UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS,

Petitioner,

v. Index No. 19-cv-00735-WMS

STATE OF NEW YORK,

Respondent.

SENECA NATION'S REPLY IN SUPPORT OF
RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. Federal Rule of Civil Procedure 81 Does Not Bar the Nation's Requested Relief 1

II. The Appellate Mandate Did Not Deprive This Court of Jurisdiction 3

III. The State Has Not Refuted the Nation's Showing of Exceptional Circumstances 5

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

American Telephone & Telegraph Co. v. United Computer Systems, Inc.,
5 F.3d 534 (9th Cir. 1993) 3

Arrowood Indemnity Co. v. Equitas Insurance Ltd.,
No. 13cv7680 (DLC), 2015 WL 2258260 (S.D.N.Y. May 14, 2015) 2

Baltia Air Lines, Inc. v. Transaction Mgmt., Inc.,
98 F.3d 640 (D.C. Cir. 1996) 1, 2

Bridgeport Rolling Mills Co. v. Brown,
314 F.2d 885 (2d Cir. 1963) 3

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984).....9

Citizens Against Casino Gambling in Erie Cty. v. Hogen,
No. 07-CV-0451S, 2008 WL 4057101 (W.D.N.Y. Aug. 26, 2008) 9

City of Duluth v. Fond du Lac Band of Lake Superior Chippewa,
No. 09-CV-2668 (SRN/LIB), 2015 WL 4545302 (D. Minn. July 28, 2015) 10

City of Duluth v. Fond du Lac Band of Lake Superior Chippewa,
785 F.3d 1207 (8th Cir. 2015) 9, 10

Cook Chocolate Co., a Div. of World's Finest Chocolate, Inc. v. Salomon Inc.,
748 F. Supp. 122 (S.D.N.Y. 1990) 2

DeWeerth v. Baldinger,
38 F.3d 1266 (2d Cir. 1994) 4

Eutectic Corp. v. Metco, Inc.,
597 F.2d 32 (2d Cir. 1979) 5

Fidelity Federal Bank, FSB v. Durga Ma Corp.,
387 F.3d 1021 (9th Cir. 2004) 2

Fine v. Bellefonte Underwriters Ins. Co.,
758 F.2d 50 (2d Cir. 1985) 4, 5

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,
500 F.3d 111 (2d Cir. 2007) 2

Karsner v. Lothian,
532 F.3d 876 (D.C. Cir. 2008) 2

Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.,
791 F.2d 1334 (9th Cir. 1986) 3

LFoundry Rousset v. Atmel Corp.,
690 F. App'x 748 (2d Cir. 2017) 5

Merit Ins. Co. v. Leatherby Ins. Co.,
714 F.2d 673 (7th Cir. 1983) 2

Motor Vehicle Manufacturers Ass'n of the United States, Inc. v.
State Farm Mutual Automobile Ins. Co.,
463 U.S. 29 (1983).....8, 9

New Hampshire v. Maine,
532 U.S. 742 (2001) 6

Picarella v. HSBC Sec. (USA) Inc.,
No. 14-CV-4463 (ALC) (S.D.N.Y. June 28, 2018) 5

Seneca Nation of Indians v. New York,
988 F.3d 618 (2d Cir. 2021) 4, 8

Standard Oil Co. of California v. United States,
429 U.S. 17 (1976).....4, 5

United Airlines, Inc. v. Brien,
588 F.3d 158 (2d Cir. 2009) 9

Federal Rules and Statutes

Fed. R. Civ. P. 60(b) ..... *passim*

Fed. R. Civ. P. 81 .....1, 2

9 U.S.C. § 10(a)(1) 2, 3

25 U.S.C. § 2710(d)(8) 8

INTRODUCTION

The State's arguments share a common denominator: a cavalier disregard for the significance of the Interior Department's declaration that: (1) it has never had the opportunity to subject renewal-period payments to the requisite economic scrutiny; and (2) it accordingly cannot attest to their legality. The Department has a duty to engage in that review to ensure that the Nation is not turning over gaming revenues in amounts contrary to the express will of Congress. With the Department's letter of April 15, 2021, there no longer exists *any* dispute that this review has never been conducted, and hence that Congress's central mechanism for safeguarding the purposes of the statute has been bypassed. As a result, no one knows whether the Years 15–21 payments are a tax or otherwise violate IGRA, yet absent its requested relief, the Nation will be required to make them. By any measure, these are exceptional circumstances.

