UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al, Plaintiffs, v. SALLY JEWELL, Secretary, United States Department of the Interior et al. Defendants and ONEIDA NATION OF NEW YORK Defendant-Intervenor	No. 6:08-cv-644 (LEK-DEP)

MEMORANDUM OF LAW IN SUPPORT OF CAYUGA NATION'S MOTION TO INTERVENE

The Cayuga Nation (the "Nation"), by its undersigned counsel, respectfully submits this memorandum of law in support of its motion to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure.

The Nation possesses direct, substantial, and legally protectable interests in the subject matter of this litigation that are not adequately represented by the existing parties. In particular, the Nation's legal rights are violated by the geographic casino gaming exclusivity provision of the proposed Settlement Agreement between the State of New York, the Oneida Indian Nation, Oneida County, and Madison County. Because the Nation meets all the requirements for

intervention as of right under Rule 24(a)(2), this motion should be granted. In the alternative, the facts and circumstances of the case warrant permissive intervention pursuant to Rule 24(b)(1).

BACKGROUND

A. The Proposed Settlement Agreement

On May 16, 2013, Governor Cuomo announced an agreement between the State of New York, the Oneida Indian Nation ("OIN"), Oneida County, and Madison County ("the Agreement"). Under the Agreement, the OIN will give the State 25% of its net gaming revenue from slot machines at the OIN-owned Turning Stone Casino – an estimated $50 million per year – in exchange for, among other things, (a) an agreement from Madison and Oneida Counties to withdraw their legal challenges on OIN land issues; (b) dismissal of the instant litigation; and (c) the exclusive right to conduct casino gaming in a ten-county region of Central New York, including Cayuga County. *See* Decl. of Clint Halftown ¶ 4 ("Halftown Decl.") (attached hereto as Ex. A), Attach. 1, §§ III.A, IV.A, VI.. With respect to gaming, the Agreement's "Geographic Scope of Exclusivity" provision states:

> Except as provided in Section IV(B) of this Agreement, the [Oneida] Nation shall have total exclusivity with respect to the installation and operation of Casino Gaming and Gaming Devices, by the State or any State authorized entity or person, within the following geographic area: Oneida County, Madison County, Onondaga County, Oswego County, Cayuga County, Cortland County, Chenango County, Otsego County, Herkimer County, and Lewis County.

Id. § IV.A.

The Agreement contemplates that, upon its approval by the New York State Legislature, all existing parties to the instant litigation – including the federal defendants – will request that this Court approve the Agreement and terminate this litigation. *See id.* § VI.A.1.a. By its terms, the Agreement takes effect only when this Court enters an order in this case approving the Agreement and dismissing this litigation. *See id.* § II.D. The Nation now seeks to intervene, in

anticipation of the Agreement's imminent presentation to this Court, so that it may urge the Court to reject the Agreement on the ground that its geographic exclusivity provision violates the Nation's rights under federal law.

B. The Cayuga Nation

Proposed Intervenor the Cayuga Nation is a federally recognized Indian nation. *See* 77 Fed. Reg. 47,868 (Aug. 10, 2012). As the federal government and multiple courts have recognized, the Nation maintains a reservation in New York State, including land in Cayuga County. The Nation's reservation was established by the United States in the Treaty of Canandaigua in 1794, and it has never been diminished or disestablished. Indeed, the New York Court of Appeals – as well as "every federal court" to consider the question – has held that the Nation's reservation in New York State remains extant. *Cayuga Indian Nation of New York v. Gould*, 930 N.E.2d 233, 247 (N.Y. 2010) (collecting authorities), *cert. denied*, 131 S. Ct. 353 (2010) .

