SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 18709

EMILY VANSTAEN-HOLLAND, PPA SUSAN HOLLAND AND SUSAN HOLLAND, INDIVIDUALLY
PLAINTIFF-APPELLANT

V.

GLENN R. LAVIGNE, JANE E. NELSON, GARY S. CROWDER, MOHEGAN TRIBAL GAMING AUTHORITY, BRUCE BOZSUM, MITCHELL ETESS AND JAMES MALONEY
DEFENDANTS-APPELLEES

BRIEF OF THE DEFENDANTS–APPELLEES GARY S. CROWDER, MOHEGAN TRIBAL GAMING AUTHORITY, BRUCE BOZSUM, MITCHELL ETESS, AND JAMES MALONEY WITH SEPARATELY BOUND APPENDIX

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COUNTER STATEMENT OF THE ISSUE

Whether the trial court properly concluded that the doctrine of sovereign immunity from suit deprived it of subject matter jurisdiction over the Plaintiffs' claims against the Mohegan Defendants, where the Mohegan Tribal Gaming Authority is an instrumentality of the federally-recognized Mohegan Tribe of Indians of Connecticut and the remaining Mohegan Defendants are authorized representatives of the Mohegan Tribal Gaming Authority.

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NATURE OF THE PROCEEDINGS

This is a case brought in the wrong forum. The Plaintiffs-Appellants, Emily Vanstaen-Holland and Susan Holland ("Plaintiffs")[1], seek damages for injuries sustained when Ms. Vanstaen-Holland was struck by a motor vehicle in the early morning hours of Saturday, October 13, 2007. Plaintiffs contend that either Defendants Glenn LaVigne or Jane Nelson was driving the vehicle,[2] and that Defendants Mohegan Tribal Gaming Authority ("MTGA" or "Gaming Authority") and its representatives Gary S. Crowder, Bruce Bozsum, Mitchell Etess, and James Maloney (collectively "the Mohegan Defendants") are liable because the driver of the vehicle had been served alcohol at a Gaming Authority bar. Plaintiffs did not sue the Mohegan Defendants in the Mohegan Gaming Disputes Court, the forum in which the Mohegan Defendants are amenable to suit, but in Superior Court. The Mohegan Defendants moved to dismiss on grounds that the court lacked jurisdiction since the claims were barred by sovereign immunity. In a Memorandum of Decision dated February 26, 2009, (the "Trial Court Decision") the Superior Court, *Martin, J.*, granted the motion to dismiss on grounds of tribal sovereign immunity. This appeal followed.

COUNTERSTATEMENT OF FACTS

I. TRIBAL SOVEREIGN IMMUNITY

The Mohegan Tribe of Indians of Connecticut (the "Mohegan Tribe" or the "Tribe"), as recognized in the Mohegan Land Claims Settlement Act, 25 U.S.C. § 1775, is the

[1] The Plaintiffs' Appellate Brief (Pl. Br.) treats VanStaen-Holland as a single plaintiff, but her complaint was brought in the names of both VanStaen-Holland and her mother, Susan Holland.

[2] On September 15, 2009, LaVigne entered a plea of guilty to criminal charges resulting from the incident. He was sentenced to a term of five years, suspended after two years.

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successor in interest to the aboriginal entity known as the Mohegan Indian Tribe and has existed in what is now the State of Connecticut ("State") since long before the colonial period of the United States. 25 U.S.C. § 1775.

The Tribe has been federally-recognized since 1994; as such, it has been acknowledged by the United States "to have the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States. . .." *See* 74 Fed. Reg. 40218, 40219-40220 (August 11, 2009); *see also,* 62 Federal Register 55270 (1997)(officially recognizing Mohegan Tribe).

Pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA), the State and the Tribe entered into a federally approved Gaming Compact (the "Compact"). The Compact recites that "the Mohegan Tribe is a federally-recognized Indian Tribe, possessed of all sovereign powers and rights thereto pertaining. . . ." Compact, p. 1. Execution of the Compact was partial consideration for federal approval of the Tribe's land claims settlement with the State. Pursuant to the Mohegan constitution and Tribal ordinance the Tribe established the MTGA as a governmental instrumentality, which opened the Mohegan Sun Casino in October, 1996.

The Connecticut courts have properly respected the sovereign immunity of the Tribe and the MTGA. In a case arising from an injury to a Mohegan Sun Casino patron, the Connecticut Supreme Court in 2002 expressly affirmed the sovereignty, and the sovereign immunity, of the Tribe, the MTGA, and their authorized representatives in Kizis v. Morse Diesel International, Inc., 260 Conn. 46 at 52-53, 794 A.2d 498 (2002). These principles were reaffirmed in 2006 by the Appellate Court in Davidson v. Mohegan Tribal

Gaming Authority, 97 Conn. App. 146, *cert. denied*, 280 Conn. 941 (2006), *cert. denied*, 549 U.S. 1346 (2007); and again by our Supreme Court in Beecher v. Mohegan Tribe, 282 Conn. 130 (2007). These cases follow the United States Supreme Court's decision in Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc., 523 U.S. 751 (1998), which affirmed the doctrine of tribal sovereign immunity as a matter of controlling federal law.[3]

Absent an express waiver of immunity and consent to suit, those who may have claims against the MTGA, or its officials and employees acting in their representative capacities, may not sue them in federal or state court. Yet such claimants are not without a remedy. As recognized in Kizis, the Tribe has waived its immunity by ordinance and has consented to suit in the Gaming Disputes Court on the Mohegan Reservation.

This is consistent with provisions of the Compact, which provides for "Tort remedies for patrons," as follows:

> "The Tribe shall establish, prior to the commencement of class III gaming, reasonable procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming facilities. The Tribe shall not be deemed to have waived its sovereign immunity from suit with respect to such claims by virtue of any provision of this Compact, but may adopt a remedial system analogous to that available for similar claims arising against the State or such other remedial system as may be appropriate following consultation with the State gaming agency."

Compact § 3(g). The Tribe adopted a Torts Code in 1995. It has been subsequently amended but continues to serve as the source of remedies for torts arising from conduct

[3] *See also* Chayoon v. Chao, 355 F.3d 141 (2d Cir.2004), cert. denied sub nom. Chayoon v. Reels, 543 U.S. 966, 125 S.Ct. 429, 160 L.Ed.2d 336 (2004)(Mashantucket Pequot Tribe and its representatives enjoy sovereign immunity from suit under the federal Family and Medical Leave Act); Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 359 (2d Cir.2000)(Mashantucket Pequot Tribe immune from copyright suit, as copyright act does not abrogate tribal sovereign immunity); Romanella v. Hayward, 114 F.3d 15, 16 (2d Cir.1997) (*per curiam*)(federal court lacks diversity jurisdiction over Mashantucket Tribe, which would also be immune from suit).

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of the MTGA and its representatives. Mohegan Torts Code, Ord. No. 2005-02, § 10 6-22-2005; Res. No. 2007-17, 4-18-2007; Res. No. 2009-34, 3-25-2009; Res. No. TGA 2009-09, 3-25-2009 (the "Torts Code").

In Kizis, the Supreme Court expressly rejected arguments that Connecticut state courts have jurisdiction over tort claims arising on the Mohegan Reservation against the Tribe, the MTGA, and its representatives. It concluded:

> The Mohegan Torts Code together with the gaming compact and the Mohegan constitution provide a forum and mechanism to redress the plaintiff's injuries. Therefore, the Connecticut courts do not have subject matter jurisdiction over this claim. **Accordingly, the Mohegan Gaming Disputes Court is the exclusive forum for the adjudication and settlement of tort claims against the tribe and its employees because it is the forum in which the sovereign has consented to being sued**, as set forth in Ordinance No. 98-1 amending the Mohegan Torts Code.

Kizis, *supra, 260 Conn.* at 58-59 (emphasis added).