Nothing in Federal Rule 81 or the Second Circuit's mandate precludes this Court from considering whether the Department's letter warrants relief from its judgment under Rule 60(b). And the case for relief is compelling. The State could easily join in submitting the payments to the Department for the requisite economic analysis, as the Department has suggested. That the State has steadfastly refused to do so suggests a real concern with the potential upshot of that analysis. But while the State is happy to receive payments of dubious legality, the Nation should not be forced to make them. Rule 60(b)(6) is tailor-made for such circumstances.[1]

I. Federal Rule of Civil Procedure 81 Does Not Bar the Nation's Requested Relief.

The State contends that "[r]elief under Rule 60 … is barred by virtue of Rule 81." State Br. 11–12. Federal courts, however, routinely recognize that "Rule 60(b) is an appropriate vehicle by which to challenge a judgment confirming an arbitration award[.]" *Baltia Air Lines,*

[1] It is impossible to overstate the critical legal and economic stakes for the Nation that these proceedings implicate. Given those stakes, the Nation reiterates its request for oral argument.

Inc. v. Transaction Mgmt., Inc., 98 F.3d 640, 642 (D.C. Cir. 1996). *See*, *e.g.*, *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 118 n.9 (2d Cir. 2007) ("[t]he District Court [correctly] noted that Pertamina could have sought relief from the federal judgments confirming and enforcing the [arbitration] award in federal court through Fed.R.Civ.P. 60(b)(3)"); *Karsner v. Lothian*, 532 F.3d 876, 887 (D.C. Cir. 2008) (noting that on remand, intervenor could "successfully move[] under Rule 60(b)(4) to void the district court's confirmation order"); *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 387 F.3d 1021, 1023–24 (9th Cir. 2004) (stating that "[a] judgment confirming an arbitration award is treated similarly to any other federal judgment" and affirming district court's grant under Rule 60(b) of partial relief from judgment confirming arbitration award); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 682 (7th Cir. 1983) (Posner, J.) (addressing district court's grant of Rule 60(b) motion for relief from judgment confirming arbitration award *on the merits*).

None of the State's cases suggests that Rule 81 writes Rule 60(b) out of the Federal Rules. Most of them involve a party attacking an arbitration award *directly* under Rule 60(b). In *Cook Chocolate Co., a Division of World's Finest Chocolate, Inc. v. Salomon Inc.*, 748 F. Supp. 122 (S.D.N.Y. 1990), *aff'd*, 932 F.2d 955 (2d Cir. 1991), for example, the plaintiff "moved to vacate the award under 9 U.S.C. § 10," *id.* at 124, and "filed a second motion seeking to overturn the award under Rule 60(b)," *id*. at 125. The party, in other words, invoked Rule 60(b) to vacate the award itself, not the court's confirmation of the award, which had not yet occurred.

In *Arrowood Indemnity Co. v. Equitas Insurance Ltd.*, No. 13cv7680 (DLC), 2015 WL 2258260 (S.D.N.Y. May 14, 2015), a party invoked Rule 60(b)(3) based on "misconduct in the arbitration proceedings," *id*. at *3, after the FAA's three-month deadline for petitions to vacate an award had passed. That is, it invoked Rule 60(b) *in lieu of* a petition to vacate. The court

denied the motion because "Rule 60(b)(3) cannot be used to challenge *directly*" the arbitration award and thereby "escape the three month limitation imposed by the FAA on motions to vacate an arbitration award[.]" *Id*. (emphasis added). No comparable circumstances exist here.