In addition to these recognized reservation lands, the Nation has also applied to have certain of its lands – including lands within Cayuga County – taken into trust by the Department of the Interior pursuant to 25 U.S.C. § 465. Halftown Decl. ¶ 3. On June 3, 2013, the Nation learned that the Eastern Region of the Department of the Interior's Bureau of Indian Affairs had favorably completed its review of the Nation's trust application. *Id.* The Nation expects that its trust application will be approved. *Id.*

C. The Indian Gaming Regulatory Act and the Nation's Proposed Intervention

Under the Indian Gaming Regulatory Act ("IGRA"), Indian nations have the ability to conduct gaming on "Indian lands," defined in part as "all lands within the limits of any Indian reservation." 25 U.S.C. § 2703(4)(A); *see* 25 C.F.R. § 502.12. IGRA divides gaming into three

classes: Class I, Class II, and Class III. Class III gaming includes casino-style games, slot machines, and lotteries, 25 U.S.C. § 2703(8), and may be conducted only "in conformance with a Tribal-State compact entered into by the Indian tribe and State." *Id.* § 2710(d)(1)(C). IGRA expressly requires that states negotiate with Indian nations "in good faith" to enter into Class III gaming compacts. *Id.* § 2710(d)(3)(A).

The Agreement stands in conflict with this federal requirement, barring the State from permitting *any* non-OIN Class III gaming – including gaming by the Cayuga Nation on its reservation lands – in Cayuga County. In other words, the Agreement effectively forbids New York State from negotiating "in good faith" with the Nation. As such, the Agreement's geographic exclusivity provision is blatantly contrary to, and preempted by, IGRA. To make matters worse, the Agreement – which cannot take effect unless the federal defendants endorse it for this Court's approval – cannot be squared with the United States government's trust obligation to the Nation. *See, e.g., United States v. Mitchell,* 463 U.S. 206, 225 (1983) (noting "the undisputed existence of a general trust relationship between the United States and the Indian people"); *Nevada v. United States*, 463 U.S. 110, 142 (1983).

The Nation seeks to intervene only as a last resort to guard its federally protected rights. Since learning of the Agreement's geographic exclusivity provision, the Nation has repeatedly approached the State to urge that the agreement be modified. As of the making of this Declaration, however, the Nation and the State have been unable to reach accord on an approach that would protect the Nation's rights. Halftown Decl. ¶ 5. Now, the Agreement appears poised to receive the State Legislature's assent. The Nation seeks to intervene so that it may protect its sovereign rights should the Agreement be presented for this Court's approval.

ARGUMENT

I. The Nation Should Be Permitted to Intervene as of Right Pursuant to Federal Rule of Civil Procedure 24(a)(2).

To intervene as of right under Rule 24(a)(2), an applicant must: "(1) file a timely motion; (2) claim an interest relating to the property or transaction that is the subject of the action; (3) be so situated that without intervention the disposition of the action may impair that interest; and (4) show that the interest is not already adequately represented by existing parties." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 176 (2d Cir. 2001).

Federal courts, including those in the Second Circuit, have emphasized that Rule 24's intervention requirements should be construed flexibly and in favor of intervention. *See, e.g., United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984) ("Rule 24(a)(2) is a nontechnical directive to courts that provides the flexibility necessary 'to cover the multitude of possible intervention situations.'" (quoting *Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc.*, 725 F.2d 871, 875 (2d Cir. 1984))); *see also Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999) ("Rule 24 is to be construed liberally, and doubts resolved in favor of the proposed intervenor."); *Tachiona ex rel. Tachiona v. Mugabe*, 186 F. Supp. 2d. 383, 394 (S.D.N.Y. 2002) (describing Rule 24 intervention standard as "a flexible and discretionary one"); *German v. Federal Home Loan Mortgage Corp.*, 899 F. Supp. 1155, 1166 (S.D.N.Y. 1995) (recognizing that intervention requirements are "to be construed liberally"). The Nation easily satisfies the requirements to intervene as of right.