The Mohegan Defendants are thus immune from suit in Connecticut Superior Court. Moreover, tribal sovereignty is a matter of federal law and is "not subject to diminution by the States." *Id.* Therefore, unless "Congress has authorized the suit or the Tribe has waived its immunity," a suit brought against the Tribe or the MTGA in state court must be dismissed for lack of subject matter jurisdiction. Kiowa Tribe, *supra*, 523 U.S. at 754. There has been no Congressional authorization for private suits against the Mohegan Tribe or Indian tribes in general in state court for torts of any nature; the Tribe has waived its immunity from suit for tort claims brought against the MTGA only in the Mohegan Gaming Disputes Court, which provides an "exclusive forum" for tort claims against the Mohegan Defendants. Kizis, *supra,* 260 Conn. at 52-53.

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II. THE PLAINTIFFS' LAWSUIT AGAINST THE MOHEGAN DEFENDANTS

Plaintiffs' Superior Court Complaint[4] alleged that the driver of a vehicle that hit Ms. VanStaen-Holland on October 17, 2007, was under the influence of alcohol. Counts 7-10 are directed to the Mohegan Defendants. These counts allege that the Defendants LaVigne and Nelson had been served alcohol at Sachem's Lounge, "located at the Mohegan Sun Resort Casino;" Complaint Count 7, ¶ 2; that Defendant Crowder was the duly licensed permittee of Sachem's Lounge; that Defendants Bozsum and Etess were "duly licensed backers and/or owners" of the licensed premises; and that the Defendant Maloney "was an agent and/or employee of one or all of the [Mohegan] Defendants herein, and was in the course and scope of his agency and/or employment at said establishment." Complaint, Count 7, ¶¶ 2-5.

Counts 7 and 8 asserted claims under the Connecticut Dram Shop Act, Conn. Gen. Stat. § 30-102 (the "Dram Shop Counts") based on allegations that LaVigne and Nelson were over-served alcohol. Counts 9 and 10 alleged that the Mohegan Defendants recklessly served alcohol to either LaVigne or Nelson (the "Reckless Service Counts").

III. THE TRIAL COURT'S DISMISSAL OF PLAINTIFFS' CLAIMS AGAINST THE MOHEGAN DEFENDANTS ON TRIBAL SOVEREIGN IMMUNITY GROUNDS.

The Trial Court held that the MTGA is immune from suit, and that its immunity has not been explicitly waived or abrogated to permit the Plaintiffs' claims to be heard in the Superior Court. Trial Court Decision at 11.

[4] The Motion to Dismiss was directed to the original June 19, 2008 complaint. The Mohegan Defendants' Motion to Dismiss is dated September 23, 2008. The non-Mohegan Defendants LaVigne and Nelson filed a Request to Revise dated September 29, 2008. Plaintiffs filed a Revised Complaint dated October 14, 2008. With respect to the counts asserted against the Mohegan Defendants, the original Complaint and the Revised Complaint are identical. Plaintiffs' Brief asserts that the operative complaint for purposes of this appeal is the "Revised Complaint" dated October 14, 2008. Defendants-Appellees refer herein to the Revised Complaint as the "Complaint."

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As to the Mohegan Defendants Crowder, Bozsum, Etess and Maloney, the Trial Court found with respect to Counts 7-10 that "[t]he plaintiffs identify Crowder as the licensed permittee of Sachem's Lounge, and Bozsum and Etess as the licensed owners of the establishment. The plaintiffs made no allegations that Crowder, Bozsum and Etess were not acting in their representative capacities. . . .Additionally, . . . the plaintiffs allege that Maloney "was acting "in the course and scope of his agency and/or employment at [Sachem's Lounge]." The Trial Court ruled that these Mohegan Defendants were all acting in their representative capacities for the MTGA and that the Complaint contained no allegations they were acting outside their tribal authority or in any individual capacity. Hence, the Court ruled that it lacked jurisdiction over the claims against the individual Mohegan Defendants due to the Tribe's immunity. *See* Trial Court Decision pp. 11-13.

This ruling is in accord with Chayoon v. Sherlock, 89 Conn. App. 821, 828, 877 A.2d 4, *cert. denied*, 276 Conn. 913, 888 A.2d 83 (2005), U.S. *cert. denied*, 547 U.S. 1138 (2006):

> Claimants may not simply describe their claims against a tribal official as in his individual capacity in order to eliminate tribal immunity.... [A] tribal official--even if sued in his individual capacity--is only stripped of tribal immunity when he acts manifestly or palpably beyond his authority ....[I]n order to overcome sovereign immunity, the [plaintiff] must do more than allege that the defendants' conduct was in excess of their ... authority; [the plaintiff] also must allege or otherwise establish facts that reasonably support those allegations.

The Trial Court correctly ruled that the Tribe's immunity extends to individual tribal officials and employees acting in their representative capacity and within the scope of their authority. Kizis *supra*, 260 Conn. at 54, *citing* Romanella v. Hayward, 933 F.Supp. 163, 167 (D.Conn.1996); *accord,* Bassett v. Mashantucket Pequot Museum & Research Center, Inc:

> In the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity *only* where the complaint pleads--and it is shown--that a tribal official acted beyond the scope of his authority to act on behalf of the [t]ribe.

Bassett, *supra*, 221 F.Sup.2d at 280 (Emphasis added).

Accordingly, Plaintiffs' claims against all the Mohegan Defendants are barred by the Tribe's sovereign immunity and the Trial Court correctly dismissed those claims for lack of subject matter jurisdiction.[5] The remainder of the case against the non-Mohegan Defendants has been stayed. Additional facts will be set forth as necessary.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE COMPLAINT AGAINST THE MOHEGAN DEFENDANTS FOR LACK OF SUBJECT MATTER JURISDICTION

The Trial Court's decision granting the Mohegan Defendants' Motion to Dismiss was based on controlling federal and Connecticut precedent. On appeal, the Plaintiffs argue that the Trial Court erred in dismissing the case because: (1) the viability of the doctrine of tribal immunity should be questioned; Pl. Br. at 5-6; (2) even if tribal sovereign immunity exists, the Tribe has waived (or Congress has abrogated) its immunity with respect to any tort in which alcohol was involved; Pl. Br. at 7-16; (3) the trial court erred in concluding that the Plaintiffs had sued the individual defendants in their official or representative capacities; and (4) tribal sovereign immunity does not apply to individuals. The Plaintiffs also make procedural claims: that they should have been permitted to take the deposition of Maloney; Pl. Br. at 22-25; and that the trial court erred in denying their motion for reconsideration. Pl. Br. at 25-26.

[5] Although a motion to dismiss for lack of subject matter jurisdiction might be filed at any time, the Motion to Dismiss was filed prior to the expiration of the one-year time limit for the assertion of tort claims in the Gaming Disputes Court. Plaintiffs took no timely action to file in the Mohegan court.

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The trial court properly applied the well-established doctrine of tribal sovereign immunity from suit, and dismissed those counts of the Complaint directed at the Mohegan Defendants; hence, the Plaintiffs' arguments are without merit.

A. Standard Of Review.

The standard of review is well-established:

> "A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court.... A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction.... [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to] grant ... the motion to dismiss will be de novo." (Internal quotation marks omitted.) State v. Haight, 279 Conn. 546, 550, 903 A.2d 217 (2006). "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Internal quotation marks omitted.) Kizis v. Morse Diesel International, Inc., 260 Conn. 46, 51, 794 A.2d 498 (2002); *see also* Beecher v. Mohegan Tribe of Indians of Connecticut, 282 Conn. 130, 134, 918 A.2d 880 (2007).

Columbia Air Services, Inc. v. Department of Transp., 293 Conn. 342, 347 (2009).

B. The Tribal Sovereign Immunity Doctrine Remains Robust.

Plaintiffs' primary argument is that tribal sovereign immunity has been "watered down" and that where a tribe has undertaken a proprietary function, "their (sic) immunity is lost." Pl. Brief at 6-7. Federal and state authority demonstrates the fallacy of Plaintiffs' argument.

