

To be Argued by:
ERIK A. GOERGEN
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

CAYUGA NATION,

Docket No.:
CA 23-00739

Petitioner-Appellant,

– against –

DUSTIN PARKER and DUSTIN PARKER
d/b/a Pipekeepers Tobacco & Gas,

Respondents-Respondents.

BRIEF FOR RESPONDENTS-RESPONDENTS

NIXON PEABODY LLP
Daniel J. Hurteau, Esq.
Erik A. Goergen, Esq.
Attorneys for Respondents-Respondents
677 Broadway, 10th Floor
Albany, New York 12207
(518) 427-2650
dhurteau@nixonpeabody.com
egoergen@nixonpeabody.com

Seneca County Clerk's Index No. 20210519



TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
COUNTERSTATEMENT OF QUESTION PRESENTED.....	1
PRELIMINARY STATEMENT.....	1
STATEMENT OF FACTS	2
ARGUMENT	6
 POINT ONE	
THE NATION COURT JUDGMENT MUST NOT BE RECOGNIZED BY THIS COURT BECAUSE THE NATION COURT JUDGE DID NOT POSSESS THE REQUISITE QUALIFICATIONS UNDER THE NATION’S OWN JUDICIARY LAW.....	6
 POINT TWO	
THE NATION COURT JUDGE’S ENGAGEMENT AGREEMENT WITH THE NATION FURTHER UNDERMINES THE VALIDITY OF THE NATION COURT JUDGMENT	17
 POINT THREE	
THE NATION’S PETITION IS DEFICIENT ON ITS FACE IN THAT IT FAILED TO SUFFICIENTLY ALLEGE NATION COURT SUBJECT MATTER JURISDICTION AND PERSONAL JURISDICTION	21
CONCLUSION.....	23

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>People v. Alteri</i> , 47 A.D.3d 1070 (3d Dep’t 2008).....	12, 13
<i>Matter of Beer Garden, Inc. v New York State Liq. Auth.</i> , 79 N.Y.2d 266 (1992).....	13
<i>Caffrey v. N. Arrow Abstract & Settlement Servs., Inc.</i> , 160 A.D.3d 121 (2d Dep’t 2018).....	18
<i>Cayuga Nation v. Dustin Parker, et al.</i> , 605 F. Supp. 3d 414 (N.D.N.Y. June 2, 2022).....	15, 16
<i>CIBC Mellon Tr. Co. v. Mora Hotel Corp. N.V.</i> , 100 N.Y.2d 215 (2003).....	9
<i>Greschler v. Greschler</i> , 51 N.Y.2d 368 (1980).....	7
<i>Khatibi v. Weill</i> , 8 A.D.3d 485 (2d Dep’t 2004).....	18
<i>Knopf v. Sanford</i> , 65 Misc. 3d 463 (Sup. Ct. N.Y. Cnty. 2019).....	18
<i>Lenchyshyn v. Pelko Elec., Inc.</i> , 281 A.D.2d 42 (4th Dep’t 2001).....	5, 22
<i>Matter of Maron v. Silver</i> , 14 N.Y.3d 230 (2010).....	20
<i>Matter of Pendell v. Columbia Cty. Dist. Attorney’s Office</i> , 166 A.D.3d 1088 (3d Dep’t 2018).....	18
<i>Sung Hwan Co., Ltd. v. Rite Aid Corp.</i> , 7 N.Y.3d 78 (2006).....	7

Walker v. City of N.Y.,
46 A.D.3d 278 (1st Dep’t 2007)18

Statutes

Cayuga Nation Judiciary Law.....*passim*
CPLR 503.....3, 21
CPLR 507.....3, 22
CPLR 4511(b).....10
CPLR 5301(a)7, 8
CPLR 5304.....1
CPLR 5304(a)(1).....9, 20
CPLR 5304(a)(2).....21
CPLR 5304(a)(3).....21

Rules

22 NYCRR § 202.71.....*passim*

COUNTERSTATEMENT OF QUESTION PRESENTED

Question: Did Supreme Court correctly deny the Cayuga Nation's motion for leave to renew and reargue the prior denial of its CPLR Article 4 petition seeking recognition of a default tribal court judgment?

Answer: Yes. Supreme Court properly exercised its discretion in denying the Cayuga Nation's motion for renewal and reargument; however, Supreme Court's order should be affirmed on the alternative grounds that (1) the tribal court judge lacked the requisite judicial qualifications under tribal law and (2) the Cayuga Nation's engagement agreement with the tribal court judge undermines the judicial independence of the tribal court judge.

PRELIMINARY STATEMENT

While tribal court judgments *may* be entitled to recognition by courts of this State under the principles of the common law of comity, such recognition is not mandatory. In evaluating whether a CPLR Article 4 petition seeking recognition of a foreign or tribal court judgment should be granted, New York courts are required to consider the factors set forth in CPLR 5304. This includes consideration of the impartiality of the foreign or tribal court and whether such courts adhere to procedures compatible with the requirements of due process of law.

Although Supreme Court correctly denied the Cayuga Nation's CPLR Article 4 petition and its subsequent motion for leave to renew and reargue, this

Court should affirm both Supreme Court orders on the alternative grounds that the tribal court judge lacked the requisite qualifications under the applicable Cayuga Nation Judiciary Law and that the underlying tribal court judgment was rendered in a manner inconsistent with due process requirements. Additionally, the Cayuga Nation’s petition is facially deficient insofar as it failed to adequately allege that the tribal court had subject matter jurisdiction over the underlying dispute and that it had personal jurisdiction over Dustin Parker and his business.

STATEMENT OF FACTS

On December 2, 2021, the Cayuga Nation Civil Court (“the Nation Court”) issued an order in favor of Petitioner-Appellant Cayuga Nation (“the Nation”) (1) permanently enjoining Respondents-Respondents Dustin Parker (“Parker”) and Dustin Parker d/b/a Pipekeepers Tobacco & Gas (“Pipekeepers”)¹ from the continued operation of Pipekeepers and (2) assessing a civil fine of \$1,000 per day for Parker and Pipekeepers’ violation of the Cayuga Nation Amended and Restated Business License and Regulation Ordinance (“the Nation’s Ordinance”) beginning October 22, 2021, and “continuing until such time as Pipekeepers . . . ceases operations.” (R. 14-15). This order was entered upon Parker’s failure to appear in the Nation Court and before he retained the undersigned counsel. Several days later, on December 6, 2021, the Nation Court entered a judgment against Parker

¹ Where appropriate, this brief will refer to Parker and Pipekeepers collectively as “Parker.”

and Pipekeepers (1) in the amount of \$45,000 with “said amount continuing to accrue at the rate of \$1,000 per day” and (2) permanently enjoining the operation of Pipekeepers. (R. 12-13).

Two days later, on December 8, 2021, the Nation brought this special proceeding in Supreme Court, Seneca County pursuant to Article 4 of the CPLR and 22 NYCRR § 202.71 seeking recognition and entry of the Nation Court judgment. (R. 7-11). Unrepresented by counsel, Parker did not file an opposition to the Nation’s petition or otherwise appear before Supreme Court. (R. 18).

The Nation’s CPLR Article 4 petition contained only a few allegations concerning the Nation Court judgment for which recognition is sought. (R. 9 ¶¶ 4-6). Noticeably absent are allegations establishing that the Nation Court had personal jurisdiction over Parker and Pipekeepers and that the Nation Court had subject matter jurisdiction to adjudicate the claims at issue in the underlying litigation – *i.e.*, alleged violations of the Nation’s Ordinance. (R. 8-10). Instead, the petition only asserted that venue in Supreme Court, Seneca County was “proper pursuant to CPLR 503 because judgment for which this Court’s recognition is sought was rendered against a resident of Seneca County, and CPLR 507 because the real property which is the subject of the underlying action is located in Seneca County.” (R. 9 ¶ 3).

Although Parker and Pipekeepers failed to oppose the Nation’s petition to domesticate, on July 19, 2022, Supreme Court, Seneca County (Porsch, J.), *sua sponte* denied the Nation’s petition (the “July 2022 Supreme Court Order”). (R. 17-18). Supreme Court concluded that the Nation “failed to establish that the Nation Civil Court is a court duly established under Cayuga Nation or federal law.” (R. 17) (internal quotation marks omitted). Supreme Court explained that when it is “usually presented with a Judgment from a court of foreign jurisdiction, they are accompanied by a certification of the state or country in which that court sits, the papers are overtly endorsed, stamped and attested to.” (*Id.*). Those features were not present here in the Nation’s petition to Supreme Court. (*Id.*).²

Additionally, despite Parker’s non-appearance, Supreme Court concluded that “before a default judgment can be entered, [it] must still determine whether [the Nation] has established the Court’s jurisdiction.” (R. 18). Thus, even assuming the Nation Court judgment “was entered by a trial court recognized by the New York or United States government, [the Nation] has not shown, or even alleged, that [Parker and Pipekeepers’s] property and/or business reside on tribal land (defined as a federally-recognized reservation or land held in trust by the

² Parker is not arguing that this Court should affirm the July 2022 Supreme Court Order (or the subsequent order appealed from here denying the Nation’s motion for leave to renew and reargue) on this basis, and thus, does not address the Nation’s arguments on this point. (*See* Brief for Petitioner-Appellant (“Nation Brief”), at 8-13).

federal government.)” (*Id.*). Thus, according to Supreme Court, the Nation “failed to establish, even at a minimum, that this Court has personal jurisdiction over [Parker and Pipekeepers].” (*Id.*).

