general statute" presumption is found in a Ninth Circuit case, *Donovan v. Coeur d' Alene Tribal Farm*, 751 F.2d 1113 (9th Cir.1985). As the district court recognized, a general statute applies to Indian tribes unless its application would (1) abrogate rights guaranteed under an Indian treaty, (2) interfere with purely intramural matters touching exclusive rights of self-government, or (3) contradict Congress's intent, see *id.* at 1116.

The Nation does not contend that any treaty controls on this question and the application of congressional intent is clear relative to IGRA. "The Coeur d'Alene court recognized that a statute of general application presumably applies to Indian tribes unless it affects exclusive rights of governance over "purely intramural matters." This test is more accommodating to notions of federal and tribal sovereignty. "Purely intramural matters" generally involve matters such as tribal membership, inheritance rules, and domestic relations. *Coeur d' Alene*, 751 F.2d at 1116. Unlike MSG's test, the Coeur d'Alene intramural exception does not include all aspects of sovereignty. See *Smart*, 868 F.2d at 935 n.5; see also *Farris*, 624 F.2d at 893." *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 179 (2d Cir. 1996)

It is clear that the proposed defendants can only engage in gaming pursuant to a valid tribal-state compact that is in effect pursuant to the Indian Gaming Regulatory Act. If the subject compact is invalidated on any ground then the proposed defendants have

been and will be acting in excess of their authority and in violation of federal law that is applicable to them.

**TRIBAL SOVEREIGN IMMUNITY SHOULD NOT EXTEND
TO PURELY COMMERCIAL ACTIVITY**

The Nation in support of its arguments produced a copy of the Fourth Amended Restated Charter of the Seneca Gaming Corporation (Nation's Exhibit "A").

This document demonstrates that the Seneca Gaming Corporation does in fact operate solely as a commercial entity and not as a governmental entity and therefore the Seneca Nation's immunity from suit should not extend to it.

It provides that it is "organized for the purpose of developing, constructing, owning, leasing, operating, managing, maintaining, promoting and financing Nation Gaming Facilities" and other lawful activities. It goes on to provide that "the power of gaming regulation, gaming licensing and enforcement of applicable law, which powers are reserved to the Nation (Page 2 Item 2 to Nation's Exhibit "A"). It also provides that "The Company shall have no power to exercise any regulatory or legislative power; the Nation reserves from the Company all regulatory, legislative and other governmental power, including, but not limited to the power to grant, issue, revoke, suspend or deny licenses, conduct background investigations, and enact legislation regulating Gaming on the territories of the Nation (Page 3 Item 3(c) to Nation's Exhibit "A").

The assets of the Nation are shielded from loss by any action against the Seneca Gaming Corporation. Its Charter specifically provides No activity of the Company nor any indebtedness incurred by it shall encumber, implicate or in any way involve assets of the Nation or another Nation Entity not assigned or leased in writing to the Company." (Page 5 Item 5 to Nation's Exhibit "A").

In *Washington v. Confederated Tribes of Colville Indian Reservation* (hereinafter "Colville"), 447 U.S. 134, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980), the Supreme Court stated: "This Court has found . . . a divestiture [of tribal powers] in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights." See also *United States v. Wheeler*, 435 U.S. 313, 326, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978) (describing areas in which "implicit divestiture of sovereignty has been held to have occurred" because "These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations.") Likewise it is in the national interest that Class III gaming be permitted only by a valid tribal-state compact as authorized by IGRA entered into voluntarily by the state and Indian nation or tribe in accordance with their respective authority granted to them by their respective citizens and to the end that an action seeks to vindicate this national interest the sovereign immunity of an Indian nation or tribe is divested to the extent their interests diverge from our national interest.

According to the Seneca Gaming Corporations 10-K filing with the SEC (Plaintiff's Reply Declaration Ex. "C") and its agreement with the City of Buffalo, New York (Plaintiff's Reply Declaration Ex. "D") it will employ non-Indians and its patrons will be predominantly non-members of the Seneca Nation of Indians.