In *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334 (9th Cir. 1986), the Rule 60(b) movant identified no "grounds for setting aside the court's judgment[.]" *Id.* at 1338 n.11 (quotation marks omitted). Thus, "[t]he movant in *LaFarge* … alleged only fraud in the underlying arbitration. It is for that reason that we barred the movant from attacking the arbitration award 'under the guise' of a Rule 60 motion." *Am. Tel. & Tel. Co. v. United Computer Sys., Inc.*, 5 F.3d 534 (9th Cir. 1993).

Finally, in *Bridgeport Rolling Mills Co. v. Brown*, 314 F.2d 885 (2d Cir. 1963), a party moved to vacate an arbitration award under both Rule 60(b)(2) (new evidence) and 9 U.S.C. § 10(a)(1) (fraud). *Id*. at 885. As the State notes, the Court stated that the parties were "bound by the arbitration award made upon the testimony before the arbitrator." *Id*. at 886. Far from finding Rule 60(b) inapplicable, though, the Court simply affirmed the district court's finding, *on the merits*, that the party's new evidence "failed to satisfy [its] burden of proof." *Id.* at 885.

Here, the Nation is not attacking the arbitration award in the guise of this motion. Rather, it asserts that this Court's order confirming the award should be set aside because of the exceptional circumstances created by the Interior Department's post-confirmation letter. That is an entirely appropriate and recognized use of Rule 60(b)(6).

II. The Appellate Mandate Did Not Deprive This Court of Jurisdiction.

The State next asserts that this Court has no jurisdiction to consider a Rule 60(b) motion because "[t]he relevant issues were already considered by the Second Circuit." State Br. 15–16. According to the State, the Nation "argued to the Second Circuit that the Secretary had not

expressly approved the [disputed] payments" during the 2002 approval process. *Id*. at 17. That is true. But the Circuit did not conclude that the Secretary *had* approved the payments. *Seneca Nation of Indians v. New York*, 988 F.3d 618, 621 (2d Cir. 2021) ("We express no view about whether the Secretary's position when the Compact was deemed approved was that it in fact required additional payments during the renewal term."). It held only that "IGRA does not provide for *subsequent* agency review upon an arbitrator's" interpretation of a compact. *Id.* at 630 (emphasis added); *see also id.* at 621 ("[W]e consider only … whether IGRA [requires] that the contract interpretation be subjected to the Secretary's *further* approval[.]" (emphasis added)).

The Nation's motion does not challenge the Circuit's conclusion that *subsequent* Secretarial review of arbitral interpretations falls outside of IGRA's ambit. Rather, the Nation's claim is that exceptional circumstances exist because the Department has now stated conclusively that it did not approve the disputed payments in 2002. It is hence beyond dispute that the requisite review of the payments has *never* taken place, and the Department has accordingly expressed doubt as to their legality. Nation Br. 8–17.

The Department's letter and the factual affirmations within it constitute a "'later event[]'… not previously considered by the appellate court," *DeWeerth v. Baldinger*, 38 F.3d 1266, 1270 (2d Cir. 1994) (quoting *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 18 (1976)), and establish a "material change of circumstances" from those before the Second Circuit, *id*. (quoting *Fine v. Bellefonte Underwriters Ins. Co.*, 758 F.2d 50, 52 (2d Cir. 1985)). Indeed, the Second Circuit acknowledged both (1) the materiality of such an event and (2) that the event had not yet occurred when it rendered its decision. *Seneca Nation*, 988 F.3d at 630 (discussing prior Department communications and concluding that "there is *no indication that DOI could reach a contrary ruling.*" (emphasis added)). The Department has now done

precisely that. As the Supreme Court has explained, "the appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events. Hence, the district judge is not flouting the mandate by acting on the motion." *Standard Oil*, 429 U.S. at 18. That is the case here.[2]

