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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

DANIEL T. WARREN, Plaintiff, vs. **GEORGE E. PATAKI, MICHAEL J. HOBLOCK, JR. AND WAYNE E. BENNETT.** Defendants	)))))))))	**MEMORANDUM OF LAW IN OPPOSITION TO CROSS-MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** **Index #** 2004-5270

Point I

Defendants mischaracterize my claims regarding the Oneida and Mohawk Compacts. I do not challenge their validity. The validity of these compacts was already determined in two separate actions (Peterman v. Pataki and Saratoga County Chamber of Commerce v. Pataki). My action seeks, inter alia, to enforce these declaratory judgments not relitigate the validity of the compacts. Since these judgments have been rendered within 12 months preceding the filing of this action it is well within any statute of limitations. This issue has been previously addressed in my moving papers to dismiss the defendants' Seventh defense.

Therefore the Defendants' motion based on their Seventh Defense should be denied and this defense should be stricken.

Point II

Defendants' are under the erroneous impression that my motion is one for summary judgment on all of my claims set forth in the complaint. This is clearly not so, since my Notice of Motion clearly indicates that I am seeking partial summary judgment. I have not abandoned any claims alleged in the complaint.

To the extent that Defendants' seek summary judgment against my claims attacking the validity of the Compact with the Seneca Nation based on the Third Department's decision in Dalton v. Pataki, that decision is currently under appeal to the Court of Appeals and was erroneously decided as will be detailed

below[1]. If this court decides to follow the Third Department's decision despite the arguments below, it still would not completely eliminate my challenges to the compact because the Third Department did not reach the issue of which games are permitted in New York. In footnote 6 of the Third Department's decision they limit the reach of their decision in stating "Because plaintiffs do not challenge the constitutionality of any of the specific games contemplated by the Seneca Nation compact and none of the parties provides any analysis of how each game is played in their briefs before us, we do not address whether any particular game listed, as opposed to class III gaming in general, is a "game of chance" within the meaning of NY Constitution, article I, § 9 or General Municipal Law article 9-A. Although we recognize that the determination of whether a state "permits such gaming" should be made on a game-by-game basis (see Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 843 n 10 [2003], supra [Read, J., dissenting]), in the absence of any challenge or analysis by the parties, we assume that the particular class III games in the compact are constitutional for the purposes of this decision only and confine our ruling to the issue advanced before us whether the ban in NY Constitution, article I, § 9 on "commercialized gambling" amounts to a prohibition of all class III gaming for purposes of IGRA." Plaintiff challenges whether the games listed in Appendix A of the Compact between the State of New York and the Seneca Nation of Indians (Verified Complaint ¶ 38)

THE COMPACT BETWEEN THE SENECA NATION AND THE STATE IS UNCONSTITUTIONAL

The tribal-state compact between the Seneca Nation of Indians and the State of New York is illegal in that it purports to offer gaming that is not permitted under state law and that it requires the State lend its money or credit in a manner that violates the State Constitution.

The compact under challenge here permits slot machines and various card and dice games.

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[1] Plaintiff has moved to file an amicus brief in Dalton v. Pataki urging much of the same arguments as presented here. This motion is currently returnable on October 25, 2004.

As stated above slot machines are illegal in New York and are not permitted to any person entity or organization for any purpose (Penal Law Article 225). As previously stated Penal Law § 225.30 was amended to purportedly exempt from its reach slot machines possessed pursuant to a tribal-state compact under the IGRA (This is an unconstitutional privilege or immunity in violation of Article III § 17 of the New York Constitution). However, slot machines are still prohibited to everyone else including charitable organizations even though the legislature amended GML § 186(3) to include slot machines. As previously stated a tribal-state compact entered into under § 2710(d)(1)(c) does not satisfy the permit requirement of § 2710(d)(1)(b) *Citizen Band Potawatomi Indian Tribe v. Green*, 995 F.2d 179, 181 (10th Cir. 1993); *American Greyhound Racing*, 146 F.Supp.2d 1012, 1067-69 (D. Ariz. 2001). In *Citizen Band Potawatomi Indian Tribe v. Green*, 995 F.2d 179, 181 (10th Cir. 1993) the Tenth Circuit Court of Appeals held "Finally, we reject as patent bootstrapping the Tribe's argument that the Compact itself legalizes VLTs for purposes of the IGRA's waiver provision. Congress must have meant that gambling devices be legal absent the Tribal-State compact; otherwise it would not have been necessary to require both that gambling devices be legal, 25 U.S.C. § 2710(d)(6)(A), and that the compact be "in effect," id. 2710(d)(6)(B)." Therefore slot machines must be legal to some person, entity or organization in the absence of a tribal-state compact before it can properly be the subject of a tribal state compact.

Furthermore the card and dice games listed in Appendix A are not permitted to any person, entity or organization for any purpose. They are not games of chance as defined in General Municipal Law Article 9-A because they involve wagering of money by one player against another player which is prohibited (GML §§ 186(3), 195-k). According to "The New Complete Hoyle, Revised" by Albert H. Morehead, Richard L. Frey and Geofery Mott-Smith (hereinafter referred to as "Hoyle") the term "dealer" is defined as the player who distributes the cards in preparation for play.

The only games of chance permitted by New York are Bingo under Article 14-H of the General Municipal Law and those games specifically permitted under 9 NYCRR 5620.1. Therefore any game of chance other than bingo; Craps; Roulette; Black Jack Big Six; Money Wheel; Chuck-A-Luck; Hazard; Under and Over Seven; Beat the Dealer; Merchandise Wheels; Big Nine; Color Wheel; Bang; Joker

Seven; Horse Race Wheel; Best Poker Hand; Bell Jar; Fruit wheel; Card wheel; and Raffles played in the manner as prescribed in 9 NYCRR 5620.3 through 9 NYCRR 5620.22 is prohibited and not permitted by state law as required by the IGRA (25 U.S.C. § 2710(d)(1)(b)). Although 9 NYCRR § 5620.1(u) provides for "any other game of chance which has been approved in writing by the board" that writing cannot be the compact itself and it must permit those other games to people, organizations or entities in the absence of such a compact (25 U.S.C. § 2710(b)(1)(b); 25 U.S.C. § 2710(b)(1)(c); *Citizen Band Potawatomi Indian Tribe v. Green*, 995 F.2d 179, 181 (10th Cir. 1993); *American Greyhound Racing*, 146 F.Supp.2d 1012, 1067-69 (D. Ariz. 2001)).

Profiting or the advancement of Gambling is prohibited unless constitutionally authorized

The State Legislature acted in excess of its authority when it enacted Executive Law § 12. In accordance with this State's longstanding public policy the New York Constitution forbids gambling, except for limited exceptions, and prohibits commercialized gambling. It reads:

> "[E]xcept as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section" (N. Y. Const art I, § 9 [1]).