In Beecher v. Mohegan Tribe, 282 Conn. at 134-6, the Connecticut Supreme Court recently expounded on the significance of the doctrine of tribal sovereign immunity in our state and federal jurisprudence:

> "Tribal sovereign immunity is governed by federal law. Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc., 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). 'Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by

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> sovereign powers.' Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); Oklahoma Tax Commission v. Citizen Band, Potawatomi Indian Tribe [of Oklahoma], 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed. 894 (1940). We begin with the premise that 'Indian tribes are "domestic dependent nations" which exercise inherent sovereign authority over their members and territories.' Oklahoma Tax Commission v. Citizen Band, Potawatomi Indian Tribe [of Oklahoma], *supra*, at 509, 111 S.Ct. 905, *citing* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831)." Kizis v. Morse Diesel International, Inc., 260 Conn. 46 at 52-53, 794 A.2d 498 (2002). Tribal sovereign immunity is dependent upon neither the location nor the nature of the tribal activities. Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc., supra 523 U.S. at 760, 118 S.Ct. 1700 (applying tribal sovereign immunity to claim of breach of commercial contract executed off reservation).

Beecher v. Mohegan Tribe, 282 Conn. at 134-6.

Plaintiffs' argument -- that tribal immunity is lost where a tribe has undertaken a proprietary function -- cannot withstand scrutiny in light of Kiowa Tribe's holding that tribal sovereign immunity applied to bar a claim of breach of commercial contract outside the tribal reservation. "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." Kiowa Tribe, 523 U.S. at 760. The issue of the tribe's commercial or proprietary function was clearly at the forefront of the Kiowa Tribe court's analysis.

Our Supreme Court's decisions in Kizis, holding that a patron's suit against tribal representatives for damages resulting from a slip and fall at Mohegan Sun was barred by the Tribe's sovereign immunity, and in Beecher, holding that the Tribe's initiation of a lawsuit against one of its former employees did not waive its sovereign immunity from a subsequent suit filed by that employee, further demonstrate that the doctrine of tribal

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sovereign immunity has not been "watered down" even in a commercial or proprietary context.

Plaintiffs' argument about the "inherent powers" of Indian tribes, Pl. Brief at 6, is inapposite because it invokes case law addressing the powers of *tribal courts* to assert jurisdiction. In this connection, Plaintiffs cite language in Strate v. A-1 Contractors, 520 U.S. 438, 445-46 (1997), to the effect that the inherent sovereign powers that a tribe enjoys do not "reach beyond what is necessary to protect tribal self-government or to control internal relations." Pl. Brief at 6. But this language from Strate has no bearing on the issues here. The Tribe is not attempting to "reach" anywhere. It is instead asserting the contrary: the Superior Court lacks jurisdiction over the Tribe for suits grounded in the Mohegan Defendants' on-reservation conduct. Recognizing this limitation on its own jurisdiction, the Trial Court properly dismissed the suit.

Moreover, even if the issue of the Tribe's "inherent powers" were before this court, which it is not, Kizis, is dispositive:

> "We recognize that federal law may limit a tribal court's assertion of its own jurisdiction. See Strate v. A-1 Contractors, 520 U.S. 438, 442, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997). Congress, however, only extended Connecticut criminal jurisdiction over the Mohegan Reservation. *See* Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, 25 U.S.C. § 1775 et seq. (1994). Furthermore, the legislative history of the Mohegan Nation of Connecticut Land Claims Settlement Act discloses a Congressional intent that "[t]he Mohegan Indian Nation will retain exclusive civil jurisdiction within the boundaries of its reservation...."H. Rep. 103-676, 103d Cong., 2d Sess. 9 (1994). Accordingly, in order for Connecticut to assume civil jurisdiction, the state must first obtain the consent of the affected tribe. See 25 U.S.C. §§ 1322, 1326 (1994). ***The tribe has not consented to state jurisdiction over private actions involving matters that occurred on tribal land. Indeed, in this instance, the statutes and compacts cited previously, which have been recognized by both the federal government and the state of Connecticut through compliance***

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with the procedures set forth in the gaming act and the Indian Civil Rights Act, explicitly place the present type of tort action in the jurisdiction of the tribe's Gaming Disputes Court.

Kizis, *supra,* at 57-58 (emphasis added).

This case does not present the issue of whether the Mohegan Gaming Disputes Court has jurisdiction over a claim against the Plaintiffs; they have not been sued in that court. Instead, the Tribe has made that forum available to hear tort claims against the Mohegan Defendants (*see* argument at Part I.G. *infra*) exactly as contemplated in the Compact, § 3(g).

C. The Tribe's Immunity From Private Claims in State Courts Arising From Dispensation of Alcohol Has Neither Been Waived Nor Abrogated.

Plaintiffs next argue that the Tribe has waived its immunity from a lawsuit in state court for claims arising from the on-Reservation sale of alcohol. Plaintiffs present no valid authority for this broad assertion and fail to identify a "clear and unequivocal" waiver of tribal sovereign immunity. No such waiver exists.

It is well-established that Indian tribes enjoy sovereign immunity from unconsented suit; that such immunity may be waived by the tribe; but that any such waiver must be expressed in clear and unequivocal terms. Davidson v. Mohegan Tribal Gaming Authority, *supra* 97 Conn. App. at 149. ("Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits for damages against a tribe.... However, **such waiver may not be implied, but must be expressed unequivocally."**)(emphasis added). *See also* Chayoon v. Sherlock, 89 Conn.App. 821, 825-26, 877 A.2d 4, cert. denied, 276 Conn. 913, 888 A.2d 83 (2005), U.S. *cert. den.*, 547 U.S. 1138 (2006).

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Plaintiffs summarily assert that the Tribe's immunity has been "waived by 18 U.S.C. §1161 and the Tribe's agreement with the State of Connecticut" in the Compact and by the Tribe's "application" for a State Liquor License.[6] Pl. Brief at 7. Neither § 1161 nor the Compact contains a clear and unequivocal waiver or abrogation of the Tribe's immunity. Nor is there a consent to suit in a particular forum.

> Courts consistently have applied two complementary principles to waivers: (1) a sovereign's waiver must be unambiguous, and (2) a sovereign's interest "encompasses not merely *whether* it may be sued, but *where* it may be sued.

Garcia v. Akwesasne Housing Authority, 268 F.3d 76, 86-87, C.A.2 (N.Y.), 2001. Neither the statute nor the Compact identifies a court in which the Tribe has consented to suit, and Plaintiffs fail to identify either a waiver or any applicable forum-consent provision. Moreover, the Mohegan Tribe Liquor Control Code, Tribal Ordinance Number 2000-05, § 1, 4-11-2000, (the "Tribe Liqour Code") which is federally-approved pursuant to § 1161, *see* 68 Fed. Reg. 32541 (May 30, 2003), expressly preserves the Tribe's immunity. *See* Tribal Liquor Code § 3-286: "Nothing contained in this Code is intended to nor does in any way limit, alter, restrict, or waive the Tribe's sovereign immunity." Not only is there no waiver, express or implied; the Tribe has specifically preserved its immunity, with federal approval.

D. The Gaming Compact Does Not Waive Mohegan Tribal Immunity From Tort Claims in State Court.

Plaintiffs contend that the following sentence from § 14(b) of the Gaming Compact constitutes "an explicit waiver of immunity":

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[6] The Plaintiffs did not include any liquor permit application in their Complaint or in the Trial Court record; thus the argument for the existence of a waiver based on the permit application is without any foundation.

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"Service of alcoholic beverage within any gaming facility shall be subject to the laws and regulations of the State applicable to sale or distribution of alcoholic beverages." Pl. Brief at 9, citing and quoting Gaming Compact § 14(b).

Plaintiffs do not attempt to explain how that sentence confers jurisdiction on a state court to hear and adjudicate a private claim for damages against the Mohegan Defendants, and they do not attempt to reconcile this language with Kiowa Tribe, Kizis, Beecher, and Davidson. They cannot. The Compact is devoid of language that clearly and unequivocally waives the Tribe's sovereign immunity from a private suit seeking to impose tort liability in state court.