In August 2022, the Nation filed a motion for leave to renew and reargue its petition to domesticate the Nation Court judgment. (R. 19-36). On April 7, 2023, Supreme Court denied the Nation’s motion and reaffirmed its prior decision (the “April 2023 Supreme Court Order”). (R. 4-6). Supreme Court distinguished a decision from this Court cited by the Nation, *Lenchyshyn v. Pelko Elec., Inc.*, 281 A.D.2d 42 (4th Dep’t 2001), involving enforcement of a Canadian judgment, where this Court held that “a judgment creditor be permitted to obtain recognition and enforcement of a foreign country money judgment without any showing that the judgment debtor is subject to personal jurisdiction in New York.” (R. 4-5 (quoting *Lenchyshyn*, 281 A.D.2d at 49)). Unlike *Lenchyshyn*, Supreme Court stated that its previous decision “was not premised on the principle that Petitioner needs to prove the Respondents are subject to the jurisdiction of New York, but rather that Petitioner failed to establish that the Cayuga Nation Civil Court is empowered to issue a judgment at all.” (R. 5).

Citing CPLR § 5304(a)(1), Supreme Court further concluded that “[w]here, as here, a foreign court does not operate within the bounds of due process, its judgments are not entitled to recognition by our state courts.” (*Id.*). Supreme

Court also took “judicial notice of the fact that the subject property of this action does not lie within any recognized federal reservation, nor is it part of land held in trust for the Cayuga Nation by the federal government.” (*Id.*). In sum, Supreme Court concluded that the Nation Court “has no legal authority to issue rulings against citizens whose property lies solely within Seneca County.” (R. 6).

For the reasons discussed below, both the July 2022 and the April 2023 Supreme Court Orders declining to domesticate the Nation Court judgment should be affirmed, but on alternative grounds.

ARGUMENT

POINT ONE

THE NATION COURT JUDGMENT MUST NOT BE RECOGNIZED BY THIS COURT BECAUSE THE NATION COURT JUDGE DID NOT POSSESS THE REQUISITE QUALIFICATIONS UNDER THE NATION’S OWN JUDICIARY LAW

In 2015, a new rule was added to the Uniform Civil Rules for the Supreme Court and the County Court setting forth the procedure for domesticating tribal court judgments in Supreme Court. *See* 22 NYCRR § 202.71. That rule, vesting Supreme Court with discretion in determining whether to recognize tribal court judgments, states that:

Any person seeking recognition of a judgment, decree or order rendered by a court duly established under tribal or federal law by any Indian tribe, band or nation recognized by the State of New York or by the United States may commence a special proceeding in Supreme

Court pursuant to Article 4 of the CPLR by filing a notice of petition and a petition with a copy of the tribal court judgment, decree or order appended thereto in the County Clerk's office in any appropriate county of the state. *If the court finds that the judgment, decree or order is entitled to recognition under principles of the common law of comity, it shall direct entry of the tribal judgment, decree or order as a judgment, decree or order of the Supreme Court of the State of New York.* This procedure shall not supplant or diminish other available procedures for the recognition of judgments, decrees and orders under the law.

Id. (emphasis added). Under New York's common law comity principles, courts will not recognize "the judgments rendered in a foreign country under the doctrine of comity . . . [if] the judgment would do violence to some strong public policy of this State." *Greschler v. Greschler*, 51 N.Y.2d 368, 376 (1980); *Sung Hwan Co., Ltd. v. Rite Aid Corp.*, 7 N.Y.3d 78, 82 (2006).

Other than decisions involving Parker and similarly situated Cayuga Nation members (*see* Nation Brief, at 9 n.1 and n.2), there does not appear to be any reported decisional authority interpreting the meaning and breadth of 22 NYCRR § 202.71. However, CPLR Article 53, which addresses recognition of foreign country judgments, should be considered in evaluating whether to domesticate the Nation Court judgment here.

Under CPLR 5301(a), a foreign country means "a government other than . . . the United States . . . a state, district, commonwealth, territory or insular possession of the United States . . . or . . . any other government with regard to which the

decision in this state as to whether to recognize a judgment of that government's courts is initially subject to determination under the Full Faith and Credit Clause of the United States Constitution." Thus, CPLR Article 53 "applies to all judgments falling outside the scope of the full faith and credit clause of U.S. Const., art. IV, § 1.1" and "would include not only judgments of the courts of foreign sovereigns, but Native American tribal court judgments as well." Weinstein, Korn & Miller, *New York Civil Practice: CPLR* ¶ 5301.02 (David L. Ferstendig ed., LexisNexis Matthew Bender 2d Ed. (2023)).

While CPLR Article 53 is not explicitly referenced in 22 NYCRR § 202.71, the proposed version of that rule annexed as Addendum A to the Nation's Brief states that "[i]f the court finds that the judgment is entitled to recognition under the provisions of Article 53 of the CPLR or under principles of the common law of comity, it shall direct entry of the tribal judgment as a judgment of the Supreme Court of the State of New York." (Nation Brief, Addendum A, at p. 4). The Nation's Addendum also includes a memorandum of the Advisory Committee on Civil Practice which states that "tribal money judgments may receive recognition pursuant to Article 53 of the CPLR, which is derived from the Uniform Foreign Money-Judgments Recognition Act." *Id.* at p. 3. Thus, Parker respectfully submits that this Court should consider CPLR Article 53 in evaluating whether to recognize the Nation Court judgment here.

Pursuant to CPLR 5304(a)(1), “[a] court of this state may not recognize a foreign country judgment if . . . the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.” As explained by the Court of Appeals, CPLR 5304(a)(1) does not require “that the foreign tribunal’s procedures exactly match those of New York,” instead, “the statute is satisfied if the foreign court’s procedures are ‘compatible with the requirements of due process of law.’” *CIBC Mellon Tr. Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 222 (2003). “[T]he relevant inquiry under CPLR 5304 (a)(1) is the overall fairness of [the foreign country’s] legal system.” *Id.* (concluding that “the overall fairness of England’s legal system” was “beyond dispute”) (internal quotations omitted).

There are significant due process concerns with respect to the Nation Court judgment rendered here. As a threshold matter, the judge who rendered the default judgment issued by the Nation Court was not qualified to sit as a judge under the Nation’s own Judiciary Law. As far as Parker can discern, there are at least two versions of the Cayuga Nation Judiciary Law. The later adopted one, enacted in October 2022 – *after* the Nation Court judgment was rendered in December 2021 – is part of the Record on Appeal in this case. (R. 46-59). The *original* version of Cayuga Nation Judiciary Law in effect at the time the Nation Court judgment was issued on December 6, 2021, is not part of Record on Appeal here or in the

Nation’s appeal from the July 2022 Supreme Court Order. As such, for the reasons explained below, Parker respectfully requests that this Court take judicial notice of the original version of the Cayuga Nation Judiciary Law (annexed hereto as “Addendum A”) pursuant to CPLR 4511(b).

Under CPLR 4511(b), judicial notice of foreign law can be mandatory or discretionary depending on the circumstances. Under the discretionary prong of CPLR 4511(b), “[e]very court *may* take judicial notice without request of private acts and resolutions of the congress of the United States and of the legislature of the state; ordinances and regulations of officers, agencies or governmental subdivisions of the state or of the United States; and the *laws of foreign countries* or their political subdivisions.” CPLR 4511(b) (emphasis added). On the other hand, the mandatory component of CPLR 4511(b)’s judicial notice provision states that it “*shall* be taken of matters specified in this subdivision if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it.” *Id.* (emphasis added). “Notice shall be given in the pleadings or prior to the presentation of any evidence at the trial, but a court may require or permit other notice.” *Id.*

Here, Parker urges this Court to take judicial notice under either provision of CPLR 4511(b). The mandatory provision applies because there should be no

dispute regarding the authenticity and validity the original version of the Cayuga Nation Judiciary Law as the Nation has twice submitted it as an exhibit in two other nearly identical proceedings involving Parker in a neighboring county (Cayuga County),³ and in another proceeding involving a similarly situated Cayuga Nation member.⁴ As such, this Court has “sufficient information” upon which to take judicial notice of the Cayuga Nation Judiciary Law applicable at the time the Nation Court judgment was rendered against Parker and Pipekeepers. As discussed below, that law should be interpreted in accordance with its plain language and preclude enforcement of the Nation Court judgment because the Nation Court judge lacked the necessary qualifications under that law to serve as a judge.

