

Daniel T. Warren
836 Indian Church Road
West Seneca, New York 14224-1235

December 27, 2007

Hon. William M. Skretny
U.S. District Judge
68 Court Street, 7th Floor
Buffalo, New York 14202

Re: Daniel T. Warren v. United States, et al.
06-CV-00226-WMS

Dear Judge Skretny:

Pursuant to Local Rule of Civil Procedure 7 for the United States District Court for the Western District of New York, the plaintiff seeks leave to file a memorandum of points and authorities in further support of my motion to amend and supplement the complaint in the above-captioned matter, in excess of the page limit imposed by LCv.R 7.1(f) and a scheduling order for the submission and argument of the Plaintiff's motion to amend and supplement and the Seneca Nation's motion to appear as amicus curiae currently pending in this action.

In support of this request for leave, I state the following:

1. Plaintiff on October 4, 2007 filed a motion to amend and supplement the complaint in this action.
2. I have been informed by Gina L. Allery, Esq. as counsel for the United States and David J. State, Esq. as counsel for the New York State Defendants that they are taking no position on plaintiff's motion to amend.
3. The Seneca Nation of Indians, although not named as a proposed defendant, has applied for leave to file an amicus brief in opposition. Plaintiff is opposing the application of the Seneca Nation of Indians.
4. If the Seneca Nation's application to file an amicus brief is not denied plaintiff must address the issue of sovereign immunity raised in its papers.
5. I request leave to file a reply memorandum in support of its motion to dismiss this action in excess of the 10 page limit imposed by LCv.R 7.1(f) because the page limit imposed by that rule is insufficient for me to address the numerous issues

relative to sovereign immunity whether or not it is applicable, and if so whether it has been waived in this case.

6. Although I have attempted to be as succinct as possible, the memorandum is 15 pages in length and exceeds the 10 page limit specified in LCv.R 7.1(f). The proposed reply brief is enclosed with this letter for the Court's review.
7. I have previously tried to communicate with the attorneys that represent the Seneca Nation in an attempt to obtain their consent on various issues and never even received the courtesy of a negative response. Based on this I believe asking for their consent to this request is futile.

Plaintiff respectfully requests leave to file my memorandum of points and authorities in excess of the 10-page limit and a scheduling order for the submission and argument of Plaintiff's motion to amend and supplement and the Seneca Nation's motion to appear as amicus curiae currently pending in this action.

Respectfully yours,

Daniel T. Warren

cc: Gina L. Allery, Esq.
David J. State, Esq.
Carol E. Heckman, Esq.
Riyaz A. Kanji, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DANIEL T. WARREN

Plaintiff,

vs.

UNITED STATES OF AMERICA, individually,
and as trustee of the goods, credits and chattels
of the federally recognized Indian nations and
tribes situated in the State of New York; et al.
Defendants

HON. WILLIAM M. SKRETTY

Case # 06-CV-00226 WMS

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO AMEND

DATED: December 26, 2007
Buffalo, New York

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

PRELIMINARY STATEMENT

This action was commenced on April 6, 2006. The State Defendants have filed a motion to dismiss this action on May 31, 2006 and the Federal Defendants moved to dismiss this action on July 24, 2006. The Seneca Nation of Indians moved for leave to file a brief as amicus curiae to urge dismissal of this action based on FRCP 19 for failure to join it as a party and asserting its sovereign immunity from being joined as a party to this action on August 17, 2006. Plaintiff moved to add various parties to his action on or about October 2, 2006 this motion was argued and submitted to Judge Elfvig, who has since retired, and the parties are still awaiting a decision on this motion. Since then several material events have occurred most notably is the decision in *Citizens Against Casino Gambling v. Kempthorne*, 471 F. Supp. 2d 295 and Commissioner Hogen's determination of July 3, 2007. On or about October 4, 2007 Plaintiff moved to amend and supplement the complaint in this action to address these new material events. The Seneca Nation has moved for leave to appear as amicus, which is being opposed, and does not challenge any of the supplementation of the complaint, but only the addition of certain parties as defendants in this action.

AMENDING THE COMPLAINT TO ADD THE PROPOSED PARTIES IS NOT FUTILE

As in this case, when a plaintiff is proceeding pro se, leave to amend should be freely granted. *Frazier v. Coughlin*, 850 F.2d 129, 130 (2d Cir. 1988). "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. The nature of the objection by the Nation to the Plaintiff's request to amend the complaint is akin to a motion to dismiss based on its assertion of the affirmative defense of sovereign immunity under FRCP 12(b), the standard for which is that in "ruling on a motion to dismiss the court should not dismiss 'unless it appears beyond doubt

that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"-- *Oliver Schools, Inc. v. Foley*, 930 F.2d 248, 252 (2d Cir. 1991) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). However, because the actual issue being addressed is not a motion to dismiss but rather one for leave to amend the complaint, the applicable standard is that, if the "underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962).