The New York Court of Appeals described the gambling prohibitions of Penal Law Article 225 as follows:

> "Article 225 of the Penal Law sets forth a framework establishing two promoting gambling offenses and various other gambling -related offenses. Under the statutory scheme a mere "player" or bettor is not criminally liable but one who, in some capacity other than as a player, participates in any gambling enterprise or activity is guilty of a crime. The basic inquiry in each case is whether the game or scheme in issue constitutes gambling and whether defendant's conduct is other than as a player.

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> The core crime, section 225.05, provides that a person is guilty of promoting gambling in the second degree when "he knowingly advances or profits from unlawful gambling activity." A person "advances gambling activity" when, acting as other than a player, he engages in conduct which materially aids any form of gambling activity (Penal Law § 225.00 [4]). The statute identifies various types of conduct which may constitute gambling activity, including conduct "toward the arrangement of any of its financial or recording phases", and concludes with the catchall phrase referring to conduct directed "toward any other phase of [a gambling] operation." Section 225.05 imposes misdemeanor liability for the entire spectrum of gambling activity, and is augmented by section 225.10 which criminalizes specialized kinds of felonious bookmaking and policy activity not included within it (see, Staff Notes of New York State Commission on Revision of Penal Law and Criminal Code, McKinney's Spec Pamph [1964]). The article also sets forth various possessory offenses (see, e.g., Penal Law § 225.15, 225.30)." People v. Giordano, 87 N.Y.2d 441 (1995)

Unlawful gambling activity has been defined as any gambling activity that is not explicitly authorized by the State of New York (N.Y. Penal Law §§ 225.05-225.20 & 225.30; Op.Atty.Gen. 81-68).

Games of chance as it is permitted in relation to charitable organizations are defined by General Municipal Law § 186(3) as follows:

> "Games of chance" shall mean and include only the games known as "merchandise wheels", "coin boards", "merchandise boards", "seal cards", "raffles", and "bell jars" and such other specific games as may be authorized by the board, in which prizes are awarded on the basis of a designated winning number or numbers, color or colors, symbol or symbols determined by chance, but not including games commonly known as "bingo or lotto" which are controlled under article fourteen-H of this chapter and also not including "bookmaking", "policy or numbers games" and "lottery" as defined in section 225.00 of the penal law. ***No game of chance shall involve wagering of money by one player against another player***.

General Municipal Law § 195-k criminalizes as a misdemeanor unlawful games of chance. That section provides:

> "Unlawful games of chance. 1. Any person, association, corporation or organization holding, operating, or conducting a game or games of chance is guilty of a misdemeanor, except when operating, holding or conducting:
>
> (a) In accordance with a valid license issued pursuant to this article or

(b) On behalf of a bona fide organization of persons sixty years of age or over, commonly referred to as senior citizens, solely for the purpose of amusement and recreation of its members where (i) the organization has applied for and received an identification number from the board, (ii) no player or other person furnishes anything of value for the opportunity to participate, (iii) the prizes awarded or to be awarded are nominal, (iv) no person other than a bona fide active member of the organization participates in the conduct of the games, and (v) no person is paid for conducting or assisting in the conduct of the game or games.

2. The provisions of this section shall apply to all municipalities within this state, including those municipalities where this article is inoperative."

General Obligations Law § 5-417 provides: "All contracts, agreements and securities given, made or executed, for or on account of any raffle, or distribution of money, goods or things in action, for the payment of any money, or other valuable thing, in consideration of a chance in such raffle or distribution, or for the delivery of any money, goods or things in action, so raffled for, or agreed to be distributed as aforesaid, shall be utterly void". The Court of Appeals has held that "All contracts and dealings in respect to lotteries, and tickets in lotteries, being illegal, no right of action can accrue to a party, by reason of such contracts and dealings" (Thatcher v Morris, 11 N.Y. 437, 438; Holberg v Westchester Racing Assn., 184 Misc 581; Moskowitz v Cohen, 158 Misc 489). It is the public policy of this State that no person shall profit from a criminal enterprise. See CPLR Article 13A - Proceeds of a crime, Forfeiture PL § 60.27. Our courts have historically refused to aid illegal enterprises. The First Department in Intercontinental Hotels Corporation (Puerto Rico) v. Golden, 18 A.D.2d 45, described our public policy against gambling as "The anti- gambling clause of the State Constitution is of the same venerable vintage as the wrongful death action provision and has also been included in all later revisions of the Constitution. Thus the prohibition against gambling represents, not just a temporary fancy, but a deep-rooted policy to which courts should give constructive effect." This public policy is so strong and deep rooted that our law in recognition that title to property or money does not pass when it is obtained through illegal gambling activities and that in derogation of the common law provides that a person who places a bet or loses money or an object of value in excess of $25.00 may sue to recover it (GOL §§ 5-419, 5-421). Furthermore the places where unlawful gambling takes place is considered a criminal nuisance (Penal Law § 240.45)

The statutes related to gambling are to be strictly construed and those not specifically authorized are prohibited. For example in the case of New York Racing Association, Inc. v. Hoblock, 270A.D.2d 31, 3/7/2000) where it was sought to allow wagers on horse races to be placed over the phone the First Department held “Defendants maintain that the simultaneous transmission of audio without the video portion of the signal does not constitute a "simulcast", within the meaning of the statute, which provides, " 'Simulcast' means the telecast of live audio and visual signals" (Racing, Pari-Mutuel Wagering and Breeding Law § 1001[a]). This is correct. However, it does not invariably follow that a simultaneous audio-only broadcast is permissible. Given the public policy against gambling in this State (Constitution, art 1 § 9; Penal Law § 225; Intercontinental Hotels Corp. v Golden, 18 A.D.2d 45, 49, revd on other grounds 15 N.Y.2d 9), the statute is subject to strict construction, and any activity not expressly authorized is prohibited. The language relied upon by defendants to support telephone wagering "without the display of the live simulcast signal" requires such wagers to be authorized "under any other provision of this chapter" (Racing, Pari-Mutuel Wagering and Breeding Law § 1017[1][e]). As defendants can point to no express authority in the governing statute for accepting telephone wagers on transmissions that are not simulcasts, as defined in § 1001[a], such wagering is prohibited. This Court will not permit laws authorizing gambling to be extended, by implication, beyond what the Legislature has specified (Intercontinental Hotels Corp. v Golden, supra, at 49).”