The original Cayuga Nation Judiciary Law contains a provision entitled “Qualifications for Judges.” (Addendum A, Section 1.11-1). In addition to

³ The original Cayuga Nation Judiciary Law was filed with the Cayuga County Supreme Court in *Cayuga Nation v. Dustin Parker and Dustin Parker d/b/a Pipekeepers*, Cayuga County Supreme Court Index No. E2022-0209 (NYSCEF Doc. No. 51) and in *Cayuga Nation v. Dustin Parker and Dustin Parker d/b/a Pipekeepers*, Cayuga County Supreme Court Index No. E2022-0560 (NYSCEF Doc. No. 52). The Nation filed this exhibit in opposition to Parker’s motions to vacate judgments rendered against him in Cayuga County Supreme Court that sought to domesticate two tribal court judgments and to dismiss the Nation’s petitions. Parker has appealed both Cayuga County Supreme Court orders domesticating two Nation Court judgments. See CA 22-01729 and CA 23-00163.

⁴ The original Cayuga Nation Judiciary Law was also filed with the Seneca County Supreme Court in *Cayuga Nation v. Wanda John*, Seneca County Supreme Court Index No. 2021-0293 (NYSCEF Doc. No. 79).

submitting to a “thorough background investigation,” the statute sets forth four explicit requirements for judicial service. *See id.* at Section 1.11-1(a)(1)-(4). As relevant here, the first requirement states as follows:

(a) A person *shall* be eligible to stand for election, or be eligible for appointment in accordance with Rule 801.11-9, and to serve as a Judge if such individual:

(1) *Is an enrolled member of the Nation* and is at least thirty (30)-years’ of age on the date of the election or appointment; . . .

Id. at Section 11.1(a)(1) (emphasis added)).

But here, the default Nation Court judgment was issued by Judge Joseph E. Fahey, who was appointed to the Nation Court and is a former Onondaga County Court Judge. (R. 37 ¶ 3). Judge Fahey is not a member of the Cayuga Nation,⁵ and therefore, was not qualified to sit as a judge in December 2021 when the default judgment was issued by the Nation Court.⁶ This Court should decline to recognize and enforce the Nation Court judgment because it was invalid and void *ab initio*, pursuant to the plain language of the Nation’s own Judiciary Law. *Cf. People v.*

⁵ *See* R. 43 (Cayuga Nation Court of Appeals decision stating that the Nation “demonstrated that it was unable to find a qualified judicial candidate who was a member of the Nation and, thus, selected a qualified jurist who met the remaining qualifications set forth in Cayuga Nation Judiciary Law 11.1”). It should therefore be undisputed that Judge Fahey was not a member of the Cayuga Nation.

⁶ To be clear, Parker is not challenging the integrity of Judge Fahey or any of his other qualifications, but rather, this challenge is limited to whether Judge Fahey met the qualifications set forth in the applicable Cayuga Nation Judiciary Law when the judgment was entered in December 2021.

Alteri, 47 A.D.3d 1070, 1070 (3d Dep’t 2008) (“a judge disqualified under a statute cannot act even with the consent of the parties interested, because the law was not designed merely for the protection of the parties to the suit, but for the general interests of justice”) (quoting *Matter of Beer Garden, Inc. v New York State Liq. Auth.*, 79 N.Y.2d 266, 278-79 (1992)). Because the Nation Court did not follow its own laws here in that it allows non-qualified individuals to sit as judges in violation of its own Judiciary Law, it did not “operate within the bounds of due process,” as required by CPLR § 5304(a)(1). Thus, the Nation Court judgment should not be entitled to recognition or enforcement by this Court.

In the interest of full disclosure and candor to the Court, this issue was admittedly not raised below. Parker also notes that this argument was raised by other litigants and rejected by the Cayuga Nation Court of Appeals in a consolidated appeal involving six other Cayuga Nation members (not Parker) who appealed from the Nation Court’s denial of their motions to vacate default judgments issued against them. (R. 41-45). On September 29, 2022, in a decision issued *after* the Nation Court judgment here, the Cayuga Nation Court of Appeals rejected the judicial qualification argument Parker raises here, concluding that:

[A]dopting Appellants’ literal reading of [Cayuga Nation Judiciary Law] Section 11.1 would result in there being no candidates who could be found properly qualified under Cayuga Nation law. Certainly, that is not the overarching intent of the statute. This Court need not blindly adhere to a literal reading of a statute where

doing so would frustrate the general purpose of the law, or where such a reading would result in inequity, injustice, or absurdity. This Court finds that the general purpose of Cayuga Nation Judiciary Law § 11.1 is to ensure that properly qualified judges are elected or appointed to serve in its tribal court. Respondent demonstrated that it was unable to find a qualified judicial candidate who was a member of the Nation and, thus, selected a qualified jurist who met the remaining qualifications set forth in Cayuga Nation Judiciary Law 11.1. This Court finds no reason to disturb the Lower Court's decision on this basis.

(R. 43).

Parker respectfully argues that this decision cannot be followed as the conclusion on judicial qualification is contrary to the express and plain language of the original Cayuga Nation Judiciary Law, which states that “[a] person *shall* be eligible to stand for election, or be eligible for appointment . . . , and to serve as a Judge if such individual . . . [i]s an enrolled member of the Nation.” (Addendum A, Section 11.1(a)(1)). And the Nation Ordinance establishing the Nation Court confirms that “Judges of the Trial Court and the Court of Appeals *shall* be individuals who meet the respective qualifications set forth in the Cayuga Nation Judiciary Law.” (R. 28, Article 10(I)(a) (emphasis added)).

This Court is not obligated to follow this flawed reasoning in its own plenary evaluation of (1) whether the Nation Court judge was qualified to render the judgment in question and (2) whether the Nation Court adhered to principles of due process in this case. A fundamental tenet of due process is that a court follow its

own laws and rules, but the Nation’s own Judiciary Law was not complied with. Section 202.71 of the Uniform Rules vests the Supreme Court with the authority to enforce or decline to enforce tribal court judgments. Here, Supreme Court properly exercised that discretion in declining to enforce the default Nation Court judgment.

Notably, to further support Parker’s plain language interpretation of the original Cayuga Nation Judiciary Law, the express requirement that a Cayuga Nation judge be “an enrolled member of the Nation” was removed by the Cayuga Nation Council in an October 2022 amendment. (R. 54). This change in the law post-dates the default Nation Court judgment and thus it cannot retroactively cure its deficiencies.

Finally, the Northern District of New York decision in *Cayuga Nation v. Dustin Parker, et al.*, 605 F. Supp. 3d 414 (N.D.N.Y. June 2, 2022) does not support recognition of the Nation Court judgment here, as the Nation argues. (*See* Nation Brief, at 9). According to the Nation, “the Nation Court has been acknowledged and recognized by the United States District Court for the Northern District of New York, which stayed federal RICO proceedings under the tribal exhaustion rule until such time as proceedings before the Cayuga Nation Civil Court had been fully exhausted.” (*Id.* (citing *Parker*, 605 F. Supp. 3d at 431)). This federal case does not involve a challenge to the qualifications of the Nation

Court judge, judicial independence, or whether the court's operation satisfied due process standards. Instead, the Northern District of New York stayed the federal action against Parker and the other defendants pursuant to the "tribal exhaustion rule" pending exhaustion of proceedings in the Cayuga Nation Civil Court. *See Parker*, 605 F. Supp. 3d at 426-431. There was no challenge to the Nation Court and no review by the federal court of the functioning of the Nation Court. This decision, therefore, does not support reversal of either the July 2022 Supreme Court Order or the subsequent April 2023 Supreme Court Order denying renewal and reargument.

In sum, Parker recognizes that his judicial qualification arguments were not raised before the Nation Court or Supreme Court as he did not appear in those proceedings. He nevertheless urges this Court in the "interests of justice" to reach this argument because it goes to the Nation Court's authority to issue the judgment in question. This is an alternative ground for affirming both the July 2022 and the April 2023 Supreme Court Orders declining to domesticate the Nation Court judgment.

POINT TWO

THE NATION COURT JUDGE’S ENGAGEMENT AGREEMENT WITH THE NATION FURTHER UNDERMINES THE VALIDITY OF THE NATION COURT JUDGMENT

This Court should also take judicial notice of the Nation Court judge’s engagement agreement with the Nation, which raises significant doubts concerning Judge Fahey’s authority to issue the Nation Court judgment rendered against Parker and Pipekeepers, and whether the Nation Court possesses the attributes of an independent judiciary. As with the original Cayuga Nation Judiciary Law, this document is not part of the record here; however, in similar proceedings involving Parker, the Nation filed its engagement agreement with the Nation Court judge. (Addendum B (Cayuga Nation Engagement Agreement dated October 18, 2018) (“Engagement Agreement”)).

