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** **Index #** 2004-5270

Preliminary Statement

In the early 1990s shortly after the enactment of the Indian Gaming Regulatory Act the Governor Cuomo and Governor Pataki entered into tribal-state gaming compacts with the St. Regis Mohawk Tribe and the Oneida Indian Nation of New York. These tribal-state compacts were done without legislative authorization. Recently the Courts of this State have ruled the tribal-state-compacts between the State of New York and the Oneida Indian Nation of New York and the St. Regis Mohawk Tribe was entered into unconstitutionally and they are illegal and void. Despite these rulings by the Courts of this State (*Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (N.Y. 06/12/2003) and Peterman v. Pataki, Index # 99-533, Supreme Court, Oneida County), the defendants continue to expend the assets of this state to perform their obligations under these voided compacts. This motion seeks summary judgment dismissing each defense asserted in the Defendants' Answer, individually and on so much of the cause of action alleged in the complaint seeking the injunctive relief compelling the state to enforce Penal Law Article 225 to end the illegal Class III gaming occurring at the Turning Stone Casino and the Akwesasne Mohawk Casino and enjoining them from expending any assets of the State in performing the obligations under the aforementioned voided tribal-state compacts.

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FORMAL JUDICIAL ADMISSIONS OF THE DEFENDANTS

Defendants have admitted the allegations contained in paragraphs 4, 5, 6, 7, 9, 20, 21 and 28 of the complaint due to their failure to deny them in their Answer (CPLR § 3018(a)) and they constitute

formal judicial admissions ((see, Richardson, Evidence § 216 [Prince 10th ed]; Fisch, New York Evidence § 805 [2d ed])).

Defendants have admitted the allegation in paragraph 13 of the Verified Complaint except that they denied it was executed on September 10, 2002 and that it purports to be a compact.

Defendants have admitted so much of paragraph 22 of the Verified Complaint that alleges that the New York State Division of State Police does maintain a presence at each location offering Class III gaming however, not in every case is it on a 24/7 basis.

Defendants have admitted the genuineness of the letter attached as Exhibit "A" relative to paragraph 24 of the Verified Complaint.

THE DEFENSES RAISED BY DEFENDANTS' ANSWER SHOULD BE DISMISSED

FIRST DEFENSE

The First Defense asserts that I lack standing to maintain this action in whole or in part. As previously stated plaintiff asserts standing under State Finance Law Article 7-A and common law taxpayer standing.

Plaintiff can maintain this claim as a citizen taxpayer action pursuant to State Finance Law, article 7-A, which authorizes "any person, who is a citizen taxpayer *** [to] maintain an action for equitable or declaratory relief, or both, against an officer or employee of the state who in the course of his or her duties has caused a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property ***" (§ 123-b [emphasis added]; Complaint ¶¶ 2, 21, 22, & 27). This section is not restricted to un-reimbursed expenditures but to any expenditure. Defendants' argument that the expenditures are reimbursed and I should be denied standing due to this is specious. If that is the case then the Defendants are in violation of the State Constitution's prohibition against loaning of the State's money or credit to or in aid of any individual, or public or private corporation or association, or private undertaking (Art. VII § 8), particularly since the Akwesasne Mohawk Casino and the Turning Stone Casino is operating illegal gambling enterprises since the tribal-

state compact they were operating under has been declared by the courts of this State as illegal and void. Further the Court of Appeals was aware of the reimbursement provision contained in the tribal-state compact it struck down in *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (N.Y. 06/12/2003) and standing was still upheld.

Plaintiff also has common law taxpayer standing. The complaint alleges that the Legislature and the Governor acted ultra vires in authorizing, negotiating and entering into the tribal-state compact permitting Class III gaming in this State. It specifically alleges that the defendants' actions in enacting L. 2001, c. 383, Part B exceeded their authority as limited by the State Constitution. In challenges regarding the defendants action there will be few if anyone that can claim concrete injury as a result of the alleged illegal acts. As the New York Court of Appeals has recently stated in *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (N.Y. 06/12/2003) "It follows that our doctrines governing standing must be sensitive to claims of institutional harm. Actions of this type can serve as a means for citizens to ensure the continued vitality of the constraints on power that lie at the heart of our constitutional scheme (cf. Dairylea Corp. v Walkley, 38 N.Y.2d 6, 10 [1975]; Committee for an Effective Judiciary v State, 679 P.2d 1223, 1227 [Mont 1984]; State ex rel. Howard v Oklahoma Corporation Commission, 614 P.2d 45, 52 [Okla 1980]). Thus, where a denial of standing would pose "in effect * * * an impenetrable barrier to any judicial scrutiny of legislative action," our duty is to open rather than close the door to the courthouse (see Boryszewski, 37 N.Y.2d at 364; see also State ex rel. Clark v Johnson, 904 P.2d 11 [NM 1995]; Rios v Symington, 833 P.2d 20 [Ariz 1992]; State ex rel. Sego v Kirkpatrick, 524 P.2d 975, 979 [NM 1974])." The Court went on to state "Here, the citizen-taxpayer plaintiffs argue that the expenditure of State funds and the use of State regulatory personnel for the casino violate the New York Constitution. If standing doctrine precludes them from bringing this suit, the casino will remain operating indefinitely whether or not the 1993 compact was constitutional. Standing is properly satisfied here, lest procedural hurdles forever foreclose adjudication of the underlying constitutional issue."