"Limitations on tribal authority are particularly acute where non-Indians are concerned. See *id.* The Supreme Court has recognized that tribal "inherent sovereign powers . . . do not extend to the activities of nonmembers of the tribe." *Montana*, 450

U.S. at 565; see also *A-1 Contractors v. Strate*, 76 F.3d 930, 939 (8th Cir. 1996). This is so because the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes" *Montana*, 450 U.S. at 564." *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 180 (2d Cir. 1996)

Due to the above facts and the rationale of the dissent in *Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751 the judge made doctrine of tribal sovereign immunity should be limited to a tribe's purely governmental activity and not include its commercial endeavors that is violation of federal law or our national interest.

SENECA GAMING CORPORATION CAN NOT CLAIM SOVEREIGN IMMUNITY

The Charter contains a "sue and be sued" clause (Page 5 Item 5 to Nation's Exhibit "A"). "Such "sue and be sued" clauses waive immunity with respect to a tribe's corporate activities, but not with respect to its governmental activities. See *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1268 (10th Cir. 1998); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 674 P.2d 1376, 1382-83 (Ariz. Ct. App. 1983). " *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002).

"Under Section 17 of the Indian Reorganization Act, tribes were also permitted to form corporate organizations -- business corporations through which they could enter the world of commerce. See *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 866 n.17 (9th Cir. 1987). Housing authorities are Section 17 organizations. See Cohen, § 4.04[3][a], at 256 (citing housing authority cases in examples of Section 17 organizations). Housing authorities are public corporations with enabling ordinances that

resemble articles of incorporation, and contain a hierarchical structure similar to a board of directors. Charters for Section 17 organizations often contain "sue and be sued" clauses like the one at issue here. See Cohen, § 4.04[3][a], at 256. And, although the Housing Authority "occupies a role quintessentially related to self-governance," *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1080 (9th Cir. 2001), a tribal housing authority is nonetheless a "public corporation carrying on public enterprises," see *Eligibility of Indian Tribes for Loans and Grants under National Housing Act of 1937*, 57 Interior Dec. 145, 149, 1940 WL 4162, at *4 (Dep't of the Interior 1940)." *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 982 (9th Cir. 2006). The Marceau court went on to hold that "'The designation of an entity as a Section 16 or a Section 17 organization affects how we interpret any waiver of immunity. This court has been careful to separate a tribe's corporate functions from its governmental functions. Accordingly, we have refused to read a waiver of immunity in the Section 17 corporate context as abrogating immunity for the tribe's governmental actions as a Section 16 entity. See, e.g., *Linneen*, 276 F.3d at 492. In the same way, however, a "sue and be sued" clause in the enabling ordinance of a Section 17 entity must be examined in light of the rationale of Section 17. The purpose of allowing tribes to create Section 17 corporations, even corporations that perform some quasi-governmental role, is to allow tribal entities to fully participate in the world of commerce. See 78 Cong. Rec. 11732 (1934) (noting that, in allowing tribes to incorporate under Section 17, Congress sought to promote the organization of tribal business enterprises and to enable those enterprises "to enter the white world on a footing of equal competition"). And: It is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and able to contract with others, or to injure others, confident that no redress may be had against it as

a matter of right. Namekagon, 395 F. Supp. at 29 (citing Fed. Sugar Ref. Co. v. U.S. Sugar Equalization Bd., 268 F. 575, 587 (S.D.N.Y. 1920)). Where there is an express waiver of tribal immunity, such as this "sue and be sued" clause, we should read that waiver in light of the purpose of Section 17. Because "developers and lenders will be reluctant to deal with a corporation which is legally irresponsible and cannot be made to answer for its debts," id. at 29, tribes can compete fully in the business world only if they voluntarily agree to limit their right to immunity." Marceau v. Blackfeet Hous. Auth., 455 F.3d 974, 982 (9th Cir. 2006).

Whether the Seneca Gaming Corporation in fact enjoys tribal sovereign immunity as asserted by the Nation is an open question for the reasons set forth above.

Additionally the Fourth Amended and Restated Charter of the Seneca Gaming Corporation was adopted in whole or in part due to the Court of Appeals of the Seneca Nation of Indians August 10, 2004 ruling (Plaintiff's Reply Declaration Ex. "B") which held the creation and continued existence of the Seneca Gaming Corporation and its subsidiaries is unconstitutional and that they do not enjoy sovereign immunity.

CONCLUSION

The Plaintiff's motion to add the proposed parties should be granted in its entirety

DATED: November 15, 2006
Buffalo, New York

Daniel T. Warren
Plaintiff, Pro Se
836 Indian Church Road
West Seneca, New York 14224