Elsewhere in the Compact there *is* a clear and unequivocal waiver of the Tribe's sovereign immunity that unmistakably authorizes the state Gaming agency to bring litigation in the U.S. District Court for the District of Connecticut to "enjoin a class III gaming activity located on the Reservation and conducted in violation of this Compact." In order to permit such litigation, the Compact at § 13(c) provides:

> "[t]he Tribe hereby waives any defense which it may have by virtue of its sovereign immunity from suit with respect to any such action in the United States District Courts to enforce the provisions of this Compact and consents to the exercise of jurisdiction over such action and over the Tribe by the United States District Court with respect to such actions to enforce the provisions of this Compact. . . ."

Compact § 13(c). This provision of the Compact illustrates the form of a waiver that fully meets the well-established requirements for such waivers in the context of federal Indian law.[7] And, while the Compact at § 13(c) provides that limited waiver, the Compact also contains, at Section 3(g), the provision that "**[t]he Tribe shall not be deemed to have**

[7] Notably, even this waiver does not contemplate the recovery of money damages from the Tribe; the provision only permits equitable relief.

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waived its sovereign immunity from suit with respect to such [tort] claims by virtue of any provision of this Compact . . .." Compact § 3(g)(emphasis added).

This language erases any doubt that the Compact elsewhere implicitly waived the Tribe's immunity as to private tort claims. When it entered into the Gaming Compact with the State, the Tribe did not waive its sovereign immunity from suits on torts, but instead expressly reserved its immunity and closed the door to any contrary construction of other portions of the Compact.[8]

In addition, the absence of any language in § 14(b) designating a forum for the adjudication of potential liquor-related claims demonstrates the fallacy of Plaintiff's argument.[9] Nowhere in the Compact is there any indication of an agreement by the Tribe that *state* courts would have jurisdiction over claims of any nature arising against the Tribe or its representatives.[10] As shown above, the sole waiver by the Tribe in the Compact consents to suit only by the state Gaming agency, only under narrow circumstances, and only in federal court.[11] As stated in Kizis: "[a]s a matter of federal law, an Indian tribe is

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[8] As discussed *infra*, the Mohegan Tribe has waived its sovereign immunity from tort claims asserted in its tribal courts, and has gone beyond the requirements of the Compact; the tribal courts are authorized to adjudicate claims against the Gaming Authority filed by non-patrons as well as patrons.

[9] The *amicus* brief filed by the Attorney General comments, in a footnote, that "the Court need not address the questions of whether Section 14(b) of the .....Compact would constitute a valid waiver of tribal sovereign immunity or whether sovereign immunity would otherwise bar an action against the Tribe's employees and agents and this brief does not address those issues." *Amicus* Brief at p. 10, n. 3. The *Amicus* Brief makes the suggestion that the Mohegan Tribe had no sovereignty to waive in the "area of liquor," on the basis of Congressional enactment of 18 U.S.C. § 1161. As will be shown *infra*, this suggestion is contrary to federal law.

[10] Kizis recognized that federal law specifically preserved the Tribe's exclusive civil jurisdiction within the Mohegan Reservation.

[11] IGRA specifically designates the federal court as a forum for hearing disputes. 25 U.S.C. § 2710(d)(7)(A)(ii) provides in pertinent part that "[t]he United States district courts shall have jurisdiction over ... any cause of action initiated by a State or Indian tribe to

subject to suit only where Congress has authorized the suit or the tribe has waived its immunity ***and the tribe itself has consented to suit in a specific forum***." 260 Conn. at 53 (internal citations omitted; emphasis added).

The Trial Court's decision holding that the Tribe has not waived its sovereign immunity and consented to private suits on tort claims in the Superior Court is solidly grounded in federal Indian law, is consistent with the decisions of our Appellate and Supreme Courts, and is firmly supported by the language of the Compact.

E. The Tribe's Sovereign Immunity Has Not Been Abrogated by Congress.

The Tribe's sovereign immunity has not been abrogated by Congress so as to permit the Superior Court to assert jurisdiction over Plaintiffs' claims. Like waivers, abrogation of tribal sovereign immunity requires clear and unequivocal language demonstrating Congressional abrogation, and no such language is found in any Act of Congress. *See,* Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 356-357 (2d Cir.2000).

Plaintiffs rely heavily on a Superior Court decision in Schram v. Ohar, 1998 WL 811393 (Conn. Super. 23 Conn.L.Rptr. 407) (Nov. 16, 1998)(Hurley, J.), and its analysis of Rice v. Rehner, 463 U.S. 713 (1983), as authority for the proposition that "any claims relating to the protections of tribal immunity are waived by 18 U.S.C. § 1161." Pl. Brief at 7. The Plaintiffs are essentially arguing that the enactment of 18 U.S.C. § 1161 constitutes Congressional abrogation of tribal sovereign immunity from suit. Title 18 USC § 1161 provides in its entirety as follows:

> The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title, shall not apply within any area that is not Indian country, nor to any act or

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enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact..."

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> transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

18 U.S.C. § 1161.

Certainly there is nothing on the face of this statute abrogating tribal sovereign Immunity from suit in state courts. The provisions that "shall not apply" if § 1161 is operative are summarized as follows: § 1154 prohibits the furnishing of intoxicating liquor in Indian country and provides criminal penalties; § 1156 prohibits the possession of intoxicating liquor in Indian country and provides criminal penalties; and §§ 3113, 3488, and 3669 address forfeiture and destruction of intoxicating liquor illegally in Indian country. "Indian country" is defined in 18 U.S.C. § 1151 as including lands and rights-of-way within an Indian reservation under federal jurisdiction, all dependent Indian communities, and all Indian allotments, the Indian titles to which have not been extinguished. In effect, then, a liquor transaction that is not in conformity with the laws of the State *and* with a tribal liquor ordinance exposes the actor to prosecution under the federal criminal laws.

The legislative history of § 1161 contains no indication that Congress sought or intended to abrogate tribal sovereign immunity from private tort liability, or to subject tribes to private suits in state courts on such claims. The act was originally proposed in 1953 to cure the discrimination experienced by Indians with respect to liquor, where Prohibition had been repealed but Indians were still barred from possession of alcohol on their reservations. The legislation was initially to apply only to the State of Arizona but was made generally applicable after hearings before the House Committee on Interior and

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Insular Affairs. *See* Legislative History, "Indians-Discriminatory Legislation-Elimination" Senate Report # 722.

Rice v. Rehner considered whether a federally-licensed Indian trader could sell alcohol on the Reservation of the Pala Band of Indians in California without first obtaining a state liquor license. The case did not involve any question of the Pala Band's immunity from unconsented suit in the state courts, especially since the Band was not a party to the litigation. The Court concluded that because Congress "has delegated authority to the States **as well as to the Indian tribes** to regulate the use and distribution of alcoholic beverages in Indian country," the Ninth Circuit, which held that the state regulation was preempted by federal law, should be reversed. *Id.* (emphasis added).

The Court reviewed whether Indian Tribes historically exercised sovereignty over liquor within their territories and determined that the Federal government had largely regulated the area and had essentially "divested the Indians of any inherent power to regulate in this area." 463 U.S. at 724. The result was that the Indian trader had to get a California liquor license *and* comply with tribal liquor laws, enacted pursuant to § 1161, in order to sell liquor on the reservation. Rehner's core holding was that Congress has divested the tribes of the ***exclusive*** inherent power to regulate in this area, but that *both* state and tribal regulation was a requirement of federal law. Therefore, tribal power to regulate was not eliminated, it was confirmed by the Congress in § 1161.

Consistent with this dual regulatory approach, the Tribe has enacted the Tribe Liquor Code with approval of the U.S. Department of Interior, 68 FR 32541 (May 30, 2003). The Bureau of Indian Affairs, in publishing its approval, provides a summary stating in pertinent part:

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> "The Code regulates and controls the possession, sale and consumption of liquor within the boundaries of the Mohegan Indian Reservation, in conformity with the laws of the State of Connecticut where applicable and necessary. "

68 FR 32541. Thus, the dual regulation by the State and the Tribe, as ratified by the BIA pursuant to § 1161, continues in full force.