Executive Law § 12 is in direct conflict with the above constitutional and long standing public policy of this State and must be stricken as unconstitutional. When language of a constitutional provision is plain and unambiguous, full effect should be given to "the intention of the framers ... as indicated by the language employed" and approved by the People (*Settle v Van Evrea*, 49 N.Y. 280, 281 [1872]; see also, *People v Rathbone*, 145 N.Y. 434, 438). The Court of Appeals in the absence of ambiguity found "no justification ... for departing from the literal language of the constitutional provision" (*Anderson v Regan*, 53 N.Y.2d 356, 362). As the Court of Appeals stated in *Settle v Van Evrea*, supra, "[I]t would be dangerous in the extreme to extend the operation and effect of a written Constitution by construction beyond the fair scope of its terms, merely because a restricted and more literal interpretation might be inconvenient or impolitic, or because a case may be supposed to be, to some extent, within the reasons

which led to the introduction of some particular provision plain and precise in its terms. That would be pro tanto to establish a new Constitution and do for the people what they have not done for themselves" (49 N.Y. 280, 281, supra). If the guiding principle of statutory interpretation is to give effect to the plain language (*Ball v Allstate Ins. Co.*, 81 N.Y.2d 22, 25; *Debevoise & Plimpton v New York State Dept. of Taxation & Fin*., 80 N.Y.2d 657, 661; McKinney's Cons Laws of N.Y., Book 1, Statutes § 94), "[e]specially should this be so in the interpretation of a written Constitution, an instrument framed deliberately and with care, and adopted by the people as the organic law of the State" (*Settle v Van Evrea*, 49 N.Y., at 281, supra). These guiding principles do not allow for interstitial and interpretative gloss by the courts or by the other branches of government themselves that substantially alters the specified law-making regimen. Courts do not have the leeway to construe their way around a self-evident constitutional provision by validating an inconsistent "practice and usage of those charged with implementing the laws" (*Anderson v Regan*, 53 N.Y.2d 356, 362, supra; see also, *People ex rel. Burby v Howland*, N.Y. 270, 282; *People ex rel. Crowell v Lawrence*, 36 Barb 177, affd 41 N.Y. 137; *People ex rel. Bolton v Albertson*, 55 N.Y. 50, 55).

Dalton v. Pataki was erroneously decided and should not be followed

Some may urge that this issue was already decided by Justice Teresi in Dalton v. Pataki., Albany County, Index #2002-719 which, as relevant to the challenge of Part B of Chapter 383 of the laws of 2001, was affirmed by the Appellate Division, Third Department on July 7, 2004. While this issue was decided in that action this court is not bound by Justice Teresi's decision and the Third Department's affirmance is clearly erroneous and should not be followed for the following reasons.

Other than referring to his "careful consideration," Justice Teresi simply opts for Judge Read's dissenting opinion in *Saratoga County Chamber of Commerce Inc. v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (N.Y. 06/12/2003) rather than Judge Smith's concurring opinion. No other reasons for this opinion are offered by Justice Teresi. It is peculiar to base an opinion on a dissent from an appellate court and in any event Judge Read does not opine that all gambling pursuant to a

tribal-state compact is legal in New York. The Third Department in its affirmance of Justice Teresi's decision on this issue appears to acknowledge this. Furthermore in his opinion Justice Teresi implies that slot machines are illegal, if they are illegal then the tribes can't have them. However, Justice Teresi did not address this issue either. Judge Read placed great emphasis on the Supreme Court decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 94 L. Ed. 2d 244, 107 S. Ct. 1083 (1987), however the IGRA was passed to fill a void in Indian gaming regulation that arose from the states' dependence on Congress for any authority to regulate tribal affairs (Spokane Tribe of Indians v. Washington State, 28 F.3d 991 (9th Cir. 07/06/1994)).

The Third Department's Holdings

The Third Department's decision on the applicability of New York Law on Indian land is erroneous. The Third Department held that the IGRA "'preempts the field in the governance of gaming activities on Indian lands' (S Rep No. 100-46, 100th Cong, 2d Sess, at 6, reprinted in 1988 US Code Cong & Admin News, at 3071) and sets forth a mechanism by which states may exert some measure of control over gambling on Indian lands (see Seminole Tribe of Fla. v Florida, 517 US 44, 58 [1996]). We determine that, pursuant to IGRA, a state may enter into tribal-state compacts permitting particular class III, casino-type gaming activities on tribal lands if the state permits any person to conduct those particular gaming activities for any purpose, including a charitable purpose. That a compact permits a certain game to be conducted in a manner that is otherwise inconsistent with state law will not render it invalid if the game is not completely prohibited. Because New York permits the gaming activities at issue here for charitable purposes, subject to heavy regulation, the gaming is properly the subject of a tribal-state compact." The Court then went on to hold "Plaintiffs' argument fails, however, because the term "gambling" excludes "class III gaming conducted under a [t]ribal-[s]tate compact approved by the Secretary" (18 U.S.C. § 1166 [c] [2]). That is, under 18 U.S.C. § 1166, state laws regulating gambling do not apply to class III gaming otherwise permitted under IGRA. Class III gaming is allowed on Indian lands by IGRA if, as relevant here, it is "conducted in conformance with a [t]ribal-[s]tate compact" (25

U.S.C. § 2710 [d] [1] [C]) and "in a [s]tate that permits such gaming for any purpose by any person, organization, or entity" (25 U.S.C. § 2710 [d] [1] [B] [emphasis added]).” The Third Department further held “To the extent that 25 U.S.C. §§ 232 and 233 conflict with IGRA – i.e., insofar as those statutes provide that the state retains authority over gaming other than that agreed to in a tribal-state compact – we conclude that IGRA impliedly repealed those statutes (see generally State of Rhode Island v Narragansett Indian Tribe, 19 F3d 685, 703-705 [1994], cert denied 513 US 919 [1994], abrogated by statute as stated in Narragansett Indian Tribe v National Indian Gaming Commn., 158 F3d 1335, 1337-1338 [1998]).” Lastly the Third Department also held that our public policy prohibition on gambling is not strong enough to preclude the Governor from concurring with the Secretary of the Interior under 25 U.S.C. 2719(b)(1)(a) stating “while New York does have a strong policy against commercialized gambling, "the New York public does not consider authorized gambling a violation of 'some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal'" (Intercontinental Hotels Corp. of Puerto Rico v Golden, 15 N.Y.2d 9, 15 [1964], supra [citation omitted]). Hence, the Governor's concurrence cannot be said to violate New York public policy”

What Gambling does New York “permit”?

Tribal-state compacts alone do not satisfy the “permit” prong of the IGRA. Two courts have held that a compact entered into under § 2710(d)(1)(C), does not satisfy the state permission requirement of § 2710(d)(1)(B). *Citizen Band Potawatomi Indian Tribe v. Green*, 995 F.2d 179, 181 (10th Cir. 1993); *American Greyhound Racing*, 146 F.Supp.2d 1012, 1067-69 (D. Ariz. 2001). It would be inconsistent to not compel a state to choose one type of Class III game over another (*Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 at 1258 (9th Cir. 1994)), but not to allow the state to choose for what purposes over another. In the State of New York only charitable organizations are permitted to operate certain games of chance and commercialized gambling is prohibited altogether. Therefore if an Indian Nation or Tribe would like to conduct the same games of chance in aid or in support of education to its members, or to support its own volunteer fire department the State must

1 permit and negotiate arrangements with the Indian Nation or Tribe to do so under the IGRA. On the
2 other hand if the Indian Nation or Tribe wants to permit commercialized gaming the State cannot be
3 compelled to enter into such a compact and in fact has no authority to do so under our State
4 Constitution.