Lastly, plaintiff has voter standing as well as taxpayer standing to challenge the tax parity agreements that the state is negotiating with various Indian nations and tribes.

Wherefore the First Defense should be dismissed.

SECOND DEFENSE

The Second Defense asserts that this action is not ripe for review either in whole or in part. Defendant Pataki raised this defense in Huron Group, Inc., et al v. Pataki, et al, Supreme Court, Erie County, Index #2004-4425 [Huron]. In Huron the plaintiffs challenged so much of the tribal-state compact between the Seneca Nation of Indians and the State of New York relating to the location provisions as unconstitutional. Justice Makowski held that a declaratory judgment action is premature only if the future event is beyond the control of the parties and may never occur citing *New York Public Interest Group, Inc. v. Carey*, 42 N.Y.2d 527, 531 (1977). Justice Makowski then determined that a number of steps have already been taken toward establishing a location outside the City of Buffalo and if the court waited until the point in time that the Defendants therein asserted the court would lose jurisdiction over the land and it would in effect render the state constitutional issue un-reviewable. Since the Governor and the Seneca Nation have already entered into a tribal-state compact and that two Class III casinos are currently operating under that compact this action is not premature.

To the extent that this defense is asserted against the challenge of tax parity agreements the Defendants have admitted that negotiations have taken place on this issue. Further tax parity agreements were proposed in at least two instances in combination of land claim settlements and Casino negotiations with the St. Regis Mohawk Tribe and the Cayuga Indian Nation of New York. Therefore a number of steps have been taken to enter into one of these agreements on at least two occasions. The negotiation of these agreements is in the control of the Defendants. A declaration of the validity of these agreements at this juncture would prevent harm to the State and prejudice to the Indian nations and tribes to which they are currently in discussions with on this issue. If this is not reviewed the State and the parties to that agreement may be harmed if it is ultimately determined unlawful. Also a determination of the legality of this type of agreement would, if determined to be illegal, prevent the expenditure of state assets in negotiating and executing this type of agreement.

Therefore the Second Defense should be dismissed.

THIRD DEFENSE

The Third Defense is based on laches. The legislative act being challenged herein became law on or about October 24, 2001. The tribal-state compact between the Senecas and the State was entered into on or about August 22, 2002. In this case the Senecas have been operating and profiting from one Casino under the challenged compact for over a year and a few months ago opened a second one in their land in the southern tier. Under similar facts the Court of Appeals in *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, refused to dismiss an action commenced nearly six years after the compact was effective as well as in *Peterman v. Pataki*, Index # 99-533, Supreme Court, Oneida County. This one was commenced at most just over two and one half years after the passage of the challenged legislative act and resultant effective date of the subject compact and less than one year after the judgments in Saratoga and Peterman were entered.

Therefore the Third Defense should be dismissed.

FOURTH DEFENSE

The Fourth Defense asserts that this action is barred by the applicable statute of limitations. This action concerns acts that occurred in 2001, 2002, 2003 and 2004. Once again as stated in the Court of Appeals decision in *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, the "Plaintiffs seek a declaration as to the unconstitutionality of the 1993 compact and an injunction against the use of State funds to implement it. That relief cannot be afforded under CPLR article 78. The closest remedy contained in article 78 is prohibition, where an official is proceeding "without or in excess of jurisdiction" (CPLR 7803 [2]). We have held, however, that article 78 may not be used against executive officials, and plaintiffs would therefore have been unable to use article 78 to prevent the Governor from signing the compact (see Matter of Morgenthau v Erlbaum, 59 N.Y.2d 143, 147 [1983]; Matter of Dondi v Jones, 40

N.Y.2d 8, 13 [1976]; see also Sears v Hull, 961 P.2d 1013, 1016-1017 [Ariz 1998]). Accordingly, the article 78 statute of limitations does not apply. That being so, plaintiffs' declaratory judgment action falls within the residuary six-year statute of limitations period under CPLR 213(1) (see Vigilant Ins. Co. v Housing Auth., 87 N.Y.2d 36, 42 [1995]; see also Solnick, 49 N.Y.2d at 230; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3001:18, at 446)."