Had Congress intended for § 1161 to abrogate tribal immunity, and had the Rehner court so held, it is difficult to imagine that such a radical action would have escaped the attention of the Supreme Court itself. But the Kiowa Tribe court certainly did not point to § 1161 as an example of a Congressional abrogation or limitation:

> "Congress has acted against the background of our decisions. It has restricted tribal immunity from suit in limited circumstances. See, *e.g.*, 25 U.S.C. § 450f(c)(3) (mandatory liability insurance); § 2710(d)(7)(A)(ii) (gaming activities). And in other statutes it has declared an intention not to alter it. See, *e.g.*, § 450n (nothing in financial-assistance program is to be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe"); see also Potawatomi, 498 U.S., at 510, 111 S.Ct., at 909-910 (discussing Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.*)."

Kiowa Tribe, *supra,* 523 U.S. at 758-59. Moreover, even statutes that extend particular State or federal law to tribes do not necessarily abrogate tribal sovereign immunity in the absence of clear and unequivocal abrogating language. Rejecting the argument that application of state law to an off-reservation tribal enterprise also meant that the tribe's immunity was lost, the Kiowa Tribe court wrote:

> Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-149, 93 S.Ct. 1267, 1270-1271, 36 L.Ed.2d 114 (1973); *see also* Organized Village of Kake v. Egan, 369 U.S. 60, 75, 82 S.Ct. 562, 570-571, 7 L.Ed.2d 573 (1962). To say substantive state laws apply to off-reservation

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> conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In Potawatomi, for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. 498 U.S., at 510, 111 S.Ct., at 909-910. There is a difference between the right to demand compliance with state laws and the means available to enforce them. See id., at 514, 111 S.Ct., at 911-912.

Kiowa Tribe, *supra,* 523 U.S. at 755.

The disconnection between a Congressional act's impact on tribal sovereignty generally and the right to bring a lawsuit against an Indian tribe to enforce the act's provisions is well illustrated by cases cited in Vann v. Kempthorne, 534 F.3d 741 (D.C. Cir. 2008), which rejected a District Court decision holding that the Cherokee Nation's immunity was implicitly abrogated with respect to a suit for alleged breach of the 13th Amendment, among other claims.

> The district court is mistaken to treat every imposition upon tribal sovereignty as an abrogation of tribal sovereign immunity. Sovereignty and immunity are related, Alden v. Maine, 527 U.S. 706, 715, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999), the latter being an attribute of the former, P.R. Aqueduct & Sewer Auth., 506 U.S. at 146, 113 S.Ct. 684. **But it is possible to cut back sovereignty in a way that leaves sovereign immunity intact**. Cf. Kiowa Tribe, 523 U.S. at 755, 118 S.Ct. 1700 . . . Congress can impose substantive constraints upon a tribe without subjecting the tribe to suit in federal court to enforce those constraints, as the Supreme Court made clear in Santa Clara Pueblo. . . .; see also Nero v. Cherokee Nation, 892 F.2d 1457, 1461 (10th Cir. 1989) (noting the Santa Clara Pueblo distinction between a substantive constraint and an abrogation of sovereign immunity). **Absent explicit and unequivocal language to the contrary, the imposition of substantive constraints upon a tribe's sovereignty cannot be interpreted as an abrogation of its sovereign immunity.**

Kempthorne, 534 F.3d 741 at 748(emphasis added). In the absence of explicit and unequivocal language abrogating tribal immunity in the Thirteenth Amendment (or in an

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1866 Treaty), the Kempthorne court held that the Cherokee Tribe's immunity had not been abrogated as to suits by private parties.[12]

As cited by the Kempthorne court, this conclusion is also supported by the Second Circuit in Bassett v. Mashantucket Pequot Tribe, *supra*, 204 F.3d at 357 (holding that while the Copyright Act may apply to an Indian tribe, that law does not abrogate tribal sovereign immunity, where nothing on the statute's face could be so construed); by the Eleventh Circuit in Fla. Paraplegic, Ass'n v. Miccosukee Tribe, 166 F.3d 1126, 1131 (11th Cir.1999) (holding that while the Americans with Disabilities Act applies to the tribe, it did not abrogate tribal sovereign immunity and declaring, "Congress abrogates tribal immunity only where the definitive language of the statute itself states an intent either to abolish Indian tribes' common law immunity or to subject tribes to suit under the act"); *see also* Sanderlin v. Seminole Tribe of Florida, 243 F.3d 1282 (11th Cir. 2001) (Federal Rehabilitation Act of 1973 forbade Indian tribes and other federal grant recipients from discrimination against the disabled but did not unmistakably demonstrate congressional intent to subject tribes to private suits for violations nor to otherwise abrogate tribal immunity from such suits); Freemanville Water System, Inc. v. Poarch Band of Creek Indians, et al., 563 F.3d 1205 (11th Cir. 2009) (consolidated Farm & Rural Development Act, 7 U.S.C. § 1926(b) applied to tribal defendants but did not unambiguously abrogate tribal immunity from private civil lawsuits brought under the Act).

The *amicus* argument, that the Tribe "had no sovereign immunity to waive" in the "area of liquor" because § 1161 stripped tribes of sovereignty, *Amicus* Brief at 2-3, is

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[12] The Kempthorne court, at footnote 4, pointed to a compilation of "statutes that satisfy the abrogation standard," citing Cohen's Handbook [of Federal Indian Law], § 7.05[1][b]. Once again, 18 U.S.C. § 1161 is notably absent from this compendium.

faulty. Even if Rice v. Rehner were construed as holding that tribes no longer have any inherent and exclusive sovereign power to regulate alcohol sales on their reservations, the court clearly recognized that tribes exercise concurrent jurisdiction over such sales based on authority delegated by Congress. It is up to Congress to decide when or how to limit or eliminate tribal immunity. Kiowa Tribe, *supra* at 760; Oklahoma Tax Comm'n v. Citizen Band Potawatomie Indian Tribe, 498 U.S. 505 (1991) (tribal sovereign immunity bars states from collecting taxes due from tribes which federal law gives states the right to collect); United States v. United States Fidelity & Guaranty, 309 U.S. 506 (1940) (tribal sovereign immunity exists as an instrument of federal public policy and remains in force even upon dissolution of tribe as a sovereign government).[13]

Further, even if § 1161 could somehow be deemed ambiguous on the question whether the Act subjects tribes to private dram shop suits in State court, any such ambiguity must be construed against derogation of tribal sovereign immunity. Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior, 228 F.3d 82, 88 (2d Cir.2000) *cert. denied* 532 U.S. 1007, 2001 (canon of construction favoring Indian tribes applied to construction of Mashantucket Pequot Indian Claims Settlement Act, 25 U.S.C.A. § 1754(b)(8)).

The U.S. Supreme Court has also rejected arguments that a federal statute extending some state jurisdiction over some Indian reservations had the effect of subjecting Indian tribes on those reservations to the jurisdiction of state courts or otherwise abrogating their sovereign immunity. *See* Bryan v. Itasca County, 426 U.S. 373

[13] Courts construing Connecticut statutes in derogation of state sovereign immunity must construe them strictly. "[When] there is any doubt about [the] meaning or intent [of statute in derogation of sovereign immunity, it is] given the effect which makes the least rather than the most change in sovereign immunity." Rivers v. New Britain, 288 Conn. 1, 11, 950 A.2d 1247 (2008).

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(1976) (Pub. L. 83-280, which conferred on certain states the jurisdiction to hear "civil causes of action between Indians or to which Indians are parties" is ambiguous and contains no language conferring state jurisdiction over the tribes themselves); *see also,* Three Affiliated Tribes v. Wold Engineering, *supra,* 476 U.S. at 892:

> Public Law 280 certainly does not constitute a "governing Act of Congress" which validates . . . interference with tribal immunity and self-government. We have never read Pub. L. 280 to constitute a waiver of tribal sovereign immunity, nor found Pub. L. 280 to represent an abandonment of the federal interest in guarding Indian self-government.