5 The Third Department erred in resorting to legislative history and transcripts of Senate debates
6 in deciding that "the enactment of General Municipal Law article 9-A similarly evince an
7 acknowledgement that the definition contained in section 186 was intended to include casino-type
8 games." "The governing rule of statutory construction is that courts are obliged to interpret a statute to
9 effectuate the intent of the Legislature" (People v Finnegan, 85 N.Y.2d 53, 58 [1995]). The "'clearest
10 indicator of legislative intent'" is the statute itself (People v Robinson, 95 N.Y.2d 179, 182 [2000],
11 quoting Majewski v Broadalbin-Perth Cent. School Dist., 91 N.Y.2d 577, 583 [1998]). If the language
12 chosen by the State Legislature is clear and unambiguous, and "involves no absurdity or contradiction,
13 there is no room for construction and courts have no right to add to or take away from that meaning"
14 (Tompkins v Hunter, 149 N.Y. 117, 123 [1896]; see People ex rel. Harris v Sullivan, 74 N.Y.2d 305,
15 309 [1989]). When this doctrine is violated, a court impermissibly encroaches upon the legislative and
16 executive domains and thereby violates the foundation of the separation of powers doctrine (see People
17 v Finnegan, 85 N.Y.2d at 58). General Municipal Law § 186(3) clearly and unambiguously provides
18 that "No game of chance shall involve wagering of money by one player against another player."
19 Article I § 9 of the New York Constitution, General Municipal Articles 9-A and 14-H, General
20 Obligations Law Art. 5 Title 5 and Penal Law Article 225 clearly and unambiguously prohibit the
21 advancement or profiting from gambling.

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23 **Does the Legislature have the authority?**

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25 Even if some charitable gambling that is permitted in the Constitution is considered Class III does
the Legislature even have the authority to enter into a tribal-state compact that permits commercialized
gaming? Particularly in light of Penal Law Article 225 and General Municipal Law Article 9-A which
were enacted by the legislature pursuant to the Constitutional command that "the legislature shall pass

appropriate laws to prevent offenses against any of the provisions of this section." (N.Y. Const. Art. 1 §9 (1)) There is no dispute that New York's criminal laws prohibit profiting from gambling or the advancement of it. The State Constitutional command is clear and unambiguous and the Legislature does not have the authority to approve anything that permits the profiting from gambling or its advancement. If a person (off-reservation) runs an operation that conducts a game of chance for profit he can be charged under Article 225 of the Penal Law and/or GML § 195-k. It should also be noted that Justice LaMendola addressed Cabazon in *People v Snyder*, 141 Misc.2d 444 (1987) and concluded "The question then appears to be whether New York permits the possession or operation of gambling devices such as "joker poker", "black jack" or "casino" video machines and electronic slot machines anywhere within the State and whether it permits the promotion or profit from the operation of such devices. The answer is that such conduct or activity is not permitted to any extent in this State. Accordingly the statutes at issue in this case can be characterized as criminal/prohibitory and fully enforceable against the defendant by reason of Congress' express grant of criminal jurisdiction under 25 U.S.C. § 232." It is also curious that L. 2001, c. 383, Part B amended Penal Law § 225.30 (a possessory crime) to except games conducted under the compact but did not amend any other provisions of Article 225 prohibiting profiting from the advancement or conducting unlawful gambling activities. Therefore although possession of gambling devices may not be unlawful in the presence of a valid tribal-state compact it did not amend the prohibition from profiting from gambling or its advancement. In fact the mere possession of three or more of these coin operated gambling devices or possession of one of these coin operated gambling devices in public raises a presumption of intent to use in the advancement of unlawful gambling activity (PL § 225.35(3)). Furthermore, the Second Circuit did state in Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2nd Cir. 09/04/1990) that "We recognize that United States v. Dakota, 666 F. Supp. 989, 997-1000 (W.D. Mich. 1985), aff'd on other grounds, 796 F.2d 186 (6th Cir. 1986), and United States v. Burns, 725 F. Supp. 116, 126 (N.D.N.Y. 1989), appeal pending sub. nom. United States v. Cook, (2d Cir. Nos. 90-1070, -1072, -1168, and -1179, can be cited for the proposition that a state which allows charities to engage in episodic, regulated casino-type gambling may still be deemed to be in a prohibitive, rather than regulatory, posture as to commercial casino gambling of the type that the Tribe seeks to operate."

Like California in 1999, New York's Constitution prohibits commercial gaming and the legislature and the Governor lack the authority to enter into tribal-state compacts under the IGRA permitting the profiting from gambling or its advancement. Connecticut did not have such a provision in its constitution when the Second Circuit Court of Appeals ruled in Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2nd Cir. 09/04/1990). The decisions of the District Court and the Court of Appeals in the Mashantucket litigation, it was the absence of a clear criminal prohibition of casino gaming under state law - the type of gaming requested by the Tribe - which led to the courts' conclusion that Connecticut was a "State that permits such gaming" under State Law. 25 U.S.C. § 2710(d)(1)(B). Lastly the Second Circuit Court of Appeals held in United States v. Cook "Appellants maintain that New York law is civil/regulatory because New York allows some gambling activity and possession of some gambling devices under certain circumstances, see N.Y. Gen. Mun. Law § 185 et seq. (McKinney 1986 & Supp. 1990) (local legislatures may license the operation of games of chance by authorized charitable organizations); N.Y. Penal Law § 225.32 (McKinney 1989) (antique slot machines not used for gambling purposes or machines assembled for purposes of being transported to a jurisdiction where such devices are lawfully operated are permitted), and therefore their activities did not violate the "law of a State . . . in which [they were] conducted." We are not persuaded by their contention. Although some gambling activity is permitted, New York flatly prohibits the operation of slot machines for gambling purposes. State v. Snyder, 141 Misc. 2d 444, 449, 532 N.Y.S.2d 827, 831 (County Ct. 1988) ("such conduct . . . is not permitted to any extent in this State"); N.Y. Penal Law § 225.30 (McKinney 1989)."

Therefore, the Seneca Compact and L. 2001, c. 383, Part B, § 2, now Executive Law § 12, is in direct conflict with the deep-rooted public policy and the Constitution of the State of New York and is null and void.