Therefore the Fourth Defense should be dismissed.

FIFTH DEFENSE

The Fifth Defense asserts that I have failed to join indispensable party(ies) namely the various Indian governmental entities that may be affected by this action. This defense was also rejected by the Court of Appeals in *Saratoga County Chamber of Commerce v. Pataki,* 100 N.Y.2d 801 and by Justice McCarthy in *Peterman v. Pataki,* supra. I have sent a copy of these motion papers to the Indian nations and tribes so they may participate in this litigation if they so desire. I will object to any of them appearing as amici, but I will not oppose, and in fact will support, any of them intervening as a party defendant.

The Seneca Nation, Oneida Indian Nation of New York and any other Indian governmental entity is not an indispensable party. It has been noted that a contrary ruling would put Indian gaming compacts beyond constitutional challenge or review (see *Saratoga County Chamber of Commerce v Pataki*, 275 A.D.2d 145, 151-154 [2000] ["Saratoga I"]). While the Appellate Division acknowledged that the Tribe's interests would be affected by the suit, it determined that, on balance, the Tribe's absence should not prevent the suit from going forward. The Court also rejected the State's statute of limitations, standing and laches defenses (see id. at 154-158). Additionally the relief sought in this suit will provide the Seneca Nation the opportunity to protect its interests in federal court if it so chooses. Part of the relief requested against the Defendants is that they commence an action pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) to enjoin such illegal gaming that has been commenced pursuant to the terms of this illegal compact and any other compact adjudicated illegal or unconstitutional (Complaint's Ad Damnum Clause ¶ L). Also the Senecas interests in this action will be adequately represented by the State. In *Kansas v. United States*,

249 F.3d 1213 (10th Cir. 2001) and *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001), the Tenth Circuit relied heavily on the fact that other parties to the cases had substantially the same interests as the tribes, and would be able to protect the tribes' interests and therefore they were not indispensable parties. Lastly the Seneca Nation was given notice of this action so it could appear to protect its interests if it so desires.

Alternatively, if this Court decides that this action cannot proceed without certain parties, movant requests leave to add the Seneca Nation of Indians, the Oneida Indian Nation of New York and the St. Regis Mohawk Tribe or their officers as party defendants pursuant to CPLR §§ 1001(b), 1003 and to serve the Amended Complaint with a Supplemental Summons upon them. (*Thompson Water Works Company v. Diamond*, 44 A.D.2d 487, 356 N.Y.S.2d 130). Although these new defendants may assert sovereign immunity, they may equally as well not assert it and appear in this action. It is at that point the court should address this issue. In any event the claim of sovereign immunity is not a bar to this court exercising jurisdiction over the Seneca Nation of Indians due to the following.

Indian nations and tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories. *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831). The powers of Indian tribes are "'inherent powers of a limited sovereignty which has never been extinguished.'" *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting F. Cohen, Handbook of Federal Indian Law 122 (1945)). When the tribes were incorporated into the territory of the United States and accepted the protection of the Federal Government, they necessarily lost some of the sovereign powers they had previously exercised. In Wheeler, the Supreme Court explained: "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." 435 U.S., at 323 (citations omitted). Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

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 (2d Cir. 10/03/2001) "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. See Santa Clara Pueblo v. Martinez, 436 U.S. at 59 (citing the doctrine of Ex parte Young, 209 U.S. 123 (1908)); Puyallup Tribe v. Dep't of Game, 433 U.S. 165, 171-72 (1977); Bassett v. Mashantucket Pequot Tribe, 204 F.3d at 358-59 (2d Cir. 2000); cf. Board of Trustees v. Garrett, 121 S. Ct. 955, 968 n.9 (2001) (even though state sovereign immunity precludes damages suits against states under Title I of the Americans with Disabilities Act, the doctrine of Ex parte Young permits private plaintiffs to sue a state "for injunctive relief")."

The officers of the Indian governmental entities are violating state and federal law in the absence of a valid tribal-state compact under the IGRA (New York Penal Law Article 225 and 18 U.S.C. § 1166, 1957; 25 U.S.C. §§ 232, 233). Therefore they are acting in excess of the sovereign's authority and will not be protected by its immunity.

