

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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CITIZENS AGAINST CASINO GAMBLING IN ERIE  
COUNTY, et al.,

-against-

PHILLIP N. HOGEN, et al.,

Plaintiffs, 07-CV-00451-S  
Hon. William M.  
Skretny, U.S.D.J.

Defendants.

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**AFFIDAVIT IN SUPPORT OF MOTION FOR  
ORDER ENFORCING JUDGMENT**

STATE OF NEW YORK    )  
                                  )ss.:  
COUNTY OF ALBANY    )

CORNELIUS D. MURRAY, being duly sworn, deposes and says that:

1. I am an attorney at law duly admitted to practice before this Court. I am the lead attorney for Plaintiffs in this action and as such, I am fully familiar with the facts hereinafter set forth.

2. This Affidavit is respectfully submitted in support of Plaintiffs' Application for an order enforcing the judgment of this Court dated July 8, 2008 (Docket #62) and directing the Defendants and, in particular, the Chairman of the National Indian Gaming Commission (the "NIGC"), to order the permanent closure of the operation of Class III gambling currently being conducted by the Seneca Nation of Indians (the "SNI") at a 9-1/2 acre site located in downtown Buffalo that has been commonly referred to in this litigation as the "Buffalo Parcel."

3. On July 8, 2008, this Court issued a Decision and Order (Docket #61) vacating the ordinance that the Defendant Chairman of the NIGC had issued on July 2, 2007 that purportedly gave the SNI the authority to conduct a Class III gaming operation at the Buffalo Parcel site under the Indian Gaming Regulatory Act (the "IGRA"). On that same day, this Court entered the Judgment (Docket #62) pursuant to that Order and Decision.

4. Under the IGRA, Class III gambling by an Indian tribe in the absence of an ordinance approved by the Chairman of the Commission is unlawful. 25 U.S.C. § 2710(d)(1)(A)(iii).

5. In its Decision and Order, this Court also found that the Buffalo Parcel site is not gambling-eligible because it was acquired after October 17, 1988, the effective date of the IGRA, and, therefore, was prohibited by the general provisions of 25 U.S.C. § 2719(a), barring Class III gambling on Indian land acquired after such date. This Court further ruled that the Buffalo Parcel site did not fit within any of the exceptions in subdivision (b) of § 2719 to the general prohibitions set forth in subdivision (a). In particular, this Court found that the Buffalo Parcel site had not been acquired as part of the settlement of a land claim. *See* 25 U.S.C. § 2719(b)(1)(B)(i).

6. It is clear, therefore, that the Buffalo Parcel site is not currently eligible for Class III gambling and that there is no ordinance in effect authorizing such gambling at the site.

7. Nevertheless, the Seneca Nation of Indians continues to conduct Class III gambling at the site and in fact held a press conference on Wednesday, July 9, 2008, the day after this Court's Decision, Order and Judgment. The Tribe characterized this

Court's decision as "procedural," and announced that it was "business as usual" and "found no reason in Thursday's court decision to consider any alternatives." The Nation's press release distributed at the press conference is annexed hereto as Exhibit "A."

8. The press release said that the SNI had reached this determination after "consultation with Federal officials of the National Indian Gaming Commission." There is, therefore, no question that NIGC is fully aware of the continued illegal operations of the casino by the Senecas.

9. When I learned of the Court's Decision on July 8, 2008, I emailed a letter to counsel for the Defendants, Assistant United States Attorney Mary Pat Fleming, with a copy to Gina Allery, Esq., of the U.S. Department of Justice, Indian Resources Section. In that letter, I inquired as to the intentions of their client, NIGC, with respect to complying with the Court's Decision. (A copy of my July 8, 2008 letter to Ms. Fleming is annexed hereto as Exhibit "B.")

10. On July 9, 2008, after I learned of the Seneca's press conference and announcement, I again emailed Ms. Fleming with a copy to Ms. Allery, in order to ascertain whether or not the NIGC was, in fact, going to take any action to enforce and uphold this Court's Order. In light of the press release that made it appear that the NIGC was agreeing with the continuation of gambling at the Buffalo Parcel site, I requested that she respond to me by no later than 5:00 p.m. Eastern Daylight Time on Thursday, July 10, 2008. (A copy of my July 9, 2008 letter to Ms. Fleming is annexed hereto as Exhibit "C.")