The Legislature exceeded its authority in enacting L. 2001, c. 383, Part B

The challenged legislation L. 2001, c. 383, Part B along with the tribal-state compact entered into by the State of New York with the Seneca Nation of Indians was unconstitutionally passed and entered into in violation of Article III § 17 of the New York Constitution which prohibits the granting of an

exclusive privilege, immunity or franchise. The challenged legislation is a grant of "an exclusive privilege, immunity or franchise whatever" from this State's prohibition of commercial gambling. It authorizes the Governor to enter into tribal-state compacts for up to 6 casinos in 5 counties within this state with only Indian tribes or nations (L. 2001, c. 383, Part B § 2, Executive Law § 12). Since it applies to only five out of our State's 62 counties and only members of the State's Indian tribes or nations this bill is local and private in nature. The word "local" as applied to a bill, act or law means such bill, act or law as touches but a portion of the territory of the State or a part of its people, a fraction of the property of its citizens (Kerrigan v. Force, 68 N. Y. 381, 383). A local law is entirely confined in its operation to the property and persons of a specified locality whereas a general law embraces persons or property of the people of the State generally (People v. O'Brien, 38 N. Y. 193, 194). Three of these casinos are committed to the Seneca Nation of Indians. It further grants only them an immunity or exemption from our State's laws prohibiting slot machines (L. 2001, c. 383, Part B, Penal Law § 225.30, General Municipal Law § 186(3)). As the Court in Huron v. Pataki, Index # 2004-4425, Supreme Court, Erie County, stated "The State is promised a revenue share over the fourteen (14) year period of the agreement, and "host municipalities" will be compensated out of the State's share of the revenues, in exchange for the State granting the Seneca Nation an exclusive franchise for certain gaming over more than ten thousand square miles in the Western New York area." The Court held in Matter of Union Ferry Co., 98 N.Y. 139, 150 "The constitutional prohibition was evidently aimed at monopolies. At granting to corporations or individuals not merely privileges and franchises not possessed by others, but the right to exclude others from the exercise or enjoyment of like privileges or franchises." It is clear that this act was intended to, and in fact does, grant to members of The Six Nations of the Haudenosaunee an exclusive privilege and precludes all others.

Furthermore it violates N. Y. Const., art. III, § 15 that provides "No private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title." "The purpose of this provision was to prevent concealment and surprise to the members of the Legislature and to the public at large and to prevent legislative 'logrolling.' (*Economic Power & Constr. Co. v. City of Buffalo*, 195 N. Y. 286.) This is perhaps best illustrated by the occasion for the creation of

this constitutional provision, which was added as a result of the success of Aaron Burr in persuading the Legislature to grant him a charter for a water company which had hidden among its provisions a clause enabling him to found a bank. *(Matter of City of New York [Clinton Avenue]*, 57 App. Div. 166.)" (*Burke v. Kern*, 287 N. Y. 203, 213) Accordingly, the bill's title should have the effect of informing the Legislature and public what subject is covered in a particular bill. In passing S5828 and A9459 (which ultimately became Chapter 383 of the Laws of 2001) the bills, introduced by the Governor through the Committee on Rules, embraced 27 different purposes under a non-descriptive subject to wit: "This act enacts into law major components of legislation relating to issues deemed necessary for the state." This bill is the epitome of what Article III § 15 of the State Constitution was intended to avoid in that its description is unduly vague and there appears no common thread in the 27 purposes that has no necessary or natural connection to the subject.

Since this was a local act it required a Home Rule Message from the municipalities it effects which the State has admitted it did not have and this act was enacted in violation of Article IX of the New York Constitution.

The Compact between the Seneca Nation of Indians and the State of New York violate the prohibition on lending the States' money or credit to or in aid of any individual, or public or private corporation or association, or private undertaking (N.Y. Const. Art. VII § 8). The compact provides contains a provision where the fee title to the Niagara Falls Convention Center and its land will be transferred to the Seneca Nation for $1.00. The Nation will then lease the convention center back to the state for $1.00 a year for 21 years. The State then sub-leases the convention center to the Seneca Gaming Corporation for $1.00 a year for 21 years. At the end of 21 years the Seneca Nation will pay the State the balance of the general obligation bonds pledged in connection with the convention center as of July 1, 2002. This scheme uses the State's credit to fund a long term mortgage to the benefit of the Seneca Nation of Indians and to the detriment of the public fisc. This is not the case of the State holding a mortgage for premises that it sells. The State is still obligated to pay on the bonds it issued to construct and maintain the premises while receiving no compensation from the purchaser for 21 years

(Wein v. State of New York, 39 N.Y.2d 136, 347 N.E.2d 586). Further the Compact requires that the State use its power of eminent domain to acquire property for it.

New York Law on Indian Land

The Third Department in Dalton held "We similarly conclude that part B is consistent with the requirement in NY Constitution, article I, § 9 that the Legislature "pass appropriate laws to * * * ensure that such games are rigidly regulated to prevent commercialized gambling." Plaintiffs' argument that part B violates this requirement is premised on their incorrect belief that New York laws relating to gaming activities apply with the same force and effect on Indian lands as they do elsewhere within the state." This holding is clearly erroneous for the following reasons.

18 U.S.C. §§ 1166(a), 1955 makes that same for profit gambling operation prohibited by Penal Law Article 225 a federal offense and 25 U.S.C. § 232[2] is a provision of Federal law that grants New York concurrent criminal jurisdiction under 18 U.S.C. § 1166(d). The Johnson Act, 15 U.S.C. 1171-1178, prohibits the importation of gambling devices like VLTs and slot machines into a state unless it has enacted a law providing for the exemption of such from the provisions of this section Most of the cases, if not all, relied upon by the Third Department were in states that did not have such a grant of jurisdiction. The Court further erred by holding that the IGRA impliedly repealed 25 U.S.C. § 232 "'it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject the rule is to give effect to both if possible.'" Pipefitters Local 562 v. United States,407 U.S. 385, 432 n. 43, 33 L. Ed. 2d 11, 92 S. Ct. 2247 (1972) (quoting United States v. Tynen, 78 U.S. (11 Wall.) 88, 92, 20 L. Ed. 153 (1871)). Very few States have been granted criminal jurisdiction over Indian land by Congress. In enacting 18 U.S.C. § 1166(d) Congress intended to give the States that do not already have criminal jurisdiction on Indian Land a vehicle to negotiate such jurisdiction with the tribe or nation seeking to