Parker respectfully requests that this Court take judicial notice of this document as a court record in a case involving the same parties in a similar case with identical legal issues.⁷ While it is true that generally “the factual review

⁷ The Engagement Agreement was filed with the Cayuga County Supreme Court in *Cayuga Nation v. Dustin Parker and Dustin Parker d/b/a Pipekeepers*, Cayuga County Supreme Court Index No. E2022-0209 (NYSCEF Doc. No. 61) and in *Cayuga Nation v. Dustin Parker and Dustin Parker d/b/a Pipekeepers*, Cayuga County Supreme Court Index No. E2022-0560 (NYSCEF Doc. No. 62). The Nation filed this exhibit in opposition to Parker’s motions to vacate judgments rendered against him in Cayuga County Supreme Court that sought to domesticate two tribal court judgments and to dismiss the Nation’s petitions. As previously noted, Parker has appealed both Cayuga County Supreme Court orders domesticating two Nation Court judgments. *See* CA 22-01729 and CA 23-00163.

power of the Appellate Divisions is confined to the content of the record compiled before the court of original instance and does not include matter dehors the record,” that “general rule is not inviolate, as courts may take judicial notice of a record in the same court of either the pending matter or of some other action.”

Caffrey v. N. Arrow Abstract & Settlement Servs., Inc., 160 A.D.3d 121, 126-27 (2d Dep’t 2018) (internal citations omitted); *see also Matter of Pendell v.*

Columbia Cty. Dist. Attorney’s Office, 166 A.D.3d 1088, 1089 (3d Dep’t 2018) (concluding that it was “well settled that a court may take judicial notice of a record in the same court of either the pending matter or of some other action”);

Khatibi v. Weill, 8 A.D.3d 485, 485 (2d Dep’t 2004) (“[T]his Court may take judicial notice of undisputed court records and files.”); *Knopf v. Sanford*, 65 Misc.

3d 463, 470 n. 3 (Sup. Ct. N.Y. Cnty. 2019) (“This court may take judicial notice of official court records *and filings* from other state and federal actions and proceedings”) (emphasis added). As particularly important here, “[j]udicial notice may be taken by a court at any stage of the litigation, even on appeal.” *Caffrey*, 160 A.D.3d at 127.

Further, although “the mere presence of a document in a court file does not mean that judicial notice properly can be taken of any factual material asserted in the document,” *Walker v. City of N.Y.*, 46 A.D.3d 278, 282 (1st Dep’t 2007), Parker urges this Court to take judicial notice of the Engagement Agreement

because the Nation itself submitted this document in two other cases involving Parker, both of which he has appealed to this Court. *See* CA 22-01729 and CA 23-00163. As such, there can be no reasonable dispute about the Engagement Agreement’s authenticity and relevancy to the challenged Nation Court judgment.

If this Court chooses to consider the Engagement Agreement, it “sets forth the terms under which [the Nation] shall engage [Judge Fahey], as a Trial Judge, to hear and decide matters in the Nation Trial Court.” (Addendum B, Section 1). According to Section 2 entitled “Scope of Services,” Judge Fahey’s judicial appointment is limited to criminal matters: “Judge Fahey shall hear and decide matters involving *criminal violations* in the Nation Trial Court, and apply and enforce the laws of the Nation in connection with any matter therein.” (*Id.* (emphasis added)). The Nation Court judgment rendered against Parker and Pipekeepers was a civil judgment arising in the context of a civil action in the Nation Civil Court. Judge Fahey’s Engagement Agreement – limited to adjudicating “criminal violations” – casts further doubt regarding the validity of the default judgment the Nation seeks to recognize and enforce here.

Moreover, the judicial compensation and termination provisions are problematic and raise questions regarding the independence of the Nation’s judiciary. Under the Engagement Agreement, judicial compensation appears to be under the direct control of the Cayuga Nation Council and its leadership.

According to Section 3, “[w]ithin three months following execution of the Agreement, the parties shall meet and confer in order to reevaluate the compensation associated with the position of a Trial Court Judge based on [Judge Fahey’s] time entry records.” (*Id.*). This language seems to empower the Nation to diminish Judge Fahey’s compensation during his term of office, thus calling into question the independence of his judicial position.

Even more problematic, the Nation can terminate Judge Fahey for any reason whatsoever. The Engagement Agreement’s “Termination” provision states that “[e]ither party may terminate this Agreement *at any time and for any reason* by notifying the other party in writing at least thirty days in advance.” (*Id.* at Section 8). A judge who can be terminated at will and whose compensation is subject to the whims of the Nation Council is not independent. *See generally* CPLR 5304(a)(1) (“A court of this state may not recognize a foreign country judgment if the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law”); *Matter of Maron v. Silver*, 14 N.Y.3d 230, 260 (2010) (“But by failing to consider judicial compensation independently of legislative compensation, the State defendants have imposed upon the Judiciary the same restrictions that have been imposed on the Legislature, and have blurred the line between the compensation of the two branches, thereby threatening the structural

independence of the Judiciary”). The absence of an independent judiciary is a fundamental violation of due process.

As a result, Parker respectfully requests that this Court affirm the Supreme Court conclusion to decline to domesticate the Nation Court’s judgment.

POINT THREE

THE NATION’S PETITION IS DEFICIENT ON ITS FACE IN THAT IT FAILED TO SUFFICIENTLY ALLEGE NATION COURT SUBJECT MATTER JURISDICTION AND PERSONAL JURISDICTION

Pursuant to CPLR 5304(a)(2) and (3), “[a] court of this state may not recognize a foreign country judgment if . . . the foreign court did not have personal jurisdiction over the defendant” or “the foreign court did not have jurisdiction over the subject matter.” The Nation’s CPLR Article 4 petition is sparse on these jurisdictional allegations supporting enforcement of the Nation Court judgment. (R. 9 ¶¶ 4-6). The petition does not allege that Parker is a member of the Cayuga Nation, or that the property in question is subject to the jurisdiction of the Nation Court. (R. 8-10). It is thus unclear on the face of the petition whether the Nation Court had personal jurisdiction over Parker and Pipekeepers and whether the Nation Court had subject matter jurisdiction to adjudicate the Nation’s claims concerning Parker’s alleged violations of the Nation’s Ordinance.

Instead, the petition only addressed venue in Supreme Court, Seneca County, alleging that it was “proper pursuant to CPLR 503 because judgment for which this

Court's recognition is sought was rendered against a *resident of Seneca County*, and CPLR 507 because the real property which is the subject of the underlying action is *located in Seneca County*.” (R. 9 ¶ 3). While these allegations may be sufficient to establish venue in Supreme Court, Seneca County, the absence of allegations concerning the Nation Court's personal jurisdiction over Parker and Pipekeepers and its purported subject matter jurisdiction over the underlying dispute should render the Nation's Article 4 petition deficient on its face as a matter of law.

To clarify, Parker does not argue that the Nation's petition was properly dismissed on the grounds that *Supreme Court* lacked personal jurisdiction (*see* Nation Brief, at 23-26), as that argument is admittedly foreclosed by this Court's decision in *Lenchyshyn*. *See* 281 A.D.2d at 43 (holding “that the judgment debtor need not be subject to personal jurisdiction in New York before the judgment creditor may obtain recognition and enforcement of the foreign country money judgment, as neither the Due Process Clause of the United States Constitution nor New York law requires that the New York court have a jurisdictional basis for proceeding against the judgment debtor”).

Instead, Parker argues that the jurisdictional allegations in the Nation's CPLR Article 4 petition were insufficient to establish that the Nation Court had both personal and subject matter jurisdiction. Moreover, Supreme Court clarified

its personal jurisdiction conclusion in its April 2023 Order denying the Nation’s renewal and reargument motion when it stated that its July 2022 Order “was not premised on the principle that [the Nation] needs to prove [Parker and Pipekeepers] are subject to the jurisdiction of New York, but rather that [the Nation] failed to establish that the Cayuga Nation Civil Court is empowered to issue a judgment at all.” (R. 5).

CONCLUSION

For the foregoing reasons, the July 2022 and the April 2023 Supreme Court Orders should be affirmed.

Dated: September 25, 2023
Albany, New York

NIXON PEABODY LLP

By: 
Daniel J. Hurteau

Daniel J. Hurteau, Esq.
677 Broadway, 10th Floor
Albany, New York 12207
T: (518) 427-2650
F: (518) 427-2666
dhurteau@nixonpeabody.com

-and-

Erik A. Goergen, Esq.
40 Fountain Plaza, Suite 500
Buffalo, New York 14202

T: (716) 853-8118
egoergen@nixonpeabody.com

*Attorneys for Respondents-
Respondents Dustin Parker and
Dustin Parker d/b/a Pipekeepers
Tobacco & Gas*

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 1250.8(j) the foregoing Respondents' Brief was prepared on a computer.

Type: A proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

Word Count: The total number of words in the Respondents' Brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specifications statement, etc. is 5,540.

Addendum A

**CAYUGA NATION JUDICIARY LAW
TABLE OF CONTENTS**

1.1. Purpose and Policy 1

1.2. Adoption, Amendment, Repeal..... 1

1.3. Definitions..... 1

1.4. General Provisions 2

1.5. Trial Court..... 3

1.6. Mediation Division..... 6

1.7. General Civil Division 7

1.8. Court of Appeals 7

1.9. Internal Operating Procedures..... 9

1.10. Rules of Pleading, Practice and Procedure..... 9

1.11. Judges..... 9

1.12. Reprimand, Suspension and Removal of Judges..... 13

1.13. Retirement 16

Preamble

As a sovereign nation, we, the Cayuga Nation, consistent with the principles of self-determination and self-governance, hereby adopt through our lawful governing body, the Cayuga Nation Council, this Judiciary Law.