Secondly, since the relief requested is prospective declaratory and injunctive relief it appears that the majority of the limited case-law on this issue supports the view that IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought. See *Montgomery v. Flandreau Santee Sioux Tribe*, 905 F. Supp. 740, 745 (D.S.D. 1995) ("The Court has subject matter jurisdiction to consider whether defendants [tribes] have complied with [IGRA]."); *Calvello v. Yankton Sioux Tribe*, 899 F. Supp. 431, 438 (D.S.D. 1995) ("[F]ederal courts may find a waiver of tribal sovereign immunity for the purpose of enforcing the provisions of the IGRA where prospective injunctive relief, and not monetary relief, is sought."); *Maxam v. Lower Sioux Indian Community of Minnesota*, 829 F. Supp. 277 at 281 (holding that, by engaging in gaming, tribe waives sovereign immunity for narrow purpose of determining compliance with IGRA); *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738, 745 (D.S.D. 1992) ("Engaging in gaming

pursuant to the IGRA constitutes an express waiver of sovereign immunity on the issue of compliance with the IGRA."); *Cohen v. Little Six, Inc*., 543 N.W.2d 376, 380 (Minn. Ct. App. 1996) ("LSI's operation of a gaming hall subjects it to a non-tribal court's authority to enforce compliance with the IGRA, not claims for money damages."), aff'd 561 N.W.2d 889 (Minn. 1997), petition for cert. filed, 65 U.S.L.W. 3839 (June 9, 1997) (No. 96-1962). But see *Davids v. Coyhis*, 869 F. Supp. 1401, 1408-09 (E.D. Wis. 1994) (explicitly rejecting the reasoning of Ross and Maxam).

Lastly, in light of *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2 Cir. 1964), cert. denied, 381 U.S. 934, 85 S. Ct. 1763, 14 L. Ed. 2d 698 (1965), an Indian Nation or tribe's purely commercial activity should not be protected by any claim of sovereign immunity. For present purposes, a summary of the general principles emerging from *Victory Transport* should suffice; the contemporary rationale for sovereign immunity is the avoidance of possible embarrassment to those responsible for the conduct of the nation's foreign relations; in determining the scope of the immunity which a foreign sovereign enjoys, courts have therefore deferred to the policy pronouncements of the State Department, see, e. g., National City Bank of New York v. Republic of China, 348 U.S. 356, 360-361, 75 S. Ct. 423, 99 L. Ed. 389 (1955); the State Department has explicitly indicated that its policy is generally predicated on a "restrictive" theory of sovereign immunity -- "recognizing immunity for a foreign state's public or sovereign acts (jure imperii) but denying immunity to a foreign state's private or commercial acts (jure gestionis)."336 F.2d at 358. See 26 Dept. State Bull. 984 (1952); "the purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts,"336 F.2d at 360.

Justice Stevens in his concurring opinion in Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe Oklahoma 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed. 2d 1112, stated his opinion on tribal sovereign immunity as follows: "The doctrine of sovereign immunity is founded upon an anachronistic fiction. See Nevada v. Hall, 440 U.S. 410, 414-416 (1979). In my opinion all Governments -- federal, state, and tribal -- should generally be accountable for their illegal conduct. The rule that an

Indian tribe is immune from an action for damages absent its consent is, however, an established part of our law. See United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512-513 (1940). Nevertheless, I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory, cf. 28 U. S. C. § 1605(a) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by a foreign state . . ."), or that it applies to claims for prospective equitable relief against a tribe, cf. Edelman v. Jordan, 415 U.S. 651, 664-665 (1974) (Eleventh Amendment bars suits against States for retroactive monetary relief, but not for prospective injunctive relief)." More recently the United States Supreme Court deferred this questionable policy of tribal sovereign immunity that developed almost by accident to be resolved by Congress. The Court stated "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) 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.

Therefore this 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.

SIXTH DEFENSE

The Sixth Defense asserts that the complaint fails to state a cause of action. This is invalid and should be stricken for two reasons. First, it is apparent that the complaint states a cause of action. It names the parties, the obligations, the breach thereon and the remedy sought. Second, the Appellate Division, Second Department has held that an affirmative defense that a complaint fails to state a cause of action

cannot be submitted in an answer but must be part of a motion to dismiss. See *Petracca v Petracca*, 305 A.D.2d 566 (2d Dept 2003).

Therefore the Sixth Defense should be dismissed.