[2] 25 U.S.C. § 232 was enacted after the Court in United States v. Forness, 125 F.2d 928 (2nd Cir. 01/20/1942) questioned the longstanding presumption that Indian tribes in New York was under the State's general jurisdiction. (see Hearings on S.1686, S.1687 Before the Subcomm. On Indian Affairs of the Senate Comm. On Interior Affairs,

conduct Class III gaming. Moreover, "'the courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" Traynor v. Turnage,485 U.S. 535, 548, 99 L. Ed. 2d 618, 108 S. Ct. 1372 (1988) (quoting Morton v. Mancari, 417 U.S. 535, 551, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974); see also United States v. Sforza, 326 F.3d 107 (2d Cir. 04/10/2003)) There is a complete lack of any such clearly expressed intention in 18 U.S.C. § 1166 or the IGRA to limit such previously granted jurisdiction of any State. Notably, while all courts are bound by United States Supreme Court interpretations of federal constitutional and statutory provisions, the courts of this state are not bound by the interpretations by lower federal courts, although such decisions may serve as "useful and persuasive authority" (People v Kin Kan, 78 N.Y.2d 54, 59-60 [1991]; see Flanagan v Prudential-Bache Sec., 67 N.Y.2d 500, 506 [1986], cert denied 479 US 931 [1986]). It is also notable that the decision is devoid of any mention or analysis of United States v. Cook, *922 F2d 1026,* cert. denied, 500 U.S. 941 (1991) on this issue wherein the Second Circuit Court of Appeals held, while interpreting 25 U.S.C. § 232 and New York's Jurisdiction post IGRA, that "mutual exclusivity" of statutes is required to demonstrate Congress's "clear, affirmative intent to repeal". Recently the United States Supreme Court in Nevada v. Hicks, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 summarized the tribal-state jurisdictional and sovereignty issue as follows "Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that `the laws of [a State] can have no force' within reservation boundaries. Worcester v. Georgia, 6 Pet. 515, 561 (1832)," White Mountain Apache Tribe v. Bracker, 448 U. S. 136, 141 (1980). *fn4 "Ordinarily," it is now clear, "an Indian reservation is considered part of the territory of the State." U. S. Dept. of Interior, Federal Indian Law 510, and n. 1 (1958), citing Utah & Northern R. Co. v. Fisher, 116 U. S. 28 (1885); see also Organized Village of Kake v. Egan, 369 U. S. 60, 72 (1962)." The Appellate Division, Fourth

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80th Cong. 2d Sess. 13 (1948), Comment, The New York Indians' Right to Self-Determination, 22 Buffalo L. Rev. 985, 992 (1973)

Department of the New York Supreme Court ruled in People v. Debo, 652 N.Y.S.2d 174, 234 A.D.2d 944, lv denied 89 N.Y.2d 984 “The Village of Seneca Falls is not "Indian country" (18 U.S.C. § 1151), but even assuming, arguendo, that it is, we nonetheless reject the contention that the court lacked jurisdiction over the offense (see, 25 U.S.C. § 232; People v Edwards, 64 N.Y.2d 658, 485 N.Y.S.2d 252, 474 N.E.2d 612, affg 97 A.D.2d 987 for reasons stated at 78 A.D.2d 582).” In People v. Gunton, 604 N.Y.S.2d 445, 198 A.D.2d 890 lv denied 610 N.Y.S.2d 163; 82 N.Y.2d 896; it ruled “We reject defendant's contention that 25 U.S.C. § 232, which confers jurisdiction upon New York State over criminal offenses occurring on Native American reservations, is invalid because it violates the Treaty of 1794 (7 U.S. Stat 44). The validity as well as the constitutionality of 25 U.S.C. § 232 is well settled (see, People v Boots, 106 Misc. 2d 522; Gunton v Cattaraugus County, F. Supp [decided Aug. 27, 1993]; see also, United States v Cook, 922 F2d 1026, cert denied sub nom. Tarbell v U.S., U.S. , 111 S Ct 2235).” It should also be noted that "for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." 18 U.S.C. §§ 1166(a), 1955. The Fifth Circuit Court of Appeals in Ysleta Del Sur Pueblo v. Texas, 36 F.3d 1325 (5th Cir. 10/24/1994) analyzed whether 25 U.S.C. § 1300g-6[3] or the IGRA controls in the issue of gaming on the Tribe’s land. The Court held “The Tribe argues that, to the extent that a conflict between the two exists, IGRA impliedly repeals the Restoration Act. We disagree. The Supreme Court has indicated that "repeals by implication are not favored." Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442, 96 L. Ed. 2d 385, 107 S. Ct. 2494 (1987). The Court in Crawford Fitting further noted that, "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." Id. at 445 (quoting Radzanower v. Touche Ross & Co.,426 U.S. 148, 153, 48 L. Ed. 2d 540, 96 S. Ct. 1989 (1976)). With regard to gaming,

[3] 25 U.S.C. § 1300g-6 Provides in pertinent part that “All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas.”

the Restoration Act clearly is a specific statute, whereas IGRA is a general one. The former applies to two specifically named Indian tribes located in one particular state, and the latter applies to all tribes nationwide. Congress, when enacting IGRA less than one year after the Restoration Act, explicitly stated in two separate provisions of IGRA that IGRA should be considered in light of other federal law. Congress never indicated in IGRA that it was expressly repealing the Restoration Act. Congress also did not include in IGRA a blanket repealer clause as to other laws in conflict with IGRA. Finally, we note that in 1993, Congress expressly stated that IGRA is not applicable to one Indian tribe in South Carolina, evidencing in our view a clear intention on Congress' part that IGRA is not to be the one and only statute addressing the subject of gaming on Indian lands. Therefore, we conclude not only that the Restoration Act survives today but also that it -- and not IGRA -- would govern the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law." Similarly 25 U.S.C. § 232 and 233 are specific statutes and controlling and not the IGRA in relation to criminal jurisdiction.

Point III

Injunctive relief sought is appropriate and within the Court's power

The defendants contend that I am seeking to compel criminal prosecution, I am not. I am asking for an injunction that would compel them to refer to the District Attorney for the County wherein illegal gaming on Indian land is occurring. The District Attorney after reviewing the referral is free to use his discretion in whether or not to prosecute

The District Attorneys have plenary prosecutorial power in the counties wherein they are elected, the Attorney General has no such general authority and is "without any prosecutorial power except when specifically authorized by statute" (Della Pietra v State of NY, 71 NY2d 792, 797; see, County Law §§ 700, 927).

When the Governor acts by executive order pursuant to a valid grant of discretionary authority, his actions are largely beyond judicial review (see, e.g., Matter of Cunningham v Nadjari, 39 NY2d

314, 317-318; Gaynor v Rockefeller, 15 NY2d 120, 131; Matter of Nistal v Hausauer, 308 NY 146, 152-153, cert denied 349 US 962). Judicial review in such cases is generally limited to determining whether the State Constitution or the Legislature has empowered the Governor to act, and does not include the manner in which the Governor chooses to discharge that authority (see, e.g., Mulroy v Carey, 58 AD2d 207, 214-215, aff'd 43 NY2d 819; People ex rel. Saranac Land & Timber Co. v Extraordinary Special & Trial Term of Supreme Ct., 220 NY 487, 491; People v Kramer, 33 Misc 209, 219). For abuse of lawful discretionary authority, the remedy as a rule lies with the people at the polls, or with a constitutional amendment, or with corrective legislation.