The party opposing amendment bears the burden of demonstrating why leave should not be granted. See 3 Moore's Fed. Prac. § 15.15[2] (3d ed. 2000) (observing that "the party opposing amendment bears a burden of production to come forward with reasons or evidence to deny leave to amend"). Courts in this Circuit have held that a claim of sovereign immunity is an affirmative defense and that the party asserting it has the burden of proof on (*New York v. Shinnecock Indian Nation*, 2007 U.S. Dist. LEXIS 80443 (D.N.Y. 2007) n. 72).

**TRIBAL SOVEREIGN IMMUNITY RELATING TO COMMERCIAL ACTIVITIES SHOULD BE
REPUDIATED**

The Bureau of Indian Affairs currently recognizes over 550 Indian tribes in the contiguous 48 states and Alaska. See Notice of Indian Entities Recognized and Eligible to Receive Services, 72 Fed. Reg. 13647-13652 (Mar. 22, 2007). With the newfound wealth resulting from high stakes gaming activities and other commercial ventures conducted on many of the reservations, the number of tribal businesses venturing into commercial activities with non-Indians outside Indian lands has increased dramatically. These tribal businesses not only operate as restaurants, hotels, and casinos on tribal lands--as a business person dealing with a tribe might expect--but also run construction companies, manufacturing plants, power plants, mining operations, banks, gas stations, pharmacies, and retail and convenience stores, employing thousands of non-Indian citizens on non-tribal lands. See David M. LaSpaluto, Comment, A

"Strikingly Anomalous," "Anachronistic Fiction": Off-Reservation Sovereign Immunity for Indian Tribal Commercial Enterprises, 36 SAN DIEGO L. REV. 743, 744 (1999). Millions of non-Indian citizens patronize tribal businesses both on and off tribal lands.

In the past decade alone, tribes have invested billions of dollars in myriad commercial enterprises off tribal lands. For many of these tribes, tribal governance has been transformed to the point that its dominant activity is overseeing tribal businesses rather than traditional governing activities. Indeed, that transformation has spurred well-deserved criticism of continued recognition of tribal immunity, particularly in the context of commercial activities off tribal lands.

Tribe-owned businesses increasingly do not perform traditional governmental functions for which immunity was created. To be sure, all governments are frequently involved in commercial transactions. Those transactions--whether for the design and construction of a new missile system, the construction of a highway, or the operation of a large port or local landfill--are virtually always conducted in the course of providing some public benefit that is a traditional governmental function. Even still, sovereign immunity has been heavily criticized in the commercial context, and, although it can be supported on a number of policy grounds, both the federal government and the states have provided administrative or judicial remedies for their commercial partners¹. On the other hand, tribal businesses frequently compete with private businesses in commercial markets with no ties to traditional tribal affairs. The only public

¹ As a matter of national policy, the federal government has waived its sovereign immunity from tort liability under the Federal Tort Claims Act, see 28 U.S.C. §§ 1346(b), 2674, and from commercial activities via the Tucker Act, see 28 U.S.C. § 1491. In enacting the Foreign Sovereign Immunities Act of 1976, Congress waived the sovereign immunity of foreign nations for claims based upon commercial activities carried on in the United States and for activities conducted elsewhere that have a "direct effect in the United States." See 28 U.S.C. § 1605(a)(2). Moreover, nearly all of the states have statutorily waived or judicially abrogated their immunity. See, e.g., New York Court of Claims Act; GA. CONST. art. I, § II, PIX; MD. CODE ANN., STATE GOV'T § 12-201(a); NEB. REV. STAT. § 81-8,302 to § 81-8,306; *Quinn v. Mississippi S. Univ.*, 720 So.2d 843, 849-50 (Miss. 1998).

benefits they provide are employment for tribe members and commercial profits for the tribe. Any grounds that may justify tribal immunity for the performance of governmental functions cannot reasonably be extended to shield purely commercial enterprises from regulatory, tort and contract liability.

It is true that the Court stated in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991), that Congress may have chosen to retain immunity to promote economic development and tribal self-sufficiency, but the Court in *Kiowa Tribe of Okla. v. Manufacturing Technologies Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (U.S. 05/26/1998) subsequently recognized that tribal immunity for purely commercial enterprises cannot be justified by that rationale. 523 U.S., at 757-58. "At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. . . . In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.*, at 758.