A. The Nation's Motion Is Timely.

District courts must evaluate the timeliness of a motion to intervene "against the totality of the circumstances before the court." *Farmland Dairies v. Comm'r of N.Y. Dept. of Agr.*, 847 F.2d 1038, 1044 (2d Cir. 1988); *see Hooker Chemicals & Plastics*, 749 F.2d at 983 ("[T]here is

no litmus paper test for timeliness."). A district court has discretion to evaluate the timeliness of a motion to intervene in light of "all the circumstances," including "(1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *United States v. Pitney Bowes,* 25 F.3d 66, 70 (2d Cir. 1994); *see also MasterCard Intern. Inc. v. Visa Intern. Serv. Ass'n, Inc.*, 471 F.3d 377, 390 (2d Cir. 2006).

Here, the Nation's motion to intervene plainly is timely. The Nation learned of the Agreement – including its exclusivity provision – only on May 16, 2013, when the Agreement was made public. Halftown Decl. ¶ 5. The Nation did not see a copy of the written Agreement until May 21, 2013. *Id.* And the Agreement, which requires this Court's approval in order to take effect, has not yet been formally placed before this Court. Under these circumstances, the Nation's swift action plainly satisfies the timeliness standard, which is measured by when the prospective intervenor "knew or should have known of [its] interest." *United States v. New York*, 820 F.2d 554, 557 (2d Cir. 1987).

B. The Nation Has Direct, Substantial, and Legally Protectable Interests.

To intervene as of right, an applicant must assert an interest relating to the property or transaction that is the subject of the action. For an interest to be cognizable under Rule 24(a)(2), it must be "direct, substantial, and legally protectable." *Wash. Elec. Coop., Inc. v. Mass Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990). At the same time, this interest need not rise to the level of an independent claim, for "a protectable interest alone, even apart from any actual claim or the ability to file a separate action, may be sufficient for the a court to grant intervention under Rule 24(a)." *Holbock v. Albany County Bd. of Elections*, 233 F.R.D. 95, 100 (N.D.N.Y.

2005). The Second Circuit has held that, in cases involving approval of a settlement agreement, absent third parties may intervene to argue that the proposed settlement threatens their federally protected rights. *See Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 474 (2d Cir. 2010) (reversing denial of motion to intervene on ground that proposed intervenors had "an interest in their employers' employment practices and, therefore, a settlement agreement that they assert infringes their statutory and constitutional rights"); *see also Brennan v. New York City Bd. of Educ.*, 260 F.3d 123, 128-33 (2d Cir. 2001).

Here, the Cayuga Nation has a direct, substantial, and legally protectable interest in the disposition of this action. IGRA protects the Nation's ability to conduct Class III gaming on its reservation land pursuant to a duly negotiated compact. Yet the Agreement would *prohibit* the State from allowing the Nation to conduct Class III gaming in the county where the majority of its reservation land is located – and thus would prohibit the State from negotiation with the Nation in good faith for such a compact. And should the federal defendants join in endorsing this agreement for the Court's approval, the United States will have breached its "strong fiduciary duty" to Indian nations. *Nevada v. United States*, 463 U.S. at 142 It is clear, therefore, that the Nation has the requisite interest in how this Court disposes of the Agreement.

C. The Nation's Interests May Be Impaired By the Disposition of the Litigation.

Disposition of this litigation through approval of the Agreement plainly "may impair [the Nation's] interest[s]." *Butler, Fitzgerald & Potter*, 250 F.3d at 176; *see Brennan*, 260 F.3d 132 (where "the loss of appellants' relative seniority rights" was "ineluctably the result of the proposed [settlement] Agreement," appellants had "adequately demonstrated that [their] interest may be impaired by the disposition of the action"). If approved, the Agreement would effectively prohibit the State from negotiating with the Nation for a compact governing Class III

gaming on Nation lands in Cayuga County. And it is little consolation that the Nation could file a subsequent, independent suit challenging the Agreement, the State's failure to negotiate in good faith, or the federal government's violation of its trust obligations. A court considering the Nation's arguments against the compact's grant of exclusivity might view itself as bound by this Court's actions. There is no doubt, in short, that this Court's approval of the Agreement would substantially threaten the Nation's interests.