11. In writing this letter to Ms. Fleming, I wanted to extend to her the courtesy of hearing from her before taking any action to uphold this Court's Order.

12. I never did receive a response from Ms. Fleming. Instead, on the afternoon of July 10, 2008 at approximately 3:40 p.m. Eastern Daylight Time, I received a telephone call from a woman identifying herself as Penny Coleman, the attorney for the NIGC. Ms. Coleman told me that Ms. Fleming had forwarded my letter to her, that she was responding to it, and that I would not receive any further response directly from Ms. Fleming.

13. Ms. Coleman further advised me, in sum and substance (I did not make an exact recording of the phone call), that the NIGC was still weighing its options and had not yet made any decisions with respect to whether it would abide by the determination or appeal it. She made no commitment or indication as to whether, in the meantime, it would order closure or take any other action. On July 10, 2008, I sent yet another email letter to Ms. Fleming memorializing my conversation that afternoon with Ms. Coleman. (A copy of my July 10, 2008 letter to Ms. Fleming is annexed hereto as Exhibit "D.")

14. There is no question that the Chairman of the NIGC has been vested by Congress with the power to close gambling operations that are in "substantial violation" of IGRA. *See* 25 U.S.C. § 2713(b).

15. Moreover, there is no question that under the NIGC's own regulations, conducting Class III gambling in the absence of a valid ordinance approved by the Chairman of the Commission is a "substantial violation" of IGRA. *See* 25 C.F.R. § 573.6(a)(3).

16. The continued conduct of Class III gambling at the site is, therefore, not only a violation of this Court's judgment, but it is an illegal and unlawful activity under IGRA.

17. As this Court is aware, the Senecas have also announced their intentions to proceed with construction of a major hotel, parking garage, and permanent casino to supplant the temporary casino now being used at the site.

18. Unless and until the illegal Class III gambling at the site is stopped, it appears that the Tribe will continue to act as if this Court's decision was an irrelevant academic exercise and that there is nothing that can be done to stop them.

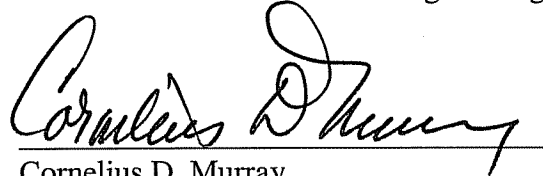
19. Once built, the Tribe will then undoubtedly argue that it should be allowed to operate the permanent casino after all the expense it has incurred, despite the fact that this is an illegal enterprise and despite the fact that the Tribe was advised by Plaintiff's counsel that if it chose to proceed with construction of the hotel casino and parking complex, the Tribe would be doing so at its own peril. *See* letter of Cornelius D. Murray, dated October 6, 2007 addressed to Maurice John, President of the Seneca Indian Nation, attached hereto as Exhibit "E."

20. There is no question that this Court has the inherent power and authority pursuant to the All Writs Act, 28 U.S.C. § 1651, to issue the order Plaintiffs seek here in order to ensure that this Court's judgment is not vitiated or circumvented. This enables the Court to ensure, in other words, that the Court's orders are abided by and that its judgments are given effect.


21. Plaintiffs did not initiate this action as a mere academic exercise and assume that the Court did not entertain their complaint in that fashion, either. The time,

effort and expense invested by Plaintiffs in this action were made to stop an illegal gambling enterprise in the heart of downtown Buffalo, and they have a right to expect that once they establish that they were entitled to relief, their hard-earned victory will not be flouted by the Tribe and ignored by federal government officials who possess the power and authority to see that this Court's decisions are carried out.

WHEREFORE, Plaintiffs respectfully request that this Court order the Defendants, and in particular, the Chairman of the National Indian Gaming Commission, to order the immediate and permanent closure of Class III gambling operations by the Seneca Nation of Indians at the Buffalo Parcel site, and that, in the event of the Chairman's failure to carry out said order, the U.S. Marshall's Office be directed to take such action as is reasonably necessary in order to ensure that such gambling be immediately and permanently stopped.

  
Cornelius D. Murray

Sworn to before me this  
14<sup>th</sup> day of July 2008.

  
Notary Public, State of New York

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**JOHN E. HUBBARD**  
Notary Public, State of New York  
Qual. in Greene Co. No. 01HU6990550  
Commission Expires June 30, 2010