Immunity for tribal businesses creates huge economic disparities that unfairly benefit tribal businesses at the expense of non-Indian customers, suppliers, and competitors. A customer seriously injured at a tribe-owned restaurant might be surprised to learn that Congress intended to cut off her right to recover personal injury damages to promote the tribe's economic development. Likewise, a jobber with an advantageous long-term contract to deliver gasoline to a tribe-owned station might more easily be persuaded to modify the contract once informed that it would have no remedy for a breach of the contract. And a neighboring station with a similar

contract might justifiably wonder why it was unable to renegotiate the terms of its contract and can no longer compete with the tribe-owned business. In short, tribal immunity for commercial enterprises serves no legitimate purpose and is a "trap" for an unsuspecting non-Indian business. See *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (CA9 1989).

The United States Supreme Court deferred this questionable policy of an overarching tribal sovereign immunity from suit whether the tribal sovereign's conduct are sovereign acts or commercial acts that developed almost by accident to be resolved by Congress. The Court stated "There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. See *Mescalero v. Jones*, 411 U. S. 145 (1973); *Potawatomi*, *supra*; *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44 (1996). In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." and went on to state "These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment." *Kiowa Tribe of Okla. v. Manufacturing Technologies Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (U.S. 05/26/1998). The Kiowa Court's reasoning, that the Indian tribal immunity doctrine was outdated in this day and age, was actually

unanimous. The disagreement was on how to get rid of it without doing mayhem to stare decisis. The majority ultimately "deferred" to Congress to fix the problem created by the conflict in prior court decisions with the reality of the modern world of commerce which includes more and more Indian owned and operated businesses, open to the public, employing non-Indian workers (NLRB decisions relies in places verbatim on the *Kiowa* language) and having significant unmitigated environmental impacts (thus flying in the face of a large body of law holding commercial businesses accountable for unmitigated negative environmental impacts on non-Indian lands and communities). This issue was most recently presented to the court in *Inyo County v. Paiute- Shoshone Indians*, 123 S.Ct. 1887, 155 L.Ed.2d 933 (U.S. 05/19/2003). However, the Court did not reach this issue.

The Court in *Kiowa* acknowledged that, rather than originating by legislative act, the doctrine was birthed from *Turner v. United States*, 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919). In *Turner*, the Court stated: ". . . in 1890, [the Indian tribe] . . . then exercised within a defined territory the powers of a sovereign people, having a tribal organization, their own system of laws, and a government with the usual branches, executive, legislative, and judicial." *Id.* at 355, 39 S.Ct., at 109. (emphasis added). *Turner* did not state that the tribe held or was entitled to hold sovereign immunity from suit. Instead the Court merely recognized that prior to its dissolution the Indian tribe had "exercised" those self-government functions which are typical of a sovereign people. The genesis of the doctrine of tribal sovereign immunity was the language, later quoted from *Turner*, where the Court stated: "The fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace." *Id.* at 358, 39 S.Ct., at 110. (emphasis added).

As the Court stated in *Kiowa*: "The quoted language . . . is, at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine." *Kiowa*, 523 U.S., at 757, 118 S.Ct., at 1704. The Court's analysis of *Turner* rings true. *Turner* may also be read as affirmatively stating that there was no sovereign immunity obstructing recovery. Despite the *Turner* Court's characterizations of the tribe as exercising the powers of a sovereign people and being "like" other governments, "municipal as well as state," it passed over the opportunity to say the tribe had sovereign immunity. Indeed, the only time the Court mentioned immunity was in its statement that sovereign immunity from suit was not an obstacle to recovery. *Turner*, 248 U.S., at 358, 39 S.Ct., at 110.

Nevertheless, the judicially created doctrine of tribal immunity stands balanced today on the "slender reed" of *Turner*. In *Kiowa*, the Court recognized that tribal immunity from suit, at least in the context of commercial activities off of the reservation, "extends beyond what is needed to safeguard tribal self-governance." Though the Court was not asked to abrogate tribal immunity and chose to defer to Congress to confine it to on-reservation or noncommercial activities, it did recognize that the Court had taken the lead in drawing the bounds of tribal immunity. Despite its deference, the Court did not say it lacked the power to further restrict the doctrine it had created. *Kiowa*, 523 U.S., at 757, 118 S.Ct., at 1704. It has been nearly ten years now since the Supreme Court deferred to Congress to correct a doctrine the judiciary created. In fact the *Kiowa* court gave Congress a pathway to fix the problem (albeit by dicta) by suggesting the simple solution of amending the Foreign Sovereign Immunity Act, thus retaining respect for the sovereign identity of Indian tribes and tribal governments, so revered by Indian tribes, while realistically applying the many laws and taxes needed to safely regulate domestic commerce and which are badly needed to protect all the citizens of the United States and the several states in