In adopting this Judiciary Law, we seek to establish and administer justice among our citizens and others on our lands in a manner befitting and respecting our heritage, laws, customs and traditions.

1.1. Purpose and Policy

1.1-1. The purpose of this law is to establish a Judiciary, and to provide for the administration of law, justice, judicial procedures and practices by the Cayuga Nation as a sovereign nation by exercising the inherent power to make, execute, apply and enforce its own law, and to apply its own customs and traditions in matters affecting Cayuga Nation citizens.

1.1-2. It is the policy of the Nation to provide a fair and impartial forum for the resolution of all matters that come before it pursuant to a grant of authorization by law.

1.2. Adoption, Amendment, Repeal

1.2-1. This law is adopted by the Cayuga Nation Council by duly-authorized Resolution.

1.2-2. This law may only be amended by the Cayuga Nation Council in accordance with Cayuga Nation laws, customs and traditions.

1.2-3. Should a provision of this law or the application thereof to any person or circumstances be held as invalid, such invalidity shall not affect other provisions of this law which are considered to have legal force without the invalid portions.

1.3. Definitions

1.3-1. The definitions below shall govern the words and phrases used within this law. All words not defined herein shall be used in their ordinary and everyday sense:

(a) “Agency” means any Nation board, committee, commission, department, or officer acting on behalf of such an entity and where relevant, a hearing body of such an entity.

(b) “Background investigation” means the process utilized by the Nation’s Personnel Department.

(c) “Benefit” means money, a service, or thing of value, to which a person is entitled by Nation law upon the satisfaction or fulfillment of named requirements.

(d) “Council” means the Cayuga Nation Council.

(e) “Court” means the specific court being referred to in any particular section. For example, if the section covers the Trial Court, the term shall mean that court.

(f) “Indian” means any person who is a member of any federally recognized Indian tribe or nation.

(g) “Interlocutory appeal” means an appeal that occurs before the Trial Court issues a final ruling on a case.

(h) “Judge” means a Judge or Chief Judge who sits on either the Trial Court or Court of Appeals within the Judiciary.

(i) “Nation” means the Cayuga Nation.

(j) “Non-Cayuga judgment” means a judgment, decree or order of any other court which may be entitled to full faith and credit by the Judiciary as determined by the Judiciary.

(k) “Person” means an individual or group of individuals and any firm, association, organization, partnership, estate, trust, company, or corporation.

(l) “Pro Tem Judge” means a decision maker who is not currently seated on the Judiciary, but who is appointed on a temporary (pro tempore), case-by-case basis to hear and decide matters in the Trial Court, Court of Appeals, and/or judicial disciplinary panels.

(m) “Reservation” means all land within the boundaries of the Cayuga Nation’s 64,015 acre Reservation as established by the 1794 Treaty of Canandaigua.

(n) “Nation law” means the Nation’s traditional laws as well as any statute, rule, regulation, policy, resolution or ordinance enacted by the Cayuga Nation Council.

1.4. General Provisions

1.4-1. *Establishment.* There is hereby established a Judiciary, which shall administer the judiciary authorities and responsibilities of the Nation. The Judiciary shall support a separation of Nation governmental powers.

1.4-2. The Judiciary shall consist of the following:

(a) The Trial Court as provided under Rule 1.5, which shall include the following divisions:

(1) Mediation Division as provided under Rule 801.6.

(2) General Civil Division as provided under Rule 801.7.

(3) Such other courts or divisions that may be created by Nation law.

(b) The Court of Appeals as provided under Rule 801.8.

1.4-3. *Seals of the Courts.* The Trial Court and the Court of Appeals shall each adopt a seal to be used to authenticate their respective judgments and other documents.

1.4-4. *Proceedings.* Attendance at proceedings of the Trial Court and Court of Appeals by members of the public shall be at the sole discretion of the presiding Judge(s).

1.4-5. *Civil Contempt.* The following provisions shall apply to the courts of the Judiciary.

(a) Any person who willfully disrupts, obstructs or otherwise interferes with the conduct of any proceeding in any Nation court, or who obstructs or interferes with the administration of justice by any court, or who disobeys or resists or interferes with any lawful summons, subpoena, process, order, rule, decree or command of any court shall be subject to punishment for contempt of court.

(b) Any person found in contempt of court may be fined in an amount not to exceed one thousand dollars (\$1,000) per act of contempt, and not to exceed five thousand dollars (\$5,000) per instance of continuing contempt. In instances of continuing contempt, each day shall constitute a separate act of contempt.

1.4-6. *Court Personnel.* Court personnel shall serve in accordance with the Nation laws.

(a) *Court Administrator.* The Chief Judge of the Court of Appeals shall hire a Court Administrator.

(b) *Clerks of Court.* The Chief Judges shall each hire a person through the to serve as the clerk of his or her Court.

(c) Court personnel positions shall be contingent upon funding availability.

1.5. Trial Court

1.5-1. *Judges.* The Trial Court shall consist of a full-time Chief Judge and three (3)-full-time Judges.

1.5-2. *Subject Matter Jurisdiction.* The Nation is a sovereign nation and reserves all sovereign rights, authority and jurisdiction consistent with being a sovereign nation. The Trial Court shall have subject matter jurisdiction over cases and controversies arising under the following:

(a) Nation laws which specifically authorize the Trial Court to exercise jurisdiction.

(b) Where an agency has denied a person a benefit or has provided a person with an incorrect or incomplete benefit, or has imposed a fine on a person, and the person has exhausted the process provided by law, if any, for review of the action, and

(1) A hearing body has not been designated by law for the purpose of an appeal; or

(2) There is no law providing that the agency's decision is final or not appealable.

(c) Where a disagreement over the terms, interpretation or enforcement of a written contract, where at least one (1)-of the parties is an agency or where both parties meet the personal jurisdiction requirements listed in 801.5-4.

(1) Statute of Limitations. In all cases requiring interpretation or enforcement of a contract, the suit must be filed within twenty-four (24)-months' after either:

(A) The date a party breaches the terms of the contract; or

(B) In actions for declaratory relief, the date a dispute arises as to the interpretation of the contract.

(d) Where a declaratory judgment is sought to determine the validity of a Nation law, the Trial Court shall render a declaratory judgment in such action only when it appears from the petition and the supporting evidence that the law or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the petitioner. The Trial Court shall declare the law invalid if it finds that:

(1) The law violates Nation law; or

(2) The law was adopted without compliance with law making procedures required under Nation law.

(e) Small claims actions where the amount in controversy is five thousand (\$5,000) or less.

1.5-3. *Territorial Jurisdiction.* The territorial jurisdiction of the Trial Court shall extend to the Reservation and all lands held in trust by the United States for the benefit of the Nation.

1.5-4. *Personal Jurisdiction.*

(a) *Indians.* The Trial Court shall have jurisdiction over all Indians.

(b) *Non-Indians.* The Trial Court shall have jurisdiction over non-Indians who have consented to the jurisdiction of the Nation or Trial Court or as otherwise consistent with federal law.

(1) *Consent to Jurisdiction.* For purposes of subsection 801.5-4(b) above, a person shall have consented to the jurisdiction of the Trial Court by:

(A) Entering into a consensual relationship with the Nation, Nation entities, Nation corporations, or Nation members, including but not limited to contracts or other agreements; or

(B) Other facts which the Trial Court determines manifest an intent to consent to the authority of the Nation or the jurisdiction of the Trial Court, including failure to raise an objection to the exercise of personal jurisdiction in a timely manner.

(c) *Long-arm Jurisdiction.* Consistent with subsections 801.5-4(a) and (b), in any case in which the Trial Court has subject matter jurisdiction, the Trial Court may exercise jurisdiction over any person who has sufficient contacts with the Reservation or Nation trust land. Such sufficient contacts can be demonstrated where a person purposefully avails himself of the Reservation such that he or she could reasonably anticipate being haled into the forum for the resolution of a case or controversy.

1.5-5. *Full Faith and Credit or Comity.* The Trial Court shall give full faith and credit to the orders and judgments of the courts of other Nations, states, and local governments unless:

- Trial Court;
- (a) The court in question does not recognize the orders and judgments of the Trial Court;
 - (b) The court in question did not have jurisdiction over the case or a party or parties to it;
 - (c) The order or judgment was based on fraud;
 - (d) To do so would violate the public policy of the Nation or would be likely to harm the culture, traditions, or sovereignty of the Nation; or
 - (e) The order or judgment is on appeal or is being contested in another jurisdiction.