SEVENTH DEFENSE

The Seventh Defense asserts that I do not have standing to enforce a judgment from a separate action. Namely Saratoga County Chamber of Commerce v. Pataki as it relates to the Akwesasne Mohawk Casino and Peterman v. Pataki as it relates to the Turning Stone Casino. Those actions were taxpayer actions. I am bound by res judicata on all issues actually litigated in those actions (*Murphy v. Erie County*, 28 N.Y.2d 80 (1971)). Had that action been determined against my position Defendants would surely use it as a shield to this action. Additionally class action certification is typically denied in taxpayer actions because the class of taxpayers as a whole should benefit via the doctrine of stare decisis (*Matter of Martin v Lavine*, 39 N.Y.2d 72, 75; *Suffolk Housing Servs. v Town of Brookhaven*, 69 A.D.2d 242, 248, app dsmd 48 N.Y.2d 652). As a member of the plaintiff taxpayer class in those prior declaratory judgment actions I have standing to commence a second plenary action to seek its enforcement in the face of defendants flouting of those judgments. The CPLR does not directly address the proper procedure for enforcing a declaratory judgment, and there is no other statutory authority. (Cf. CPLR art 52 for enforcement of money judgments.) The earlier cases seem to imply that a plenary action is necessary. (See, e.g., *Dale Renting Corp. v Bard*, 39 Misc. 2d 266, affd 19 A.D.2d 799; *Schulman v Schulman*, 223 N.Y.S.2d 353.) In some cases a motion in the prior action has also been held to be proper (*Auer v. Dyson*, 25 Misc. 2d 274; *Berlitz Pub. v Berlitz*, 37 N.Y.2d 878). In any event I have standing as a member of the taxpayer class to seek enforcement of those judgments.

Therefore the Seventh Defense should be dismissed.

EIGHTH DEFENSE

In their Eighth Defense Defendants assert that I am estopped from contesting any compact that I have not objected to or challenged the Secretary of Interior's approval of it. This defense must fail because the Secretary cannot validate an otherwise invalid compact. In fact the tribal-state compact between the Senecas and the State was allowed to be approved only to the extent it is consistent with the IGRA. The IGRA requires a valid tribal-state compact. Additionally, this argument fails because the compact between the St. Regis Mohawks and the State that was invalidated in Saratoga was also approved by the Secretary and published in the Federal Register on December 13, 1993 as well as the compact between the Oneidas and the State of New York was invalidated in Peterman and was approved by the Secretary and published in the Federal Register.

Therefore the Eighth Defense should be dismissed.

NINTH DEFENSE

The Ninth Defense asserts that this Court lacks jurisdiction and authority to compel public officials to pursue criminal or enforcement actions. The Supreme Court of the State of New York is a court of general jurisdiction over actions in law and in equity (NY Const. Art. VI § 7). The Court's authority to review the actions of coordinate branches of government where it is alleged they acted in excess of their jurisdiction or unconstitutionally is well settled. 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 N.Y. 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. Historically, the prohibitory injunction was the earliest form of judicial restraint imposed upon parties. However, this should not obscure the fact that a court's power to issue a mandatory injunction is well established and has a long history. (See Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 6301.06; Rolls v. Miller [(1640, 15 Chas. I) Tothill's Rep. 144]; Klein, Mandatory Injunctions, 12 Harv. L. Rev. 95, 103 [1898]; see, also, Note, Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts: A Study in Procedural Manipulation, 38 Col. L. Rev. 903 [1938].) The approach the Defendants would have this court take would essentially define the ambit of a constitutional right by whatever a state agency says it is. This approach fails to give due deference to the State Constitution and to the court's final authority to "say what the law is" and to provide a remedy for its breach (*Marbury v. Madison*, 1 Cranch [5 US] 137, 177; *Schieffelin v Komfort*, 212 N.Y. 520, 530-31.). As Judge Jasen stated in his dissenting opinion in *Wein v. New York*, 39 N.Y.2d 136, "The State Constitution is the fundamental and paramount law of this State. The courts cannot close their eyes to the Constitution and see only the acts and doings of the Legislature. (See *Marbury v. Madison*, 1 Cranch [5 U.S.] 137, 178.) Otherwise, the Constitution would offer but a frail protection and citizens would "be at the mercy of ingenious efforts to circumvent its object and to defeat its commands." (People ex rel. Burby v Howland, 155 N.Y. 270, 281)

Normally as a co-equal branch of government the Governor should have complied with the pronouncement of the State's highest court in *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (N.Y. 06/12/2003) voluntarily. However, over a year later while acknowledging the mandate of the Court of Appeals the Defendants continue to waste money from the public purse and expend state assets in accordance with illegal, void and unenforceable agreements. This Court must therefore use its coercive power to compel compliance by the Defendants by issuing this permanent injunction and if the Defendants continue to arrogantly flaunt the judiciary's mandate to hold them in civil and criminal contempt.