D. The Nation's Interests Will Not Be Adequately Represented by Present Parties.

Finally, there is no basis to suppose that "existing parties adequately represent [the Nation's] interest." Fed. R. Civ. P. 24(a)(2). To demonstrate inadequacy of representation, a proposed intervenor need only show "that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972); *see also Butler, Fitzgerald & Potter*, 250 F.3d at 179 ("[T]he burden to demonstrate inadequacy of representation is generally speaking 'minimal'"). Only in cases "where the putative intervenor and a named party have the same ultimate objective" is a "more rigorous showing of inadequacy" required. *Id.*

In this case, the existing parties do not adequately represent the Nation's interests. The parties have negotiated – or, in the case of the federal defendants, may stand ready to endorse – a settlement agreement that blatantly disregards the Nation's federally protected rights. Furthermore, the objectives of these existing parties and the Nation are hardly congruent. Should the Agreement be placed before the Court, the existing parties' ultimate objective will be to secure the Court's approval, and subsequent enforcement, of the Agreement. The Nation, by contrast, intends to request that this Court reject the Agreement as a violation of federal law.

Given this conflict, the Nation plainly satisfies the "minimal" burden of showing that the existing parties will not adequately represent the Nation's interest.

II. In the Alternative, Permissive Intervention is Appropriate.

Should this Court deny the Nation's request to intervene as of right, permissive intervention is still appropriate under Federal Rule 24(b). A court may grant permissive intervention "upon timely application . . . when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b)(1)(B). The permissive-intervention rule's commonality requirement is satisfied "where a single common question of law or fact is involved, despite factual differences between the parties." *McNeill v. New York City Hous. Auth.*, 719 F. Supp. 233, 250 (S.D.N.Y. 1989). Moreover, "the words claim or defense are not to be read in a technical sense, but only require some interest on the part of the applicant." *Dow Jones & Co., Inc. v. United States Dep't of Justice*, 161 F.R.D. 247, 254 (S.D.N.Y. 1995).

Here, the Nation meets the lenient requirements for permissive intervention. As explained above, the Nation's motion to intervene is timely. And the Nation seeks to argue an existing question of law or fact, as contemplated by Rule 24(b)(1)(B). Once the Agreement is presented for the Court's consideration, the Court will have to determine whether to approve it – a determination that inevitably will include an assessment of whether the Agreement is consistent with federal law. The Nation, for its part, intends to argue that the Court should *not* approve the Agreement, on the ground that the exclusivity provision violates federal law. The matters of law and fact that the Nation will address, in short, are the same as those to be placed before the Court.

Other factors similarly counsel in favor of permissive intervention. As discussed above, the Nation has direct, substantial, and legally protectable interests in the disposition of this litigation that are not adequately represented by the existing parties. *See H.L. Hayden Co. v. Siemens Med. Sys., Inc.*, 797 F.2d 85, 89 (2d Cir. 1986) ("Additional relevant factors include the nature and extent of the intervenors' interests [and] the degree to which those interests are adequately represented by other parties . . . ." (internal quotation marks omitted)). In addition, by raising the likely unaddressed arguments that the Agreement's exclusivity provision violates federal law, the Nation "will significantly contribute . . . to the just and equitable adjudication of the legal questions presented." *Id.* at 89.

Finally, intervention in this case will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Intervention will not delay the litigation, as the Agreement has not yet been submitted to this Court for approval. And rather than prejudicing the existing parties, the Nation's participation will assist in ensuring that this litigation is resolved in a manner consistent with federal law.

* * *

The Agreement has yet to be presented to the Court for approval. In the meantime, the Cayuga Nation is hopeful that the parties will find a way to modify its language so that it adequately safeguards the Nation's interests. If the Agreement's language remains intact, the Nation remains hopeful that the State Legislature will decline to ratify the Agreement, or that the federal defendants will decline to endorse the Agreement for the Court's approval. At present, however, the Nation has no choice but to intervene in this litigation to protect its rights.

CONCLUSION

For the foregoing reasons, the motion to intervene should be granted.

Respectfully submitted,

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