1.5-6. *Non-Cayuga Judgments.* A certified copy of any non-Cayuga judgment may be filed with the Clerk of Court. Except as provided under Rule 8015-5, the Clerk of Court shall treat the non-Cayuga judgment in the same manner as a judgment of the Judiciary. A judgment so filed shall have the same effect and is subject to the same procedures and status as a judgment of the Judiciary, and may be enforced or satisfied in like manner, except that the Judiciary shall reserve the right to review and modify any non-Cayuga order for the enforcement of a judgment, including but not limited to garnishment orders.

1.5-7. *Judicial Panels.* Except as otherwise provided by Nation law, cases shall be heard by one (1)-Judge.

1.5-8. *Chief Judge: Duties.* In addition to his or her other judicial duties, the Chief Judge shall have the duty of administering the courts of the Trial Court, which shall include the following:

- (a) Oversee the assignment of cases and ensure proper and impartial management of the Court's calendar and business;
- (b) Submit an annual budget for consideration by the Council;
- (c) Supervise the Clerk of Courts and other administrative court personnel;
- (d) Appoint Pro Tem Judges to preside over matters where the required number of Judges is not otherwise available;
- (e) Prescribe standards concerning the training and continued education for Judges of the Court;
- (f) Recruit and select individuals to serve as peacemakers and mediators; and
- (g) other duties as prescribed by Nation law or internal court rules.

1.5-9. *Writs, Orders and Judgments.* The Trial Court may issue all writs, orders, and judgments necessary in aid of its jurisdiction. All writs, orders, and judgments issued by the Court shall be in the name of the Nation, shall bear the date and the day they are issued, the seal of the Court, and be attested to in the name of the Judge who issued it.

1.6. Mediation Division

1.6-1. There is hereby established a Mediation Division, under the jurisdiction of the Trial Court, to provide a forum for the use of mediation to resolve disputes in a fair manner. Mediation shall be available at all stages of litigation, including appeals.

(a) In addition to the requirements set forth in this law, the Trial Court shall ensure that, where necessary, procedural rules governing the operation of mediation are promulgated in accordance with Nation law, except that culturally sensitive information may be omitted from such rules.

1.6-2. A Judge of the Trial Court shall inform the parties of every case of the availability of mediation to resolve their dispute and, except where prohibited by law, may refer the parties to mediation if the parties agree.

1.6-3. *Mediation.* The Judiciary may provide mediation to parties, by any person or public or private entity recognized by the Trial Court and contracted to conduct mediation. Every mediator provided by the Judiciary shall have not less than twenty-five (25)-hours' of mediation training or not less than three (3)-years' of experience in dispute resolution.

(a) *Private Mediator.* The parties may, at their own expense, receive mediation services from a mediator other than the mediator they are referred to by the Judge. Parties who receive services from a private mediator shall be responsible for the cost and shall sign and file with the appropriate Clerk of Court a written notice stating the mediator's name and the date of the first meeting with the mediator.

(b) *Powers and Duties of a Mediator.* A mediator may:

- (1) Require a party to provide written disclosure of facts relating to any legal issue; and/or
- (2) Suspend mediation when necessary; and/or
- (3) Terminate mediation if a party does not cooperate or if mediation is not appropriate.

1.6-4. *Agreement.* Any agreement that resolves issues between the parties and that is reached as a result of mediation shall be prepared in writing, reviewed by the attorney, if any, for each party and submitted to the Judge to be included in the order as a stipulation. The mediator shall certify that the written agreement accurately reflects the agreement made between the parties.

(a) If, after mediation, the parties do not reach an agreement on all issues in dispute, the mediator shall so notify the Judiciary. The parties may return to mediation at any time during litigation, including appeals.

(b) Violation of an order that is entered as a result of a mediation agreement is punishable as contempt of court.

1.7. General Civil Division

1.7-1. There is hereby established a General Civil Division, under the jurisdiction of the Trial Court, to provide a forum for the resolution of all civil actions and proceedings, unless jurisdiction is given to some other division or court.

1.8. Court of Appeals

1.8-1. *Judges.*

(a) The Court of Appeals shall consist of a full-time Chief Judge and four (4)-part-time Judges.

(b) The Court of Appeals shall sit in panels of three (3)-Judges to dispose of appeals cases on their merits, unless either party requests five (5)-Judges, in which event five (5)-Judges shall hear the appeal. Motions and other proceedings other than a dispositive appeal hearing may be heard by one (1)-Judge.

1.8-2. *Jurisdiction.*

(a) The jurisdiction of the Court of Appeals shall be limited to review of:

(1) Final orders, sentences and judgments of the Trial Court;

(2) Appeals of agency decisions or administrative decisions where a provision of Nation law expressly vests such jurisdiction in the Court of Appeals; and

(3) Interlocutory appeals of an intermediate ruling, judgment or order during an original hearing, that wishes to seek intermediate relief. The Court of Appeals shall implement rules that address the timelines for the initial review of an interlocutory appeal, criteria for acceptance of an interlocutory appeal, and procedures for the hearing of such an appeal.

(b) The Court of Appeals shall be the court of final appeal within the Nation.

1.8-3. *Scope of Appellate Review.*

(a) *Scope of Review.* In hearing an appeal, the Court of Appeals shall not substitute its judgment or wisdom of the credibility of testimony or the weight of evidence for that of the original hearing body.

(1) The Court of Appeals' review shall be limited to matters of record in the case, and may reject a finding of fact only where it determines that the finding is clearly erroneous. Where the rejected finding is necessary for the resolution of the issues, the Court of Appeals shall issue an order of reversal. Where the Court of Appeals determines that the original hearing body erred in not admitting relevant evidence, or in admitting irrelevant and prejudicial evidence, the Court of Appeals shall not take additional evidence or make its own judgment, but shall remand the matter to the original hearing body to reconsider the matter on a proper evidentiary basis.

(2) Except as otherwise provided by law or rule, the Court of Appeals shall not hear new or additional facts, and issues not raised in the proceedings from which an appeal is taken shall be deemed waived and shall not be considered on appeal.

(b) *Burden of Persuasion.* The appellant shall have the burden of persuasion.

(c) *Harmless Error and Discretionary Decisions.* Without limiting the appropriate standard of review, the Court of Appeals shall give due deference to the rule of harmless error and discretionary decisions of the Nation or any Nation agency.

1.8-4. *The Appellate Decision.* The Court of Appeals' decision shall consist of a written opinion setting forth the reasoning by the Court in resolving the issues of the appeal and an order that shall affirm the decision below, remand the case for further proceedings, including proceedings to supplement the record, or reverse the decision below, in whole or in part, if substantial rights have been denied because the decision of the lower hearing body:

(a) Violates applicable provisions of the this Judiciary Law;

(b) Violates provisions, substantive or procedural, of applicable Nation law or applicable federal law;

(c) Is an administrative decision that is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with applicable law; or

(d) Is not supported by the substantial evidence on the record taken as a whole.

1.8-5. *Writs or Orders.* The Court of Appeals may issue all writs and orders necessary in the aid of its jurisdiction. A writ or order issued from the Court shall be in the name of the Nation, shall bear the date it is issued, the seal of the Court, and be attested to in the names of the Judges who issued it.

1.8-6. *The Chief Judge of the Court of Appeals: Duties.* In addition to his or her other judicial duties, the Chief Judge of the Court of Appeals shall have the duty of administering the Court of Appeals, which shall include the following:

(a) To oversee proper and impartial management of the Court's calendar and business;

(b) To appoint Pro Tem Judges to preside over matters where the required number of Judges is not otherwise available;

(c) To supervise the Court Administrator, the Court of Appeals Clerk of Court and other Court of Appeals personnel;

(d) To prescribe standards concerning the training and continued education for Judges of the Court of Appeals; and

(e) Other duties as prescribed by Nation law or the Judiciary's internal operating procedures.

1.9. Internal Operating Procedures

1.9-1. *Internal Operating Procedures.* The Judiciary is authorized to establish internal operating procedures governing the operation of the court. The procedures shall not affect substantive rights and shall not conflict with existing law, the Rules of Procedure, or other rules enacted or approved by the Council.

1.10. Rules of Pleading, Practice and Procedure

1.10-1. The Judiciary shall create rules of pleading, practice and procedure to regulate all hearings conducted before it. All submitted comments shall be considered by the Judiciary prior to forwarding the rule to the Council for final action on the rule.

1.10-2. Rules of pleading, practice, and procedure shall be codified as part of the Cayuga Code of Laws.

1.10-3. This section shall not abridge the right of the Council to adopt, amend, or repeal rules relating to pleading, practice, or procedure in accordance with the Nation's lawmaking procedures.

1.10-4. Rules of pleading, practice, and procedure which are in effect on the date of implementation of this law shall remain valid and in effect until amended or repealed under the provisions of this law.

1.11. Judges

1.11-1. *Qualifications for Judges.* All candidates for, or individuals who may be appointed to, the position of Judge shall submit to a thorough background investigation which shall be completed prior to placement on the ballot or being considered for appointment.