III. The State Has Not Refuted the Nation's Showing of Exceptional Circumstances.

The Nation's motion is based on the Department's factual confirmation that (1) the Secretary never reviewed renewal-period payments in 2002; (2) the payments have thus never undergone the requisite analysis to ensure that the State has made "meaningful concessions" and is providing the Nation with "substantial economic benefits" in exchange for them; and therefore (3) the Department has not fulfilled its trust obligations under IGRA and is left with serious concerns as to the legality of the payments. The State asserts seven bases as to why these are not "exceptional circumstances" under Rule 60(b)(6). State Br. 18. None has merit.

First, the State asserts that the Department has no authority "to weigh in on a contract interpretation dispute" that has been arbitrated. State Br. 19. But nothing about the Department's letter of April 15, 2021, purports to do so. While the Department does not share

[2] None of the State's cases is to the contrary. *See Fine*, 758 F.2d at 52 (appellants "cite no material change of circumstances or newly discovered evidence so as to bring the matter under the aegis of *Standard Oil*"); *LFoundry Rousset v. Atmel Corp.*, 690 F. App'x 748, 751 n.2 (2d Cir. 2017) (affirming denial of Rule 60(b) motion under mandate rule where evidence in support of motion "is the same as that presented" on appeal); *Eutectic Corp. v. Metco, Inc.*, 597 F.2d 32, 34 (2d Cir. 1979) (where Second Circuit reversed district court non-infringement judgment based on explicit finding of infringement, party could not invoke Rule 60(b) as a basis for district court to "correct the 'mistake'" of the Second Circuit); *Picarella v. HSBC Sec. (USA) Inc.*, No. 14-CV-4463 (ALC), at 3 (S.D.N.Y. June 28, 2018) (denying Rule 60(b) motion premised on no new evidence or developments and using arguments "verbatim" from appellate brief).

the panel majority's interpretation of the Compact, the letter does not even suggest an intent to overturn that interpretation. It instead states the now indisputable fact that "[t]he Secretary did not review" any renewal-period payments, as required by IGRA, and therefore that "[w]e have not determined" their permissibility under the mandatory "meaningful concessions" analysis. Dkt. No. 40-3 at 2. Weighing in on whether it has exercised its own statutorily mandated duties is surely within the Department's authority, and entirely distinct from compact interpretation.

Second, the State asserts that "the DOI letter is premised on the erroneous assumption" that the panel majority's award constitutes an amendment, rendering the letter "meaningless." State Br. 20. The State quotes no language from the letter to that effect because it is not in there (nor is it in the Nation's briefing on this motion). Even had the Department made such an assumption, it would be beside the point. The Nation has invoked the letter as an exceptional circumstance under Rule 60(b)(6) based on the Department's *factual* confirmation that the Secretary did not subject the disputed payments to the requisite economic analysis *in 2002* and therefore questions their legality. None of that turns on whether the panel majority's award qualifies as an amendment.

The State's focus on the Nation's letter of March 21, 2021, to the Department as a basis for judicial estoppel, State Br. 20–21, is likewise a diversion. As the State's own cases hold, judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quotation marks omitted). Neither of those elements is met here. The Nation has not previously prevailed before this Court, let alone on a non-amendment argument,

and it does not seek to persuade this Court to the contrary now. The "amendment" issue is irrelevant to the Nation's motion, which explains its absence from the Nation's briefing.[3]