which tribal businesses are doing business. Also, in recent years the National Labor Relations Board has abandoned this doctrine in administrative proceedings before it. This shift in policy has been upheld by the federal judiciary (*San Manuel Indian Bingo & Casino v. NLRB*, 374 U.S. App. D.C. 435 (D.C. Cir. 2007)).

The Nation in support of its arguments produced a purported copy of the Fifth Amended Restated Charter of the Seneca Gaming Corporation (Nation's Exhibit "A"). It should be noted that these arguments are made on the assumption that these are true copies of enactments that were duly authorized by the Nation without conceding whether or not they in fact are true copies or were duly enacted. The Nation in opposing Plaintiff's prior motion to add parties produced a document purporting to be the Fourth Amended Restated Charter of the Seneca Gaming Corporation.

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*, 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 and its agreement with the City of Buffalo, New York 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 internal governmental activity on its reservation and not include its commercial or off-reservation endeavors.

SOVEREIGN IMMUNITY IS NOT A BAR TO JOINDER OF OFFICERS OF THE SENECA NATION

Officers of a sovereign may not act in excess of their lawful authority. For when they do they will not be acting on behalf of the sovereign they allegedly represent, and will thereby be stripped of the immunity conferred to that sovereign. As the United States Court of Appeals for the Second Circuit held in *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76 "Although the AHA itself cannot be made to pay damages and cannot even be named as a defendant, Garcia can still obtain injunctive relief against it by suing an agency officer in his official capacity." In fact the United States Supreme Court in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 stated "There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. See *Ex parte Young*, 209 U.S. 123 (1908)" The *Ex Parte Young* doctrine applies to Indian nations and tribes just as it applies to the States (see *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030 at 1050-1051; *Santa Clara*

Pueblo v. Martinez, 436 U.S. 49 at 59; *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572).

Recently a court in this circuit has stated “Finally, even if the Shinnecock Indian Nation had tribal immunity when sued by the State, its tribal officials could be sued in their official capacities for prospective equitable relief. Specifically, the Second Circuit and other courts have held that a suit for injunctive relief can be pursued against a tribal official in his official capacity so long as plaintiff can maintain a cause of action under the applicable statute. See *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 87-88 (2d Cir. 2001); see also *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 310 (N.D.N.Y. 2003) (“*Ex parte Young* offers a limited exception to the general principle of state sovereign immunity and has been extended to tribal officials acting in their official capacities . . . but only to enjoin conduct that violates federal law.”); *Bassett v. Mashantucket Pequot Museum and Research Ctr. Inc.*, 221 F. Supp. 2d 271, 278-79 (D. Conn. 2002) (“[U]nder the doctrine of *Ex parte Young*, prospective injunctive or declaratory relief is available against tribal officials when a plaintiff claims an ongoing violation of federal law or claims that a tribal law or ordinance was beyond the authority of the Tribe to enact.”). n74 In the instant case, although the State commenced the action alleging violations of New York anti-gaming and environmental law, Judge Platt held in his denial of the State's remand motion that the lawsuit raised federal claims related to IGRA, possessory interests of an Indian tribe with respect to Indian land, and the tribal status of the Shinnecock. (Memorandum and Order, at 3-5.). Thus, given the federal questions found by Judge Platt, the State may sue tribal officials for prospective injunctive relief pursuant to *Ex parte Young* and such defendants do not have a defense of sovereign immunity.” (*New York v. Shinnecock Indian Nation*, 2007 U.S. Dist. LEXIS 80443, 341-342 (D.N.Y. 2007))

"When a complaint alleges that the tribal officer has "acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked." *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Okla.*, 725 F.2d 572, 574 (10th Cir. 1984) (permitting plaintiff to seek injunctive and declaratory relief against tribe under exception to sovereign immunity). "Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess." *Id.* (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949) ("[T]he conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign.")). Utilizing such exceptions to sovereign immunity is "especially appropriate" with regard to Indian tribes, who are otherwise protected by an extremely broad immunity that would prevent federal courts from reviewing many aspects of federal law. *Tenneco Oil*, 725 F.2d at 574 (citing *Santa Clara*)." *Vann v. Kempthorne*, 467 F. Supp. 2d 56, 73-74 (D.D.C. 2006) (See also *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1050-1051 (11th Cir. 1995))