There are, however, limits to the breadth of legislative and executive power. The State Constitution provides for a distribution of powers among the three branches of government (see NY Const, art III, § 1; art IV, § 1; art VI). This distribution avoids excessive concentration of power in any one branch or in any one person. Where power is delegated to one person, the power is always guided and limited by standards. In fact, even the Legislature is powerless to delegate the legislative function unless it provides adequate standards (Packer Coll. Inst. v University of State of N. Y., 298 NY 184, 189). Without such standards there is no government of law, but only government by men left to set their own standards, with resultant authoritarian possibilities.

It is true that in this State the executive has the power to enforce legislation and is accorded great flexibility in determining the methods of enforcement (see NY Const, art IV, § 3). But he may not "go beyond stated legislative policy and prescribe a remedial device not embraced by the policy" (Matter of Broidrick v Lindsay, 39 N.Y.2d 641, 645-646). And, as noted in the Broidrick case, decided unanimously, the flexibility allowed the executive in designing an enforcement mechanism depends upon the nature of the problem to be solved (id., p 646). Where it would be practicable for the Legislature itself to set precise standards, the executive's flexibility is and should be quite limited.

The Defendants can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the constitution or statutes enacted by the legislature (Matter of Jones v. Berman, 37 N.Y.2d 42, 57, 371 N.Y.S.2d 422, 332 N.E.2d 303). They also may not, under the guise of administering the statute ascribe a different or unreasonable meaning to its

terms (Matter of Rosenbluth v. Finkelstein, 300 N.Y. 402, 91 N.E.2d 581). An Executive cannot by regulatory fiat directly or indirectly countermand a statute enacted by the Legislature (Servomation Corp. v. State Tax Commn, 51 N.Y.2d 608, 612, 435 N.Y.S.2d 686, 416 N.E.2d 1022). As Judge Pound held: "*Laws are made by the lawmaking power, and not by administrative officers acting solely on their own ideas of sound public policy, however excellent such ideas may be*" (Matter of Picone v. Commissioner of Licenses of City of New York, 241 N.Y. 157, 162, 149 N.E. 336). Although administrative agencies have discretion in the manner of how to carry out their legislative mandates, they have no discretion to ignore those mandates or to alter the substantive standards set by the legislature or the constitution. State Division of Human Rights v. Genesse Hospital, 50 N.Y.2d 113, 118 (1980); Zalenski v. Crucible Steel Inc., 91 A.D.2d 807, 809 (3d Dep't 1982).

It is this court's constitutional power to say what the law is and fashion a remedy for any violation of it, even when it is against a coordinate co-equal branch of the state government. The courts of this state, like the federal courts, are vested with a unique role and review power over the constitutionality of legislation (see, Marbury v. Madison , 5 US[1 Cranch] 137 [1803]) which includes being the final arbiter of true separation of powers disputes (compare, Matter of King v Cuomo, 81 NY2d 247; Wolpoff v Cuomo, 80 NY2d 70; Clark v Cuomo, 66 NY2d 185; Bourquin v Cuomo, 85 NY2d 781).

The separation of executive, legislative, and judicial powers is basic to our State and Federal Governments (Story, Commentaries on the Constitution [5th ed], § 395; Marbury v. Madison, 1 Cranch [U.S.] 137; O'Donoghue v United States, 289 U.S. 516, 530). While the Supreme Court has left to the States the nature and degree of separation (Dreyer v Illinois, 187 U.S. 71, 84) our State, and its courts, have shown a continuing passion for the preservation and protection of the doctrine, as quintessential to our governmental framework (People ex rel. Burby v Howland, 155 NY 270, 282; Matter of Davies, 168 NY 89, 101-102; Matter of La Guardia v Smith, 288 NY 1).

Even when under a more "pragmatic, flexible" approach to division (Nixon v Administrator of Gen. Servs., 433 U.S. 425, 442; United States v Nixon, 418 U.S. 683), the Supreme Court has recognized that a constitutional flaw would exist in any statute which disrupts the proper balance between the

coordinate branches. Whether the formulation be one of rigid departmentalization, or the more recent approach in the Nixon cases (supra) and Youngstown Co. v Sawyer (343 U.S. 579) this court holds the power to use its coercive mandates against these defendants to enforce the prior decisions of the courts of this state. If this court does not have this fundamental power to enforce its decisions on what the law is then it has abdicated its role under the state constitution and we will no longer have a republican form of government guaranteed by the United States Constitution.

The Rule of Law it is often stated, and always recognized as the very cornerstone upon which this Republic is founded, that ours is a nation of laws, not of men. The meaning of the phrase is simple: No one is above the law's command; no one is below the law's protection. When applied to persons serving in public office, the concept is a constant reminder that they have only those powers as are given by law, and that they must perform those duties required by law, even when that performance is personally distasteful. Political disagreements are to be expected, personal disappointments are to be understood, but willful disobedience of the rule of law is not to be tolerated.

The Court of Appeals in McCain v. Koch, 70 N.Y.2d 109 rejected a municipality's argument that a court cannot set standards by the issuance of an injunction. The court in disposing of this issue stated "There is no question that in a proper case Supreme Court has power as a court of equity to grant a temporary injunction which mandates specific conduct by municipal agencies (see, CPLR 6301; Bachman v Harrington, 184 NY 458, 462-464; Tucker v Toia, 54 A.D.2d 322, 324-326; Graham v Board of Supervisors, 49 Misc. 2d 459, mod on other grounds 25 A.D.2d 250-254, appeal dismissed 17 N.Y.2d 866; 7A Weinstein-Korn-Miller, NY Civ Prac para. 6301.06; 12 Carmody-Wait 2d, NY Prac § 78:24; 17 McQuillin, Municipal Corporations § 49.50 [3d rev ed]; see also, Klostermann v Cuomo, 61 N.Y.2d 525, 530-531; and Matter of Jones v Berman, 37 N.Y.2d 42, 57 [both involving mandatory relief in CPLR art 78 proceedings]; Lexington & Fortieth Corp. v Callaghan, 281 NY 526, 530-532 [involving permanent mandatory injunction]). Defendants contend, however, that notwithstanding the power of Supreme Court to grant injunctive relief, it could not lawfully do so here." The court went on to hold that since the defendants were not complying with the statutory and constitutional obligations the court properly

invoked its equitable powers to compel compliance. Likewise in this case I am seeking the court's use of its equitable powers to compel the defendants to comply with prior decisions of the Courts of this State as well as their statutory and constitutional duties and not to substitute its judgment for that of the defendants. The Court of Appeals in Klosterman v. Cuomo, supra, in ruling on a similar argument held "The primary purpose of declaratory judgments is to adjudicate the parties' rights before a "wrong" actually occurs in the hope that later litigation will be unnecessary (see Matter of Morgenthau v Erlbaum, 59 N.Y.2d 143, 148, supra, and authorities cited there). The action, therefore, contemplates that the parties will voluntarily comply with the court's order. It is anomalous to contend that such an action should not be permitted because it may be necessary at some future date to coerce one party who has refused to act in accordance with the judicial determination. Indeed, defendants' argument in this regard is especially offensive in its implication that they will deem themselves free to disregard their judicially declared obligations should a court rule in favor of plaintiffs. Thus, the ultimate availability of a coercive order to enforce adjudicated rights is not a prerequisite to a court's entertaining an action for declaratory judgment. In any event, this objection is without merit because, in the present cases, if plaintiffs' claims are borne out, a coercive order may be drafted by the courts."