Similarly here, this court should conclude that 18 U.S.C. § 1161 does not explicitly and unequivocally abrogate the Tribe's immunity from Plaintiffs' state court suit, nor does it authorize state courts to exercise jurisdiction over private tort claims against tribal defendants.[14]

F. The Tribe Has Waived Its Immunity From Tort Claims But Only In The Gaming Disputes Court.

Plaintiffs contend that the Mohegan Defendants have "violated the Compact" by allegedly failing to provide a tribal forum for the adjudication of alcohol-related claims. Pl. Brief at 14. However, the Tribe has established a forum for the adjudication of tort claims, including tort claims arising from the sale of alcohol.

Since 1995, the Tribe has waived its immunity from tort claims (among other claims and causes of action) arising against the Gaming Authority and its authorized representatives. The waiver consents to suit only in the Mohegan Gaming Disputes Court (or, in circumstances not applicable here, in the Mohegan Tribal Court). *See* Mohegan Torts Code, (available at http://library.municode.com/index). The Code does not explicitly

[14] As noted *supra* at p. 17, the Tribe's Liquor Code, stamped with the approval of the U.S. Department of Interior, expressly preserves the Tribe's sovereign immunity.

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address alcohol-related torts, but the tribal court is free to develop Mohegan tribal common law in this area and has begun to do so.[15]

The existence of the Tribe's tort waiver was central to the Kizis court's decision holding that the Tribe's establishment of the Gaming Disputes Court and its enactment of a tort ordinance conferred exclusive jurisdiction in that court for adjudication of a tort arising on the Reservation.

> The Mohegan Torts Code together with the gaming compact and the Mohegan constitution provide a forum and mechanism to redress the plaintiff's injuries. Therefore, the Connecticut courts do not have subject matter jurisdiction over this claim. Accordingly, the Mohegan Gaming Disputes Court is the exclusive forum for the adjudication and settlement of tort claims against the tribe and its employees because it is the forum in which the sovereign has consented to being sued, as set forth in Ordinance No. 98-1 amending the Mohegan Torts Code.

Kizis, *supra*, 260 Conn. at 58-59.

The Mohegan Torts Code's section waiving sovereign immunity states, in pertinent parts:

> Sec. 3-250. Limited Waiver of Sovereign Immunity and Consent to Suit.
>
> (b) By adoption of this Code, the Mohegan Tribal Gaming Authority waives its sovereign immunity and consents to be sued by persons with tort claims arising under this Code, but only in the Mohegan Gaming Disputes Court; and this waiver of sovereign immunity shall permit no recovery of damages against the Mohegan Tribal Gaming Authority, or its authorized representatives, in any measure or amount in excess of the damages authorized to be recovered under this Code.

[15] In the 14 years since Mohegan Sun opened, ten (10) alcohol-related complaints have been filed in the Gaming Disputes court. Of these, five remain in litigation. The remaining five were resolved. In addition, besides Plaintiffs' complaint, two other alcohol-related complaints were filed against the Gaming Authority in Superior Court. Donna Richards, et al. v. Jason Champion, et al, Docket # CV-07-5004614S (J.D., New London) was dismissed; the other case was voluntarily withdrawn.

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(c) The waivers of sovereign immunity contained herein shall be strictly and narrowly construed.

(f) Nothing herein shall be construed as a waiver of either the Tribe or the Mohegan Tribal Gaming Authority of its sovereign immunity as to claims arising under any Connecticut General Statute or arising under Connecticut common law.

Torts Code Section 3-250.[16]

Under the Torts Code, "Tort" is defined as "an injury to a person caused by a breach of a legal duty to that person, but does not include a breach of a duty imposed by contract." The Torts Code defines "Actual damages" as "the measurable loss of money or property sustained as a result of an injury." "Non-economic damages" are defined as "all non-pecuniary losses including, but not limited to, physical pain and suffering and mental and emotional suffering."

The Torts Code bars recovery of "non-economic damages in excess of two hundred (200) percent of the proven actual damages *prior to any reduction for collateral source payments.*" Torts Code, § 11. (emphasis added). Thus, a plaintiff may recover three hundred percent of her "actual damages," subject to a reduction by the amount, if any, received from collateral sources (as defined in the Code).

The assumption underlying the Plaintiffs' pursuit of their claims in the Superior Court appears to be that they would be limited in their recovery of damages under tribal law. Indeed, Plaintiffs' counsel has stated that he considers the Torts Code's limitation on recovery of non-economic damages at 200 percent of economic or actual damages to be

[16] The Tribal Ordinance establishing the Gaming Disputes Court provides, at § 3-52(a)(2) that the Court shall apply Connecticut statutory and common law except where it is in conflict with Mohegan Tribal Law. Ord. No. 95-4, 7-20-1995.

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inadequate; is critical of the unavailability of a jury trial;[17] and declines to practice in tribal courts.[18] Yet, the Dram Shop Act sets a limit of $250,000 on any recovery under that statute. There is no legal or logical basis to believe that Plaintiffs could not have obtained an adequate remedy if they had prosecuted their claims against the Mohegan Defendants in the Mohegan tribal court.[19]

Plaintiffs contend that Dram Shop and Reckless Service claims are not recognized in the Mohegan courts. It is true that the Mohegan court has rejected a Dram Shop claim brought under the Connecticut statute, but it is not true that reckless service of alcohol claims are not recognized; at least one is presently under adjudication. *See* Ji Wen Fang v. MTGA, 3 GDR 127 (Mohegan Gaming Disputes Court, July, 2008)(Mohegan Gaming

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[17] The State of Connecticut does not permit jury trials for claims against the State. Such claims against the state must be presented to the Claims Commissioner and, if the state's sovereign immunity is waived by the Claims Commissioner, such claims may be presented in the Superior Court, but no jury trial is available. Conn. Gen. Stat. § 4-160(f). Similarly, the Gaming Disputes Court does not afford the right to jury trial. This again is consistent with the Compact, which provides at § 3(g): "The Tribe . . .may adopt a remedial system analogous to that available for similar claims arising against the State or such other remedial system as may be appropriate following consultation with the State gaming agency."

[18] *See* "State law carries little weight in casinos," The New London Day (March 15, 2009) (plaintiffs' counsels' remarks regarding refusal to practice in tribal courts). *See also* Connecticut Law Tribune, September 28, 2009, "Should Tribe Be Liable in Drunk-Driving Crash?"(remarks about limitations on remedy).

[19] If Plaintiffs had filed a timely claim in the Mohegan Gaming Disputes Court and proved that the Mohegan Defendants were liable to them, and had further proven "actual damages" of, say, $150,000, their potential recovery would be $450,000, less collateral source payments. Even if collateral source payments reduced the award by $100,000, their actual recovery could be $350,000, or $100,000 more than would be available under the Dram Shop Act.

Disputes Court Judge F. Owen Eagan[20]) (granting motion to strike Dram Shop Act claim under Mohegan law but allowing reckless service of alcohol claims to proceed).

Mohegan law does not impose limits on recovery by claimants like Plaintiffs that are more restrictive than the limits under the Dram Shop Act, and there is no reason to believe Plaintiffs would have been at a disadvantage had they pursued their claims in the Mohegan court. But, even if the Tribe's law were ultimately determined to impose greater restrictions on tort recoveries against the Mohegan Defendants than permitted under state law, the Tribe has the right, both under federal law and pursuant to the express terms of the Compact, to establish the law and the limits governing tort claims arising on its reservation. Williams v. Lee, 358 U.S. 217, 220, 223 (1959).

G. The Dram Shop Act Is Not Part of the State's Regulatory Scheme Enforceable by Plaintiffs for Tribal Conduct on the Mohegan Reservation; and Plaintiffs Cannot Enforce the Gaming Compact.