Third, the State asserts that "this Court and the Second Circuit have already determined there is nothing in IGRA or any other law that requires the Secretary to review or approve the Panel's interpretation of the Compact[.]" State Br. 21. Again, the Nation's motion does not rest on an argument that the Department needs to review the arbitral opinion, but rather on the Department's clear confirmation that it has never conducted an economic analysis of the renewal-period payments as required by IGRA. *See* Nation Br. 20 ("Secretarial review of a contract interpretation and affirmative Secretarial analysis of revenue-sharing provisions are two distinct matters. The Court of Appeals concluded that the former is not required by IGRA; it drew no similar conclusion as to the latter."). Nor has the Nation raised a "new allegation" that the disputed payments are a prohibited tax, State Br. 22. The Nation has been consistent that economic analysis by the Secretary is required to ensure that they are not. *See* Nation Br. 10 ("Without that analysis, there is no colorable basis to conclude that the [disputed] payments … are anything other than an illegal tax under IGRA"); Dkt. No. 2-1 at 3–4 ("Secretarial review of revenue-sharing provisions, in particular, is critical to ensuring that such payments do not constitute a tax and that Indian nations in fact receive meaningful exclusivity in return.").

Fourth, the State asserts that the Nation "mischaracterizes the DOI letter, which does not purport to make any determination regarding whether the continued revenue sharing payments are unlawful" and "expressly decline[d]" to do so by stating that it "'cannot provide certainty'"

[3] The State's assertion that the Nation acted with a "lack of candor with the DOI" regarding this Court's decision and the Second Circuit's affirmance, State Br. 21, is entirely unwarranted and should not have been made. The Nation fully apprised the Department of both decisions. *See* Dkt. No. 40-7 at 4 & n.8 (stating that "[t]he federal district court ruled against the Nation and … the Second Circuit Court of Appeals upheld the decision" and citing both opinions).

that the payments comply with IGRA. State Br. 22–23 (quoting April 15 letter). There is no mischaracterization on the Nation's part, and excerpting bits and pieces of the Department's letter does not change its meaning. That the Department is unable to provide certainty is the very point of the Nation's Rule 60(b) motion. The Department has plainly stated that it cannot find the payments to be legal because it has not conducted the requisite analysis:

> In this case, we cannot provide certainty that the extension of revenue sharing into the seven-year renewal period complies with … IGRA. We have not determined whether the State has offered meaningful concessions …. [or] whether the value of any concessions provide substantial economic benefits to the Nation in a manner justifying the revenue sharing payments. We caution the parties about their reliance on the terms because we have not determined that they are lawful.

Dkt. No. 40-3 at 2–3. The State is so eager to receive the payments that it is willing to dismiss the Department's concerns about their potential illegality and wishes to press for those payments even absent the analysis required to determine their lawfulness. But while the State may wish to take a cavalier approach to the Department's concerns, the Nation should not be forced to do so.

Fifth, the State asserts that the Department's letter commands no deference from this Court, citing cases involving the *Chevron* standard and agency interpretations of statutes. State Br. 23. But no agency interpretation of IGRA is disputed here. The panel majority agreed that "it is beyond dispute that the Panel has no legal authority to … enforce a Compact term that the Secretary did not approve, *see* 25 U.S.C. § 2710(d)(8)," Dkt. No. 2-4 at 42, and both this Court and the Second Circuit cited that as a correct statement of law, *see* Dkt. No. 14 at 5; *Seneca Nation*, 988 F.3d at 626. The Department said nothing contrary in its April 15 letter, but instead made clear that the Secretary did not *in fact* review the disputed payments. The State has not and cannot dispute that assertion, and its deference arguments are thus entirely beside the point.[4]

[4] To the extent that the State is criticizing the agency for focusing heightened attention on the potential illegality of the payments, that criticism too is entirely misplaced. *See Motor Vehicle*