(a) A person shall be eligible to stand for election, or be eligible for appointment in accordance with Rule 801.11-9, and to serve as a Judge if such individual:

(1) Is an enrolled member of the Nation and is at least thirty (30)-years' of age on the date of the election or appointment; and

(2) Agrees to attend mandatory training, upon election or appointment, as required by the Judiciary training requirements; and

(3) Has not been convicted of, or entered a plea of guilty or nolo contendere to, any offense involving fraud or misrepresentation or any felony, unless:

(A) A pardon has been granted in accordance with the Nation's pardon law at least ten (10)-years' before the election is held or the appointment is made; or

(B) The conviction has been removed from his or her record by executive pardon or state court order at least ten (10)-years' before the election is held or the appointment is made.

(4) Is not mentally disabled or mentally unstable.

(b) Chief Judges. In addition to satisfying the requirements of Rule 801.11-1(a)(1) through (3), candidates for election or appointment to serve as a Chief Judge shall hold at least one (1)-of the following from an accredited institution:

- (1) A master’s degree;
- (2) A juris doctor degree; or
- (3) A bachelor’s degree and shall have three (3)-years’ of experience

as a Judge.

(c) Non-Chief Judges. In addition to satisfying the requirements of Rule 801.11-1(a)(1) through (3), candidates for election or appointment to serve as a non-Chief Judge shall hold at least one (1)-of the following from an accredited institution:

- (1) A master’s degree;
- (2) A juris doctor degree; or
- (3) A bachelor’s degree in one (1)-of the following fields of study,

provided that a degree in a similar field of study shall also qualify:

- (A) Criminal Justice
- (B) Education
- (C) Political Science, including Government, Politics or Public
- (D) Human Rights
- (E) Journalism
- (F) Legal Studies
- (G) Native American Studies
- (H) Psychology
- (I) Sociology
- (J) Public Administration
- (K) History
- (L) Business Administration
- (M) Economics or Finance
- (N) Philosophy

Policy

- (O) Judicial Studies
- (P) Paralegal Studies
- (Q) Family Law

1.11-2. *Disclosure.* Prior to placement on a ballot, or prior to appointment to fill a vacancy, candidates seeking to serve as a Judge shall disclose to the Council all previous convictions, including those for which a pardon has been granted, which may disqualify the candidate from serving on the Judiciary.

1.11-3. *Prohibitions.*

- (a) While serving a term of office, no Judge may:
 - (1) Be elected or appointed to serve on any Nation board, committee or commission, including a Nation-chartered board, committee or commission; or
 - (2) Be otherwise employed by the Nation.
- (b) Candidates elected or appointed to the Judiciary shall resign from any applicable board, committee or commission, or from any paid position with the Nation, with such resignation to be effective prior to that candidate taking the Judicial oath of office.

1.11-4. *Election of Judges.*

- (a) The Judiciary shall consist of nine (9)-Judges who, except as provided in Rule 801.11-4(b), shall be elected to terms of six (6)-years'. Candidates for the office of Judge shall identify the specific judicial office for which they are a candidate: Trial Court Judge, Trial Court Chief Judge, Appellate Court Judge or Appellate Court Chief Judge.
- (b) Judges elected in the first judicial election shall serve terms as provided by resolution. Terms shall be staggered such that every three (3)-years', either four (4) or five (5)-seats will be up for election.
- (c) In the event that the swearing-in of a successor is delayed, the successor's term of office shall be diminished by the length of the delay, in order to maintain the staggered terms.
- (d) Any Judge selected by special election shall meet the qualifications listed in Rule 801.11-1.

1.11-5. *Appointment of Lead Judges within the Trial Court.* Within fourteen (14)-days' after a Judge taking the Judicial oath of office, the Chief Judge of the Trial Court shall appoint a Lead Judge for the General Civil Division of the Trial Court.

1.11-6. *Oath of Office.* Every elected or appointed Judge shall take and file an oath to uphold the Constitution, abide by the Canons of Judicial Ethics, and impartially administer justice.

1.11-7. *Duties of Judges.* Judges shall represent the Judiciary with professionalism and competence. In addition to all other duties imposed by this and other Nation laws, Judges shall:

- (a) Hear and adjudicate cases in accordance with Nation law;
- (b) Abide by all court rules, Nation laws, and applicable state and federal laws;
- (c) Complete assignments given by the appropriate Chief Judge;
- (d) Represent the Judiciary at functions and meetings where appropriate;
- (e) Maintain the integrity of the system by upholding the Canons of Judicial Ethics, acting ethically and honestly both in private and in public; and
- (f) Remain informed about changes to Nation, state and federal laws, and state and federal court and administrative hearing body decisions that may impact Indian country.

1.11-8. *Vacancies.* If a Judge dies, resigns, is removed from office, becomes incapacitated for a period in excess of one hundred eighty (180)-consecutive days', or is declared *incompetent* by a court of competent jurisdiction, the office of such Judge shall be declared vacant by the Council; and:

- (a) A special election shall be held to fill the office for the remainder of the Judge's term of office, if two hundred seventy (270)-days' or more remain in the term of office; or
- (b) The Council shall appoint a successor to fill the office for the remainder of the Judge's term of office, if fewer than two hundred seventy (270)-days', but more than one hundred eighty (180)-days', remain in the term.

1.11-9. *Eligibility for Appointment.* Only those persons who meet the requirements of 811.1 are eligible to be appointed by the Council to fill a vacancy on the court.

1.11-10. *Compensation and Benefits.*

- (a) Compensation for Judges shall be initially established through the passage of a resolution by the Cayuga Nation Council. Future compensation shall be in accordance with the Nation budget process, upon approval from the Council.
- (b) The compensation of Judges shall not be diminished during their term of office, unless a majority of a particular court votes to reduce that entire Court's own compensation equally for that Court's term.
- (c) Full-time Judges shall receive the same fringe benefits that are provided to Nation employees in accordance with established Nation policy.
- (d) Part-time Judges shall receive stipends for their services.

1.11-11. *Pro Tem Judges.*

(a) Pro Tem Judges shall be appointed as follows:

(1) Where the necessary number of Judges is unable to hear a matter due to conflict of interest, extended absence, or for any other reason, the appropriate Chief Judge shall, subject to approval of such appointment by the Council, appoint Pro Tem Judges to hear the matter.

(2) Where a complaint against a Judge has been filed, the Judiciary shall appoint Pro Tem Judges to sit on a disciplinary panel to hear the complaint.

(A) A disciplinary panel shall be comprised of three (3) Pro Tem Judges who are currently serving as a Judge for any court located in the state of New York except for the Nation courts. Enrolled citizens of the Cayuga Nation shall be disqualified from serving on a disciplinary panel.

(B) An individual shall not serve on a disciplinary panel as a Pro Tem Judge where that individual:

(i) Is related to either the Judge facing the complaint, or to the complainant. For purposes of this section, “related to” shall include spouses, parents and parents-in-law, children and son-or-daughter in-law, grandparents, grandchildren, siblings, half siblings, siblings-in-law, first cousins, aunts, uncles, nieces, nephews, step-parents and stepchildren; or

(ii) Currently maintains, or has previously maintained, a personal or professional relationship with either the Judge facing the complaint, or with the complainant, whereby the Pro Tem Judge could know of facts unrelated to the proceeding that could cause the Judge to be biased or that could cause the appearance of bias. For the purposes of this section, “a personal or professional relationship” shall include romantic or domestic relationships, caretaker/dependent, attorney/client, counselor/patient and similar relationships.

(b) While hearing a matter, Pro Tem Judges shall be afforded the same authority and decision making power as an elected or appointed Judge, and shall abide by the requirements of Rule 801.11-7.

(c) *Compensation.* Until such time as the Judiciary establishes a payment schedule, Pro Tem Judges shall be compensated in the same manner as part-time Judges and shall be reimbursed for travel and accommodations at the same rate that Nation employees are compensated.

1.12. Reprimand, Suspension and Removal of Judges

1.12-1. Each Judge shall be subject to reprimand; suspension without pay for a definite period of time, not to exceed six (6)-months’; or removal from office, as set forth in this section for:

(a) Willful misconduct in office;

- (b) Willful disregard of or failure to perform his or her duties, including upholding Nation law;
- (c) Habitual intemperance;
- (d) Conviction of a crime involving moral turpitude;
- (e) Conduct prejudicial to the administration of justice that brings the judicial office into disrepute; or
- (f) Violating the Canons of Judicial Ethics.

1.12-2. Any person aggrieved by the conduct of a Judge may file a complaint with the Judiciary, requesting that the Judge be disciplined for violating Rule 801.12-1.

(a) Where a complaint has been filed, the Judiciary shall convene a disciplinary panel in accordance with Rule 801.11-11(a)(2). The disciplinary panel shall conduct an initial hearing to determine if probable cause exists to believe that the Judge has engaged in misconduct. The Judiciary shall, by rule, provide for initial and formal hearing procedures for disciplinary panels.

(b) In serving on a disciplinary panel, Pro Tem Judges shall abide by the requirements of Rule 801.11-7.