Plaintiffs argue that "the MTGA applied for and was issued a liquor license by the Connecticut Department of Liquor Control. When submitting its application, the MTGA agreed to be bound by all rules and laws contained in the . . .Liquor Control Act." Plaintiffs point out that the Dram Shop Act, Conn. Gen. Stat. § 30-102, is a part of the state Liquor Control Act. Pl. Brief at 11.

This claim is unreviewable. There is nothing in the record nor in the complaint to support these allegations. No liquor license was attached to the Complaint, and there is no record concerning specific representations made by the MTGA in any license application. The Complaint merely alleges that Defendant Crowder is a "duly licensed permittee . . .." Complaint Count 7, Paragraph 2. Accordingly, this Court should decline

[20] Judge Eagan is a former United States Magistrate Judge for the District of Connecticut, and has served on the Mohegan Gaming Disputes Court since June, 1997. *See* Mohegan Tribal Resolution 97-22, June 23, 1997.

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to review this claim. *See* Smith v. Andrews, 289 Conn. 61, 77 (2008) (appellate review unavailable where record is inadequate).

Even if reviewed, the claim lacks merit. While the Dram Shop Act is part of the Connecticut Liquor Control Act, it is not part of the State regulatory scheme enforceable by Plaintiffs against the Mohegan Defendants.

In the Gaming Compact, the Tribe and the State agreed at Section 14(b) that:

> "Service of alcoholic beverage within any gaming facility shall be subject to the laws and regulations of the State applicable to sale or distribution of alcoholic beverages. The Tribal gaming operation shall be entitled to a hotel permit for the sale of liquor for gaming facilities which are contained in the same building as any hotel, or a cafe permit for the sale of liquor for gaming facilities which are not contained in the same building as any hotel, or such equivalent permits as may from time to time be available to similar enterprises operated pursuant to the laws of the State . . .."

Compact § 14(b).[21]

Connecticut General Statutes Chapter 545 sets out the legislative scheme for state regulation of liquor. The entire scheme consists of 116 separate statutes. The Department of Consumer Protection "shall enforce the provisions of this chapter." C.G.S. § 30-6. Conn. Gen. Stat. § 30-37k was adopted in 2000 to establish provisions for the previously-unrecognized "casino permit," applicable only to premises within which a gaming facility, as defined under 25 U.SD.C. § 2701 et seq., IGRA, is located. The chapter covers the issuance, revocation, suspension, and forfeiture of permits and sets out procedures for hearings and appeals. The statutes govern the prices that may be charged for liquor, beer and wine; and sets out, at Part VII, "Prohibited Acts, Penalties and Procedure." Conn. Gen. Stat. § 30-105 provides that "[t]he state's attorneys and the

[21] The Compact's provision that the gaming operation "shall be entitled" to a liquor permit indicates that licensure is not discretionary.

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assistant or deputy assistant state's attorneys shall have the right to bring and prosecute all violations of the laws relating to the sale of alcoholic liquor." Conn. Gen. Stat. § 30-86 prohibits the sale or delivery by a permittee or his agent of alcoholic liquor to "any intoxicated person." C. G. S. § 30-86(b)(1). It specifies that the penalty for a violation of this provision is found at § 30-113, which provides that "any person convicted of a violation of any provision of this chapter for which a specified penalty is not imposed, shall, for each offense, be fined not more than one thousand dollars or imprisoned not more than one year or both."

The Dram Shop Act (Conn. Gen. Stat. § 30-102) is anomalous in this statutory scheme inasmuch as it contains *no* provision for enforcement by the state. For the reasons set forth above (lack of explicit waiver, lack of specified forum, the explicit exclusion of any waiver for tort claims, and the rules favoring preservation of tribal sovereignty in the face of ambiguity), there is no basis to find that the Tribe agreed to be made subject to private suits in state court under the Dram Shop Act as a consequence of agreeing that "Service of alcoholic beverage within any gaming facility shall be subject to the laws and regulations of the State applicable to sale or distribution of alcoholic beverages.. . . ." By its terms, the State itself does not play a role in the administration or enforcement of that Act. 22 [23]

[22] In Mashantucket v. McGuigan, 626 F.Supp. 245 (U.S.D.C. D. Ct. 1986), construing the civil-regulatory (as opposed to criminal prohibitory) nature of the bingo laws, the court observed that "the dominant character of the nature and purpose of Connecticut's bingo laws is regulatory and the single penal statute included therein is not to be considered in isolation. . . As a regulatory action, Connecticut's bingo laws, including Conn. Gen. Stat. § 7-169(k), the penal statute, are found not to be enforceable under a grant of jurisdiction over criminal law." By the same token, Chapter 545's inclusion of a single provision for private rights of action can not be construed as effectuating Congressional action to strip

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Moreover, the sole and exclusive remedy for a violation of the Gaming Compact is set forth in the Compact at § 13(c), stating: "If the State gaming agency determines that the Tribal gaming operation is not in compliance with the provisions of this Compact . . ." it shall deliver notice of non-compliance and if non-compliance continues, "the United States District Courts shall have jurisdiction pursuant to 25 U.S.C. § 2710(d)(7)(A)(iii) over any cause of action initiated by the State gaming agency to enjoin a class III gaming activity located on the Reservation and conducted in violation of this Compact." Compact § 13(c). Thus, Plaintiffs' argument that the "Mohegan Defendants . . . have violated the compact," Pl. Brief at 14, is unavailing. Even if it were true, Plaintiffs have no standing to pursue an alleged violation of the Compact, and the state courts lack jurisdiction to hear such a complaint: the federal courts have exclusive jurisdiction in that regard.[24]

H. The Weight of Authority Strongly Supports the Trial Court's Decision.

Although not entirely uniform, most decisions – with only two exceptions – have held that tribal sovereign immunity bars dram shop claims against federally-recognized sovereign Indian tribal entities. The sole Connecticut case relied upon by the Plaintiff has not withstood scrutiny, especially in light of Kiowa Tribe and its Connecticut progeny.

That case, Schram v. Ohar, 1998 WL 811393, Hurley, J. included a Dram Shop Act claim against the Mashantucket Pequot Tribe, the Mashantucket Gaming Enterprise, and

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the Mohegan Tribe of its sovereign immunity from the specified private right of action by enactment of § 1161.

[23] The only mention of the Dram Shop Act in the regulations adopted by the Department of Consumer Protection is in Conn. Agencies Regs. § 30-6a-H1, "Alcohol seller and server training," which sets the standards for recognition of a training program for those who serve alcohol; there are no regulations providing for the enforcement of the Dram Shop Act by the DCP.

[24] No notice of alleged non-compliance has ever been served upon the Mohegan Tribe by the State Department of Special Revenue (the State Gaming agency under Connecticut law).

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Foxwoods Casino Permittee Robert Zito, and held "tribal immunity is not a bar to a cause of action arising from the sale of alcohol at the casino." 1998 WL 811393 *3. Although Kiowa Tribe had been decided May 26, 1998, the Schram decision made no mention of that case. Nor did Schram apply the principles enunciated in Kempthorne; and, of course, Schram preceded Kizis, Davidson, and Beecher.

Greenidge v. Volvo Car Finance, Inc., 2000 WL 1281541, Koletsky, J., expressly rejected Schram. It cited Kiowa Tribe; Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 890 (1986); and United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940) for the proposition that tribes enjoy sovereign immunity and that "[a] waiver of sovereign immunity cannot be implied, it must be unequivocally expressed." 2000 WL 1281541. Addressing the Rice v. Rehner argument, Judge Koletsky held:

> From the fact that a *state* may *regulate* the use and distribution of alcohol on a reservation, the leap to the conclusion that a tribe's immunity does not apply when a private party brings a private cause of action against a tribe in any situation involving the use or consumption of alcohol on a reservation is a leap which this court is unwilling to take, particularly in view of the recent reaffirmation of the existence (if not the logical basis) of tribal immunity from suit. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998).