Maurice A. John as President of the Seneca Nation of Indians and E. Brian Hansberry as President and Chief Executive Officer of Seneca Gaming Corp. together with the respective State Officers will be violating state and federal law and acting beyond their scope of authority if gambling under the Indian Gaming Regulatory Act on land situated within the State of New York is determined to be prohibited for the reasons asserted by the Plaintiff in this action (New York Penal Law Article 225 and 18 USC § 1166, 1957; 25 USC §§ 232, 233, 2719). Therefore they would be acting in excess of the sovereign's authority and will not be protected by the sovereign's immunity and prospective declaratory and injunctive relief is available to prohibit continued illegal activity.

Plaintiff has met both requirements to maintain this action for prospective declaratory and injunctive relief set forth in *Garcia*. Plaintiff has a private cause of action under the Administrative Procedure Act to review the validity of the Federal Defendant's actions pursuant to the Indian Gaming Regulatory Act, an act that substantively applies to the State, the Seneca Nation and their instrumentalities, officers, agents, employees and servants.

Furthermore, the declarations and prohibitive injunction sought here does not rise to the level of interference that triggers sovereign immunity.

SENECA GAMING CORPORATION HAS WAIVED ITS SOVEREIGN IMMUNITY

The Charter contains a "sue and be sued" clause (Page 5 Item 7 and & Page 11 Item 8(d)(xxiv) 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).

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"). It has been held that such "sue and be sued" clauses combined with such a provision shielding the Indian nation or tribe's assets in this manner is an express waiver of its sovereign immunity (*Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974).

The Seventh Circuit has questioned "whether there really is a requirement that a tribe's waiver of sovereign immunity be explicit, especially since the harder it is for a tribe to waive its sovereign immunity the harder it is for it to make advantageous business transactions." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659-60 (CA7 1996)

(contrasting the requirement for congressional abrogation of tribal immunity set forth in Santa Clara Pueblo with an express waiver of tribal immunity by the tribe itself); but see *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.* (In re *Ransom*), 658 N.E.2d 989, 993 n.4 (N.Y. 1995) ("At least one Federal Circuit Court of Appeals has ruled that regardless of whether the waiver is externally imposed by Congress or by an act of the tribe itself, there is no distinction in the requirement of an explicit and unequivocal waiver.") (citing *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1377 (CA8 1975)).

Here in the "sue and be sued" clause in the Charter of the Seneca Gaming Corporation there is an express and unequivocal waiver of whatever tribal sovereign immunity it may have. A tribe may clearly express its intent to waive its immunity by stating in a contract, "If the tribe breaches the contract, you may sue us in state district court." Defendant would presumably argue that there is no express waiver in that contractual provision because the provision did not contain the necessary terms². But requiring the use of certain words or terms creates an arbitrary and artificial obstacle that is neither inherent in the concept of an "express" waiver, nor justified by paternalistic notions of tribal protection. When a tribe has unequivocally expressed its willingness to expose itself to suit it has expressly waived its immunity.

Moreover, because the Court has recognized that tribal immunity for commercial enterprises is barely, if at all, defensible, there is no justification for judicially wrapping that immunity in a protective sheath that circumscribes a tribe's ability to waive its immunity from suit. The weak foundation for tribal immunity strongly recommends a relaxed standard for evaluating the validity of a claimed waiver of immunity. Certainly Congress has never acted to

² In fact, it is questionable whether recitation of the "magic words" would satisfy some tribes' interpretation of the "unequivocally expressed" requirement for waivers of tribal immunity. During oral argument in *Kiowa*, the tribe claimed an effective waiver not only required the "magic words," but also required the tribe to "select a court that they're going to go into, designate the kind of causes of action that they will be subject to," and identify "what assets can be subjected to the judgment." See Oral Argument of R. Brown Wallace, in *Kiowa*, 1998 WL 15116, at *5-*6 (Jan. 12, 1998).

restrict Indian tribes' ability to waive their immunity, and the Nation cannot articulate a valid policy rationale for a judicially imposed common-law limitation. Kiowa simply cannot support a doctrine of judicial paternalism that would protect tribes from their own voluntary and express waivers of immunity.

CONCLUSION

Based on the aforementioned reasons the court should grant plaintiff leave to amend and supplement the complaint.

DATED: December 26, 2007
Buffalo, New York

Daniel T. Warren
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