Therefore the Ninth Defense should be dismissed.

TENTH DEFENSE

The Tenth Defense asserts that since the U.S. Department of the Interior has approved of these compacts pursuant to the IGRA they are valid. The issue as to how and what type of contracts a state officer may or may not enter into is a "traditional governmental function" and for the IGRA to permit the Governor to enter into a contract that is not permitted under state law contravenes the Tenth Amendment of the United States Constitution. The Tenth Amendment of the United States Constitution prohibits commandeering state officials to carry out federal policy and cannot give him more authority than the state he serves provides to him. (*Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 01/10/1997); *New York v. United States*, 505 U.S. 144; 112 S. Ct. 2408; 120 L. Ed. 2d 120; *Printz v. United States*, 521 U. S. 898). To the extent that the approval of the subject compacts by the U.S. Department of Interior bestows upon the Governor the authority to enter into an agreement that state law prohibits is a violation of the Tenth Amendment.

Therefore the Tenth Defense should be dismissed.

ELEVENTH DEFENSE

The Eleventh Defense asserts that only a federal court can review the terms of this compact. This defense is without merit in light of the recent determination of Justice Makowski in Huron Group, Inc., et al, v. Pataki, et al and *Saratoga.* I would like to direct the courts attention to the fact that Defendant Pataki sought review of the Court of Appeals decision in *Saratoga* and was denied Certiorari. If this type of determination was within the exclusive jurisdiction of the federal courts it would have presumably declared so in that action. Plaintiff commenced this action to determine whether the Legislature acted within its constitutional powers in authorizing these compacts and if so whether it did so in accordance with proper constitutional procedures.

Therefore the Eleventh Defense should be dismissed.

TWELFTH DEFENSE

The Twelfth Defense is also meritless as all State statutes are approved by the Legislature. The question in this action is whether or not the Legislature exceeded its authority, procedurally or substantively, as limited by the State Constitution. To the extent that this defense refers to the Legislature approving appropriation bills for the expenditures at the Turning Stone and Akwesasne Mohawk Casino and thereby ratifying the respective underlying compacts this was soundly rejected in Saratoga wherein the Court of Appeals stated "The State argues that by passing certain appropriation bills, the Legislature has signaled its approval of the compact. We disagree. Those enactments are no substitute for approval or total ratification. The Legislature has been free to ratify the compact but, as yet, has not done so. Indeed, the State Assembly in a resolution expressly opposed the Governor's unilateral action in negotiating and signing the compact. The resolution asked the Secretary of the Interior not to approve any compact unless approved by the Legislature. The Assembly stated that "[a]ny compact permitting casino gambling necessarily requires at a minimum the exercise of legislative power with respect to regulatory appropriations and related police powers," and that therefore "[t]he Governor lacks authority to act on behalf of the State to enter into a Tribal-State compact" (Res of Assembly A 2413 [1996]). This expression does not square with the State's claim that the Legislature has impliedly approved the compact."

Therefore the Twelfth Defense should be dismissed.

Argument for Summary Judgment in Favor of Plaintiff

The Courts of this state have held that the tribal-state compacts entered into between the State of New York and the Oneida Indian Nation of New York and the St. Regis Mohawk Tribe by Governor Cuomo and renewed by Governor Pataki were without legislative authorization and therefore were illegal and void (*Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047, 766

N.Y.S.2d 654 (N.Y. 06/12/2003); *Peterman v. Pataki*, Index # 99-533, Supreme Court, Oneida County).

The Indian Gaming Regulatory act prohibits all gambling on Indian land unless that same gaming is permitted by the State to others[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)

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[1] Class I gaming, defined as ceremonial or traditional gaming, which includes social games for nominal prizes, remains within the exclusive control of the Indian tribe. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II gaming, which includes bingo, lotto, pull-tabs, tip jars, punch boards and card games that are either authorized or not specifically prohibited by state law, remains within the jurisdiction of the tribe but is subject to oversight by the National Indian Gaming Commission ("NIGC"). 25 U.S.C. §§ 2703(7)(A), 2710(a)(2), (b) and (c). Class II gaming is only permitted (1) if carried on in a state that allows such gaming for any purpose by any person, organization, or entity; (2) if not prohibited by federal law; and (3) if a tribal ordinance or resolution has been adopted permitting such gaming. 25 U.S.C. § 2710(b)(1)(A), (B), (b)(2) and (b)(4)(A). The IGRA expressly excludes from class II gaming slot machines of any kind. 25 U.S.C. § 2703(7)(B)(ii). Class III gaming, defined as all gaming not listed in either Class I or II, is prohibited unless (1) authorized by a tribal ordinance or resolution; (2) located in a state that permits the particular gaming for any purpose by any person, organization or entity; and (3) conducted in accordance with a compact negotiated between the Indian tribe and the state. 25 U.S.C. §§ 2703(8), 2710(d)(1).