In Heard v Cuomo (150 Misc. 2d 257, 263 [Sup Ct, N.Y. County 1991]), the court held that if a governmental agency has failed to satisfy a mandatory duty "it is appropriate for this court to direct compliance." And in Matter of Charles v Diamond (42 A.D.2d 232, 235 [4th Dept 1973]), then-Justice Richard Simons stated: "If indeed the respondents have no justification for failing to perform the legal duties imposed upon them, then the court should supply the necessary kinetic energy to resolve the problem and order performance." and finally, the eminent commentator on matters of New York practice, Professor David Siegel, succinctly summed up the guiding principle when he noted that "the fact that exercises of discretion lie along the way does not prevent the courts from making sure the department takes the trip." (Siegel, N.Y. Prac § 558, 1996 Pocket Part, at 93.)

Therefore defendants' motion for summary judgment on this ground should be denied and Plaintiff's motion to dismiss the Defendants' Ninth Defense should be granted.

Point IV

Defendants assert that I have admitted that I could have joined the Indian governmental entities or their officer in this action and that they are necessary to this action and therefore this action should be dismissed. Currently precedent dictates that these Indian governmental entities cannot be compelled to appear and defend before this court, however their absence in this action does not mandate dismissal (Saratoga County Chamber of Commerce Inc. v. Pataki, 100 N.Y.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (N.Y. 06/12/2003)). If this court determines that they are subject to this court's process and that they should be added as parties I have asked for leave to do so (*Thompson Water Works Company v. Diamond*, 44 A.D.2d 487, 356 N.Y.S.2d 130).

Therefore the Defendants motion for summary judgment on this ground should be denied and their Fifth Defense should be dismissed or alternatively this motion should be held in abeyance and leave granted to add those parties the court deems necessary and indispensable.

Point V

Defendants' argument against my standing to litigate this issue is misplaced. My standing to challenge these types of agreements is based on voter standing not taxpayer standing.

Defendants assert that any challenge to the "tax compacts" is premature. Defendants have admitted that they have had and continue to have negotiations in an attempt to enter into one. In L. 2003, c. 62 the legislature required the tax commissioner to promulgate regulations to collect taxes from non-Indians on Indian land. This past month the executive branch allowed the proposed regulations to lapse. In responding to queries as to why this occurred tax department Tom Bergin said "We are reviewing all potential options for addressing this issue through cooperation, not confrontation." This together with the press releases attached to my June 12, 2004 affidavit on the Mohawks and the Cayugas show a clear intention and sufficient steps taken towards this end that this issue is ripe for being resolved in a declaratory judgment action.

The complaint alleges a prospective injury to plaintiff's right to vote based on the unconstitutionality of these "tax compacts". These agreements are illegal and unconstitutional in that

1 they surrender and contract away the State's power of taxation in violation of Article XVI § 1 of the
2 New York State Constitution. As the Court of Appeals stated *in Matter of Roosevelt Raceway v.*
3 *Monaghan*, 9 N.Y.2d 293, 308-309; app. dsmd. 368 U.S. 12 "In the present case, Roosevelt would not
4 be aided even if we were to accept its concept of tax exemption. Section 1 of article XVI separately
5 prohibits any attempt to contract away the power of taxation unless sanctioned by the people
6 themselves. (Cf., e.g., as to Housing, N. Y. Const., art. XVIII, § 2.) A contract for a pre-established
7 limit on tax liability, whether it be considered as conferring "tax exemption" or "tax savings", or tax
8 relief by any other label, is clearly barred by this sweeping prohibition. (See *Troy Union R. R. Co. v.*
9 *Mealy*, 254 U.S. 47, 50, supra.) The 1959 Legislature was, therefore, free to increase the tax obligations
10 of the harness tracks either by raising the rates of existing taxes or by imposing new taxes. There are
11 limits on, as well as qualifications of, the power to tax, but these have not been disregarded. The
12 asserted limit based on a contract with the State does not exist." Additionally these agreements are in
13 conflict with New York Tax Law §§ 284-E, 301-a, 471-e, 1112, & 1210. Since the Article XVI § 1
14 prohibits the state government from surrendering or contracting away its power of taxation the only way
15 this can be changed is by and through the people of this state at a statewide referendum. Like the Court
16 of Appeals stated in Schultz v New York, 81 N.Y.2d 336, "History and sound checks-and-balances
17 principles of governance recognize the People as the source of all governmental power. Because the
18 express voter referendum requirement to incur debt contained in article VII, § 11 is inextricably linked
19 to the constitutional grant of debt-incurring authority, we determine that voter standing should be
20 recognized. . ." Likewise in the case at bar the prohibition on any attempt to contract away the power of
21 taxation unless sanctioned by the people themselves and these agreement in which the defendants are
22 intent on negotiating and entering into are inextricably intertwined and plaintiff has voter standing to
23 obtain a declaration of the legality of this type of an agreement in the face of the prospective injury to
24 his vote.

25 It has long been the rule that a declaratory judgment action is the appropriate vehicle for settling
a justiciable controversy "where a constitutional question is involved or the legality or meaning of a
statute is in question and no question of fact is involved" (Dun & Bradstreet v City of New York, 276

NY 198, 206 [1937] [emphasis added]; see Matter of Morgenthau v Erlbaum, 59 NY2d 143 [1983], cert denied 464 US 993 [1983]; New York County Lawyers' Assn. v State of New York, 294 AD2d 69 [2002]; Compass Adjusters & Investigators v Commissioner of Taxation & Fin. of State of N.Y., 197 AD2d 38 [1994]; 43 NY Jur 2d, Declaratory Judgments § 29).

Therefore by circumventing Article XVI § 1 plaintiff will be stripped of his right to vote on this type of surrender or contracting away the State's power of taxation as guaranteed by Article 1 § 1 and all non-Indians will be disfranchised in violation of Article II § 1 of the State Constitution.

Therefore Defendants' motion for summary judgment on this ground should be denied and their Second Defense should be dismissed.

Conclusion

Dated: October 18, 2004
Buffalo, New York

Yours, etc.,

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