Sixth, the State asserts that "any alleged harm is entirely speculative[.]" State Br. 24. That the Nation has not yet suffered harm is immaterial. *See United Airlines, Inc. v. Brien*, 588 F.3d 158, 176 (2d Cir. 2009) ("Relief is warranted [under Rule 60(b)(6)] where the judgment *may* work an extreme and undue hardship[.]") (emphasis added) (quotation marks omitted)). And here the risk is very real. *See Citizens Against Casino Gambling in Erie Cty. v. Hogen*, No. 07-CV-0451S, 2008 WL 4057101, at *3 (W.D.N.Y. Aug. 26, 2008) (IGRA's conferral of enforcement authority on NIGC "is mandatory, it connotes immediacy …. [and] directs the NIGC to act upon any indication of the existence of a violation; it does not give the Commission discretion to ignore violations or choose not to issue a [Notice of Violation]."). And the State's contention that an NIGC enforcement action would "unilaterally void" this Court's judgment, State Br. 24 n.8, is flatly incorrect. The NIGC's closure order in *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d 1207 (8th Cir. 2015), did not "unilaterally void" the district court's judgment. It instead amounted to exceptional circumstances justifying *the district court* in granting relief from that judgment under Rule 60(b)(6). So too here.

The State asserts that the *Fond du Lac* litigation "has no application here" because it "did not involve an arbitration subject to the FAA[.]" State Br. 14. That is an immaterial distinction. The Nation cited *Fond du Lac* for these fundamental principles: (1) the NIGC can and does issue closure orders where revenue-sharing payments run afoul of IGRA; (2) IGRA's purpose to protect tribal gaming revenues is entitled to "significant weight" in a court's Rule

---

Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) ("A change in administration … is a perfectly reasonable basis for an executive agency's reappraisal" of its priorities and the agency "is entitled to … evaluate priorities in light of the philosophy of the administration.") (Rehnquist, J., concurring in part, dissenting in part); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (An agency may "properly rely upon the incumbent administration's views of wise policy to inform its judgments.").

60(b)(6) determination whether to grant relief from its prior judgment, *Fond du Lac*, 785 F.3d at 1211; and (3) where "the agency tasked with making [specific] determinations" under IGRA has indicated that revenue-sharing payments would "violate th[e] intent" of the statute, that is an exceptional circumstance under Rule 60(b)(6), *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, No. 09-cv-2668 (SRN/LIB), 2015 WL 4545302, at *5 (D. Minn. July 28, 2015). That *Fond du Lac* did not involve arbitration does not alter any of these principles.

There would be real harm in forcing the Nation to make payments when the Department tasked by Congress with reviewing their legality has now clearly stated that it has not conducted that review in the first instance, and hence cannot attest as to their legality. A party should not be forced to take action that could well trigger enforcement—it does not need to go all the way down the road of incurring serious sanctions before obtaining relief from a judgment, particularly where another option is readily available to the parties, which is that of Interior review. The State's continued resistance to such review can only stem from a concern that the payments would in fact be deemed illegal because they cannot be justified through an economic analysis. And it is precisely that potential illegality that warrants relief here.

Seventh, the State asserts that the timing of the Nation's outreach to the Department and its Rule 60(b) motion suggests an "end run" around the arbitration and judicial processes. State Br. 25. That charge is entirely misplaced, as the Nation has sought all along to obtain Interior analysis of the disputed payment obligations and the State has sought all along to resist it. The Nation explained the timing issues in detail in its opening brief. Nation Br. 20–22. Because the State has not responded substantively to those arguments, the Nation does not repeat them here.

CONCLUSION

The Nation respectfully requests that the Court grant its Rule 60(b)(6) motion.

Dated this 7th day of June, 2021

Respectfully submitted,

By: /s Carol E. Heckman
Carol E. Heckman, Esq.
Lee M. Redeye, Esq.
Counsel for Seneca Nation of Indians
50 Fountain Plaza, Suite 1700
Buffalo, New York 14202
Telephone: (716) 853-5100
Facsimile: (716) 853-5199
checkman@lippes.com
lredeye@lippes.com

Riyaz A. Kanji, Esq.
David A. Giampetroni, Esq.
Kanji & Katzen P.L.L.C.
303 Detroit Street, Suite 400
Ann Arbor, Michigan 48101
Telephone: (734) 769-5400
Facsimile: (734) 769-2701
rkanji@kanjikatzen.com
dgiampetroni@kanjikatzen.com