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 of it states 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).

Oneida Nation's appeal in Peterman v. Pataki

Recently the Oneida Indian Nation of New York filed an appeal in Peterman v. Pataki. This event does not adversely affect the judgment in that action.

Since the Oneida Indian Nation of New York intentionally chose not to be a party in Peterman v. Pataki despite its knowledge of that action for over six years and therefore consented to whatever judgment was entered. "No appeal lies from an order entered upon the parties' consent (see, Matter of Unborn Baby B., 158 AD2d 455, 456; see also, Matter of Gerald H., 158 AD2d 599, 600) The Nation took this course of action in order to subsequently claim that whatever judgment was rendered in that action did not bind the Nation. Therefore, the Nation is not an aggrieved person within the scope of CPLR § 5511.

Even if the appeal is allowed to proceed there is no stay of the judgment in that action pursuant to CPLR § 5519. Those provisions of the judgment or order appealed from which are self-executing upon its promulgation and those provisions which have been brought to execution by voluntary or compelled compliance prior to the effective date of the stay are not undone (see, City of Utica v Hanna, 249 N.Y. 26, 30 [opn of Cardozo, Ch. J.]; Department of Hous. Preservation & Dev. v Vanway Overland Express, 123 Misc. 2d 372). That is to say, an appeal even by the State, a political subdivision thereof, or their officers or agencies does not suspend the operation of the order or judgment and restore the case to the status which existed before it was issued. A motion decided by an order does not become undecided and the declaratory provisions of a judgment are not undeclared when a party serves a notice of appeal therefrom. To the extent that dicta in cases such as People ex rel. Off. of Rent Admin., Div. of Hous. & Community Renewal v Berry Estates (87 A.D.2d 161, 165, affd 58 N.Y.2d 701) and the holdings of cases such as Callanan Rd. Improvement Co. v Town of Newburgh (6 Misc. 2d 1073) are to the contrary, they have been disapproved. It also should be clear from the foregoing that the scope of the automatic stay of CPLR 5519 is restricted to the executory directions of the judgment or order appealed from which command a person to do an act, and that the stay does not extend to matters which are not commanded but which are the sequelae of granting or denying relief. Thus, where an order merely denies a motion for summary judgment or to strike the case from the calendar, an appeal from that order will not stay a trial which is a consequence of the order but is not directed by it (see, e. g., Shorten v City of White Plains, 216 A.D.2d 344; Baker v Board of Educ., 152 A.D.2d 1014; Walker v Delaware & Hudson R. R. Co., 120 A.D.2d 919; see also, Bloomfield Bldg. Wreckers v City of Troy, 41 N.Y.2d 1102; Spillman v City of Rochester, 132 A.D.2d 1008). Future acts which are not expressly directed by the order or judgment appealed from may nevertheless have the effect of changing the status quo and thereby defeating or impairing the efficacy of the order which will determine the appeal. In such cases, no automatic stay is

available but the aggrieved party may apply to the appellate court to exercise either its inherent power to grant a stay of such acts in aid of its appellate jurisdiction (see, Matter of Schneider v Aulisi, 307 N.Y. 376, 383-384; Cohen & Karger, Powers of New York Court of Appeals § 183, at 682-683, and cases therein cited at n 31; see also, Scripps-Howard Radio v Commission, 316 US 4, 9-10; In re McKenzie, 180 US 536, 551; Tribal Vil. of Akutan v Hodel, 859 F.2d 662, 663; Plomb Tool Co. v Fayette R. Plumb, Inc., 171 F.2d 945, 947; cf., Fed Rules Civ Pro, rule 62 [g]; 7 Moore's Fed Prac P 62.09 [1] [2d ed]) or, in any case specified in CPLR 6301, its power to grant, limit, or modify a preliminary injunction or temporary restraining order pursuant to CPLR 5518 (see, 7 Weinstein-Korn-Miller, N.Y. Civ Prac 5518.01-5518.03). In declaratory judgment actions in which such a discretionary stay or injunction commanding or prohibiting specified acts might prove insufficient to maintain the status quo, the appellant may apply to the appellate Court, in extraordinary circumstances, to exercise its inherent power to suspend the operation of the declaratory judgment itself pending the appeal (cf., Genet v President of Del. & Hudson Canal Co., 113 N.Y. 472, 475).