2000 WL 1281541 *2. Judge Koletsky's analysis was correctly followed in Van Etten v. Mashantucket Pequot Gaming Enterprise, 2005 WL 3112753 (Conn.Super.), 40 Conn. L. Rptr. 221, (Jones, J.); Donna Richards, et al. v. Jason Champion, et al, Docket # CV-07-5004614S (J.D., New London, July 11, 2008)(Abrams, J.); and by the Trial Court in this case. *See* Trial Court Decision at 7-8. *See also,* Holguin v. Ysleta Del Sur Pueblo, 954 S.W.2d 843, 854 (1997)(while Tribe was subject to Texas alcohol licensing and permitting requirements, "[w]e cannot conclude, however, that tribal sovereign immunity is waived for

a *private suit* brought under the Texas Dram Shop Act."); Filer v. Tohono O'Odham Nation Gaming Enterprise, 129 P.3d 78, 83 (2006)(absent an express waiver of the Tribe's sovereign immunity, a dram shop action against the defendant tribe was barred;18 U.S.C. 1161 "does not even mention tribal immunity, much less waive it for private dram shop actions."); Foxworthy v. Puyallup Tribe of Indians Association, 169 P.3d 53 (2007)(18 U.S.C. § 1161 does not constitute abrogation of tribal sovereign immunity from a private dram shop claim against a tribal enterprise); Cook v. Avi Casino, 548 F.3d 718 (9th. Cir. 2008) (cert. denied, 129 S.Ct. 2159, 2009)(dram shop act liability was barred by tribal sovereign immunity, albeit the plaintiff did not argue that § 1161 and Rice v. Rehner abrogated that sovereign immunity).[25]

The only appellate court ruling that § 1161 abrogated tribal immunity to permit a private dram shop suit in state court is Bittle v. Bahe, 192 P.3d 810 (Okla. 2008). But the Oklahoma court's strained reasoning -- including its extraordinary declaration that the Kiowa Tribe decision "*does not apply here,*" 192 P.3d at 821(emphasis supplied), followed by its demonstrably refutable statement that "[i]n our study of the Indian law jurisprudence, we have found no authoritative decision supporting the doctrine of tribal immunity from suit by a nonmember alleging violation of state alcoholic beverage laws," *Id.*,[26] warrants a wholesale rejection of its analysis.

Bittle is otherwise distinguishable in important ways from the circumstances presented here. First, while the Absentee Shawnee tribe is federally recognized, the entity that is alleged to have served alcohol to the operator and the passenger of a vehicle that injured

[25] In his unsuccessful petition for certiorari to the Supreme Court, the Cook plaintiff argued that § 1161 abrogated tribal immunity.

[26] Holguin, Filer, and Foxworthy all preceded Bittle but are not cited in the court's decision.

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the plaintiff was not, according to the court, established under any federal or tribal authority. *See* Bittle, p. 813, n.2. By contrast here, the MTGA is established pursuant to IGRA, the Mohegan constitution, and the Tribe Gaming Ordinance. Kizis, *supra,* 260 Conn. at 54-55. Second, the Oklahoma court could not find a § 1161 tribal liquor ordinance certified by the Department of Interior that applied to the Shawnee tribe; by contrast, the Tribe's Liquor Code is published at 68 FR 32541. Third, no gaming compact was considered applicable in Bittle; here, by contrast, the Compact provides a narrow, specific and exclusive waiver of the Tribe's immunity for alleged breach of the Compact and identifies the U.S. District Court as an agreed venue for adjudication of disputes;[27] and the Compact provides for the establishment of a tribal forum for the adjudication of tort claims against the Tribe's gaming enterprise. [28]

In short, Bittle is not credible authority for a departure from the well-founded principles followed in Connecticut in Kizis, Beecher, and Davidson. [29]

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[27] *Compare* the Bittle court's assertion that the Absentee Shawnee Tribe acknowledged that it might be subject to suit *in state court* to enforce the state liquor laws. 192 P.3d at 823.

[28] The dissenting Justice Klauger pointed out that the majority's ruling could not be squared with controlling U.S. Supreme Court precedent. *See* 192 P.3d at 837, n. 18. The Bittle decision was not appealed. The Absentee Pawnee Tribe took the unusual route of asking the U.S. District Court to enjoin the state court from adjudicating the dram shop claim after the Oklahoma Supreme Court's decision, and the District Court, in Absentee Shawnee Tribe of Oklahoma v. Combs, 2009 WL 1752412, held that the district court lacked jurisdiction to enjoin the state court. The District Court, Friot, J., expressed the view in dicta that it agreed with the rationale of the Oklahoma Supreme Court. Since the Combs court found it lacked jurisdiction to enjoin a state court proceeding following the Oklahoma Supreme Court's decision, its view of the validity of the underlying decision is essentially advisory.

[29] The *amicus* brief of the Attorney General, which also embraces Bittle, does not even acknowledge the Connecticut Supreme and Appellate decisions in Kizis, Davidson, Chayoon, and Beecher, and ignores the controlling central holding of Kiowa Tribe while citing only its *dicta.* Accordingly, it provides little, if any, guidance for this court.

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I. The Trial Court Properly Denied Discovery.

The Plaintiffs argue that the Trial Court erred in denying discovery into facts surrounding the conduct of Defendant James Maloney, the Sachem's Lounge bartender. But discovery was unwarranted: the Motion to Dismiss was addressed to "the complaint *alone* . . .." Conboy v. State, *supra*, 292 Conn. at 651(emphasis added); and the "complaint alone" alleged that Maloney acted at all times within the course and scope of his agency and employment.[30] The Trial Court properly determined, based on the Plaintiffs' complaint, that Plaintiffs failed to establish that the bartender's conduct was unrelated to the performance of his official duties, the standard articulated in Chayoon v. Sherlock, *supra*, 89 Conn. App. 827.[31]

J. The Denial of Reconsideration Is Not Reviewable.

Finally, Plaintiffs' argument that the Trial Court erred in denying reconsideration is unreviewable because the Plaintiffs failed to file an appeal after the trial court issued its decision on their motion for reconsideration. The Mohegan Defendants moved to dismiss this appeal because the Plaintiffs simultaneously filed their appeal and moved for reconsideration, yet failed to appeal the denial of reconsideration. The Defendants have

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[30] Plaintiffs cite Wallett v. Anderson, 198 F.R.D. 20 (D.Conn. 2000) as an example of a court's denial of a motion to dismiss, on tribal sovereign immunity grounds, claims against a tribal representative; but in Wallett, the District Court found that the complaint expressly alleged that the official acted beyond the scope of her authority by conspiring "to violate the plaintiff's constitutional rights." *Id.*, at 24. No such conduct is alleged in this case; and the applicable standard is that defendant "acted without any colorable claim of authority." Trial Court Decision at 13, *citing* Chayoon v. Sherlock, *supra*.

[31] Plaintiffs' Appendix includes documents that were never properly before the Trial Court, including, especially, the Arrest Warrant of Glenn LaVigne, Pl. App. at A-1--9; the Affidavit of Courtney Rousseau, Pl.App,. A-60--62; and the Transcript of the deposition of Courtney Rousseau, Pl.App. A272-377. These documents were never admitted into evidence in the proceedings below and are not properly before this Court. Plaintiffs refer to these documents as containing evidence that the Trial Court should have considered, but they are not part of the record.

argued that this court lacks jurisdiction over this appeal as it was premature and jurisdictionally defective, inasmuch as Plaintiffs failed to appeal from a final judgment, *see* Motion to Dismiss. Even if this court has jurisdiction over the appeal, it is clear that Plaintiffs have not preserved the issue of the denial of reconsideration, never having appealed from that denial.

CONCLUSION

For all the foregoing reasons, the Trial Court's dismissal should be affirmed.

Respectfully Submitted,
Defendants-Appellees,

Gary S. Crowder, Bruce Bozsum,
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CERTIFICATION

I hereby certify that this brief complies with all provisions of Connecticut Rules of Appellate Procedure § 67-2 and that a copy of the Defendant-Appellant's Brief was mailed, first class postage prepaid, on the 22nd of March, 2010, to:

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