1.12-3. If the disciplinary panel does not find probable cause to believe that the Judge has engaged in misconduct, the panel shall dismiss the complaint. All papers filed with, and proceedings before and during the initial hearing shall remain confidential. The filing of a complaint and other papers and the testimony given before the panel during an initial hearing shall be deemed a privileged communication, unless probable cause is found.

1.12-4. If the disciplinary panel does find probable cause, the panel shall provide formal notice of the complaint and finding of probable cause to the Judge and:

- (a) Issue the Judge a reprimand in accordance with Rule 801.12-5; or
- (b) Hold a formal hearing in accordance with Rule 801.12-6, to determine the appropriate discipline.

1.12-5. *Reprimand*. If the disciplinary panel deems it appropriate, and the Judge consents, the disciplinary panel shall discipline the Judge by issuing a reprimand after finding probable cause. A reprimand shall be read to the Judge in question, in a closed session, in the presence of the assembled body of the Judges within the Judiciary. The reprimand shall contain:

- (1) A recitation of the allegations;
- (2) The findings of the disciplinary panel; and
- (3) A statement of reprimand.

1.12-6. *Formal Hearing*. If the disciplinary panel deems a reprimand is inappropriate, or the Judge does not agree to a reprimand, the panel shall hold a formal hearing, with a record preserved of the proceedings, to determine whether the Judge should be disciplined. At any such hearing, which shall be open to the public, the complainant and the Judge shall have the opportunity to present testimony and other evidence, and the Judge shall have the opportunity to cross-examine adverse witnesses.

(a) Where the disciplinary panel determines that a formal hearing shall be held, the panel shall have discretion to order a Judge to cease performing judicial duties, without loss of salary, pending the formal hearing and release of an official disciplinary report.

(b) The disciplinary panel shall announce formal hearings by publication in two (2) consecutive issues of the Cayuga Chronicles. The announcement shall contain information:

(1) Confirming that a complaint has been filed;

(2) Stating the subject and nature of the complaint; providing the date and time of the hearing, including procedural aspects; and

(3) Reciting the right of a Judge to a fair hearing.

(c) If, after a formal hearing, and after considering the record, the disciplinary panel finds that the charges are established by clear and convincing evidence, the disciplinary panel shall make specific factual findings based upon the record, and shall issue an official disciplinary report, which shall include a report of the formal hearing, the factual findings made based on the hearing, and identifying any specific penalties to be imposed. This decision shall be final.

(d) Disciplinary reports shall be submitted to the Judiciary within thirty (30)-days' after the formal hearing is concluded. The Judiciary shall immediately carry out any and all disciplinary action ordered in the disciplinary report.

(1) *Reprimand*. Where a disciplinary report recommends a reprimand, a reprimand shall be read to the Judge in question and shall contain the same information and be available as if the Judge had consented to a reprimand under Rule 801.12-5.

(2) *Suspension*. Where a disciplinary report recommends a suspension, the Judge shall draw no salary and shall perform no judicial functions during the period of suspension. Suspension shall not create a vacancy in the office of Judge, and the Judge may resume his or her office upon the completion of the suspension and the satisfaction of any other requirements that may be imposed as a pre-condition of resuming office.

(3) *Removal*. Where a disciplinary report recommends that a Judge be removed from office, removal proceedings shall be commenced in accordance with applicable removal law.

(e) On a semi-annual basis, the Judiciary shall provide a report to the Cayuga Nation Council identifying all disciplinary panels conducted, including findings of misconduct and all disciplinary action ordered and taken against any Judge.

1.12-7. *Additional Grounds for Suspension and Removal.*

(a) *Suspension.* The Judiciary shall order a Judge to immediately cease performing judicial duties, without loss of salary, while there is a pending indictment or information charging him or her with any offense involving fraud or misrepresentation or a crime punishable as a felony.

(b) *Ineligible for Election or Appointment.* The Judiciary shall immediately begin removal proceedings against a Judge when the Judge no longer meets the qualifications of 811.1 to be a candidate for or appointed to the Judgeship which he or she holds.

(c) *Overtured Convictions.* If the conviction for which the Judge is removed is later overturned, a Judge shall not be reinstated, provided that, the overturned conviction shall not prevent the Judge from seeking future election.

1.12-8. *Judges shall at all times be subject to removal.* The complaint process established in this section shall not supersede or otherwise affect the rights of eligible voters to petition for removal of a Judge in accordance with applicable removal law.

1.13. Retirement

1.13-1. A Judge may be retired for physical or mental disability seriously interfering with the performance of his or her duties if such disability is determined to be permanent or reasonably likely to become permanent.

(a) Initial and formal hearings regarding the retirement of a Judge for physical or mental disability shall be closed to the public, and the record of such proceedings shall be confidential.

(b) The Judiciary shall, by rule, provide for additional initial and formal hearing procedures for this section.

1.13-2. *Initial Hearing.* Any person aggrieved by the conduct of a Judge may file a complaint requesting that the Judge be retired for disability. In such event the remaining Judges of the respective court shall convene a panel and conduct an initial hearing to determine if probable cause exists to believe that the Judge suffers from mental or physical disability which seriously interferes with the performance of his or her duties.

(a) If the panel does not find probable cause, the panel shall dismiss the complaint.

(b) If the panel does make a finding of probable cause, the panel shall provide formal notice of the complaint and finding to the Judge, as well as notice including the date and time of a formal hearing, within ten (10)-days' after finding probable cause.

1.13-3. *Formal Hearing.* Formal hearings shall be recorded and shall be scheduled no sooner than thirty (30)-days' after the Judge receives formal notice of the complaint and finding. At such a hearing, the panel shall convene to determine whether the Judge suffers from mental or physical disability which seriously interferes with the performance of his or her duties.

(a) The panel shall consider, in confidence, any evidence that presents sufficient information to support an allegation of possible medical incapacity, and may require that relevant medical and mental health records be provided.

(b) The complainant and the Judge shall have the opportunity to present testimony and other evidence, and the Judge shall have the opportunity to cross-examine adverse witnesses.

(c) If the panel finds, by a standard of clear and convincing evidence, that the Judge suffers from mental or physical disability which seriously interferes with the performance of his or her duties, the panel shall retire the Judge.

(d) Upon being retired by the panel, the Judge shall thereby be retired with the same rights and privileges as if he or she had retired voluntarily.

End.

Adopted: _____

Addendum B

CAYUGA NATION

ENGAGEMENT AGREEMENT
TRIAL JUDGE

1. **The Agreement.** This agreement (“Agreement”) sets forth the terms under which the Cayuga Nation (the “Nation”) shall engage the Honorable Joseph E. Fahey (“Judge Fahey”), as a Trial Judge, to hear and decide matters in the Nation Trial Court.

2. **Scope of Services.** Judge Fahey shall hear and decide matters involving criminal violations in the Nation Trial Court, and apply and enforce the laws of the Nation in connection with any matter therein.

3. **Fees.** The parties recognize that the position of a Trial Court Judge is a new position and the duties and scope of work involved has not yet been determined. As a result, the parties agree that Judge Fahey shall be paid a \$20,000.00 retainer during the term of the Agreement, in two equal payments, under the following schedule.

a. **Initial Payment.** \$10,000.00 upon execution of this Agreement.

b. **Second Payment.** \$10,000.00 within six months from the date of this Agreement.

Judge Fahey shall keep reasonably detailed time entry records identifying the number of hours worked and a description of the work performed in connection with any Nation Trial Court matters. Within three months following execution of the Agreement, the parties shall meet and confer in order to reevaluate the compensation associated with the position of a Trial Court Judge, based on the time entry records.

4. **Oath.** Judge Fahey must take the following Oath of Admission in order to serve as a Nation Judge:

I, Joseph E. Fahey, do hereby swear or affirm, that I will uphold the laws of the Cayuga Nation, abide by the Canons of Judicial Ethics, and impartially administer justice in accordance with the Cayuga Nation Penal Code and Rules.

5. **Eligibility Requirements.** All Trial Court Judges must meet the qualifications set out in Title 8, Chapter 801, et seq., of the Cayuga Nation Code.

6. **Indemnification.** The Nation will defend, indemnify, and hold Judge Fahey harmless against any losses, damages or costs incurred arising out of or relating in any way to or in connection with his position as Trial Court Judge.

7. **Term.** Unless sooner terminated as provided herein, the term of this Agreement shall commence as of the date hereof and shall extend for one year following execution of this Agreement. The parties may agree to extend the terms of this Agreement beyond the initial term as negotiated.

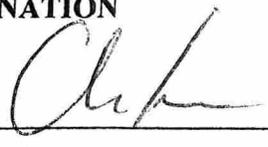
8. **Termination.** Either party may terminate this Agreement at any time and for any reason by notifying the other party in writing at least thirty days in advance.

9. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties and may be changed only by a written document, signed by both parties.

If the terms of this Engagement Agreement meet with your approval, please so indicate by signing and returning the original.



Hon. Joseph E. Fahey
Dated: October 4, 2018

CAYUGA NATION
By: 

Dated: Oct 18, 2018