The grounds that the Oneida Nation would urge the Appellate Division to consider are meritless. The Oneida Nation appeared as amici in *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (N.Y. 06/12/2003) and the issues raised by the Nation were addressed by the Court of Appeals in that case and the United States Supreme Court denied Defendant Pataki's petition for certiorari.

Therefore, the order and subsequent judgment in Peterman v. Pataki is binding until overturned or the judgment suspended by an appellate court. Neither have happened to date and this pending appeal has no bearing to the relief sought by this motion.

New York Law on Indian Land

18 U.S.C. §§ 1166(a), 1955 makes the 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) and the laws of New York are not preempted under the IGRA. 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 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 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]). In United States v. Cook, *922 F2d 1026*, cert. denied, 500 U.S. 941 (1991) the Second Circuit Court of Appeals held, while interpreting 25 U.S.C. § 232 and New York's

[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,

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). "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 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

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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)

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, 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. Further if any limitation is placed on the reach or scope of 18 U.S.C. § 1955 and 25 U.S.C. § 232 by 18 U.S.C. § 1166 a

[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."

valid tribal-state compact is required and neither the Turning Stone Casino nor the Akwesasne Mohawk Casino are currently operating one[4].

Wherefore Plaintiff prays for an order of this court:

A. Dismissing the First Defense asserted in the Answer pursuant to CPLR §§ 3211(b), 3212;

B. Dismissing the Second Defense asserted in the Answer pursuant to CPLR §§ 3211(b), 3212;

C. Dismissing the Third Defense asserted in the Answer pursuant to CPLR §§ 3211(b), 3212;

D. Dismissing the Fourth Defense asserted in the Answer pursuant to CPLR §§ 3211(b), 3212;

E. Dismissing the Fifth Defense asserted in the Answer pursuant to CPLR §§ 3211(b), 3212 or alternatively for leave to add the Seneca Nation of Indians, the Oneida Indian Nation of New York and the St. Regis Mohawk Tribe as parties to this action;

F. Dismissing the Sixth Defense asserted in the Answer pursuant to CPLR §§ 3211(b), 3212;

G. Dismissing the Seventh Defense asserted in the Answer pursuant to CPLR §§ 3211(b), 3212;

H. Dismissing the Eighth Defense asserted in the Answer pursuant to CPLR §§ 3211(b), 3212;

I. Dismissing the Ninth Defense asserted in the Answer pursuant to CPLR §§ 3211(b), 3212;

J. Dismissing the Tenth Defense asserted in the Answer pursuant to CPLR §§ 3211(b), 3212;

K. Dismissing the Eleventh Defense asserted in the Answer pursuant to CPLR §§ 3211(b), 3212;

L. Dismissing the Twelfth Defense asserted in the Answer pursuant to CPLR §§ 3211(b), 3212;

M. Granting summary judgment to the plaintiff permanent injunctive relief as follows:

    a. Declaring that the defendants are continuing to expend State assets, resources and money to perform obligations contained in the previously declared illegal and void

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[4] The New York Legislature did pass a bill to ratify the tribal-state compact in relation to the St. Regis Mohawk Tribe and the Akwesasne Mohawk Casino on June 23, 2004 (S.5670). However, it has not yet been presented to the Governor for his signature. Further this tribal-state compact will not become effective until the Secretary of Interior approves it (25 U.S.C. § 2710(d)(2)(C) & (d)(8)).

tribal-state compacts between the State of New York and the Oneida Indian Nation of New York and the St. Regis Mohawk Tribe at the Turning Stone Casino and Akwesasne Mohawk Casino.

b. Enjoining the defendant George E. Pataki as Governor of the State of New York to commence an action pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) to enjoin such illegal Class III gaming that has been commenced pursuant to the terms of the aforementioned illegal compacts and any other compact that may be declared illegal and void;

c. Enjoining the defendants to enforce New York Penal Law Article 225 on Indian Land in accordance with 25 U.S.C. § 232 at the Turning Stone Casino and the Akwesasne Mohawk Casino and to refer such activity to the District Attorney for the County in which it is occurring as well as to the appropriate federal law enforcement agency for its review for possible violations of 18 U.S.C. §§ 1955, 1166;

d. Enjoining the defendants from expending any money, assets or its right of eminent domain of the State as required by the aforementioned illegal and void compacts or to maintain a presence at any Class III gaming operation.

Dated: September 27, 2004
Buffalo, New York

Yours, etc.,

_____

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