UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BRUCE E. TASSONE,
Plaintiff,

vs.

FOXWOODS RESORT CASINO, and MASHANTUCKET PEQUOT INDIAN TRIBE
Defendant.

RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, Plaintiff, Bruce E. Tassone, representing himself pro se, for his Complaint against Defendant, Foxwoods Resort Casino and Mashantucket Pequot Indian Tribe("The Gaming Enterprise"), in his Response in Opposition to Defendant's Motion to Dismiss, alleges and states as follows:

INTRODUCTION AND FACTUAL BACKGROUND

In this case, Plaintiff, Bruce Tassone("Tassone") alleges that Defendant, Foxwoods Resort Casino("The Gaming Enterprise) violated provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), codified at 18 U.S.C. §§ 1961 *et seq.*

The first act of "racketeering activity" in which it has been alleged Foxwoods has engaged in, are acts of "mail fraud" as defined by 18 U.S.C. § 1341. Foxwoods has committed mail fraud by utilizing the United States Mail as part of a scheme or artifice to defraud Tassone, and/or to obtain from him money or property by means of false or fraudulent pretenses, representations, or promises. Foxwoods has done so by, among other things, using the mail after

Tassone requested permanent self-exclusion, to issue promotional materials to Tassone designed to lure him to the Casino for purposes of gambling.

The second act of racketeering in which Foxwoods has engaged are acts of "banking and wire fraud" as defined by 18 U.S.C. § 1343 and 18 U.S.C. § 1344.

Foxwoods has done so by knowingly accepting credit card payments from banks that was not in the name of the patron that used the card and then accepting payment from the issuing banks, thereby committing bank and wire fraud. Foxwoods has engaged in multiple incidents of such conduct with respect to Tassone.

Tassone further alleges that Foxwoods violated the terms of its agreement with the State of Connecticut and in doing so has created a business that knowingly and willingly takes advantage of patrons that are addicted to gambling by, but not limited to, the following actions

1. Encouraging patrons to gamble, even when it knows that, according to the *Diagnostic and Statistical Manual of Mental Disorders, (4th Ed.)* published by the American Psychiatric Association, such persistent and recurrent maladaptive gambling behavior will have negative and deleterious consequences on Tassone and his family.
2. By allowing such patrons to write checks payable to Foxwoods without obtaining sufficient information to know whether the patron has sufficient funds to cover the amounts of the checks;
3. By threatening such patrons with the prospect of collecting treble damages based upon allegations of a crime, even though Foxwoods would be a co-conspirator if there were such a crime
4. By offering enticements to gamble, such as free hotel rooms, meals, limousine transportation, and alcohol;

5. By actually paying such patrons to come to the casino to gamble, with the knowledge of the very high probability that such payments will be money well-invested ;
6. By extending lines of credit to such patrons in amounts and by methods that no reputable business would arrange;
7. By the notable failure to train its employees as to the proper actions to commence to avoid taking advantage of patrons addicted to gambling, when it instead encourages such employees to take advantage of such patrons.

One of the main provisions of the ***Unfair Contract Terms Act of 1977*** is that we are not able to exclude liability for personal injury if as in this case, the Defendant has been negligent. And while it is not alleged that Foxwoods owed a duty to protect Mr. Tassone from himself, the Casino's knowledge of the facts and the further knowledge of the foreseeability of the harm to pathological gamblers such as him created a duty on the part of Foxwoods to exercise reasonable duty under those circumstances, and to avoid affirmative actions to take advantage of such a patron; in other words, Foxwoods had a duty to protect Mr. Tassone from itself. Such duty would be of reasonable care to avoid causing him injuries or harm.

Foxwoods intentionally, recklessly, and/or negligently breached the duty of care it owed to Mr. Tassone by failing, *inter alia*, to:

a. acknowledge his psychological infirmities when they were well-known to it;

b. deny him access to the Casino when it knew it should have;

c. ban him from the Casino by notification to Foxwoods' security personnel to deny him entry and/or to remove him from the premises upon learning of his presence, just as it does for those who place themselves on the self-exclusion list;

d. train Foxwoods' personnel to recognize individuals who exhibit signs of pathological gambling behavior and to take appropriate steps to prevent such individuals from gambling.

Foxwoods intentionally, recklessly, and/or negligently breached the duty of care it owed to Mr. Tassone, *inter alia*:

a. by enticing him to gamble, even though it knew that he did not have the capabilities to resist such enticements;

b. by a scheme in which it allowed him to use a credit card to gamble by obtaining funds from a bank account in which it knew, or should have known, were not his.

And by failing to exclude or remove Mr. Tassone per the Defendants own Policy on Self-Exclusion, it violated the conditions of that Policy thereby breaching its contract with Plaintiff.

In tortuously breaching its above-described duties with respect to Mr. Tassone, by luring him to the Casino and taking his money with its knowledge that he was helplessly addicted to gambling, Foxwoods engaged in extreme and outrageous conduct, knowingly, intentionally, or recklessly causing severe emotional distress to Tassone. In so doing, Foxwoods exceeded all bounds of conduct usually tolerated by a decent society and caused mental, emotional, and psychological distress, suffering, and anguish, of a very serious kind to Mr. Tassone.

RESPONSE TO DEFENDANTS MEMORANDUM

When deciding a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court must accept as true all factual allegations in the complaint and must draw inferences in a light most favorable to the plaintiff. "Although a complaint does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true (even if doubtful in fact). A plaintiff must plead only enough facts to state a claim to relief that is plausible on its face. The function of a motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof. The issue is not whether a plaintiff will prevail but whether he is entitled to offer evidence to support his claims." *Flemming and Martinez v Goodwill Mortgage Services, LLC et al*

Additionally, this is no longer an issue of sovereignty. This is an excerpt from the Compact the Defendant has with the State of Connecticut:

> Enforcement authority of the State gaming agency. (from Compact)
> If the State gaming agency determines that the Tribal gaming operation is not in compliance with the provisions of this Compact the State gaming agency shall deliver a notice of non-compliance to the Tribal gaming agency and the Tribal gaming operation setting forth the nature of such non-compliance and the action required to remedy such non-compliance. In the event that the Tribal gaming operation fails to comply with any provision of this Compact following receipt of a valid notice from the State gaming agency requesting correction of such non-compliance, 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. The 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 Courts with respect to such actions to enforce the provisions of this Compact. In addition to the remedies provided hereunder, the State may exercise its right pursuant to sub-section (d) of this section to petition the National Indian Gaming Commission to impose penalties including civil fines and temporary or permanent closure of gaming facilities for violation of the ordinances of the Tribe including the provisions of this Compact incorporated in such ordinances.

"The 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…"

The Defendant has a history of seedy dealings. We only have to look at its attempts to open Casinos in other States. And by the Defendants own response in its Motion to Dismiss, "This language is specifically and exclusively addressing causes of action initiated by the State Gaming Agency to enjoin class III gaming activities and is obviously not applicable to the Plaintiff here." If the State Gaming Agency can intervene, then Defendant has abrogated their sovereignty. The issue is one of fact, and as alluded to earlier in this brief, *Fed. R. Civ. P. 12(b)(6)*, a court must accept as true all factual allegations in the complaint and must draw inferences in a light most favorable to the plaintiff.

Defendant's sovereign immunity is waived and abrogated when they violate

conditions of their Compact with the State of Connecticut. RICO violations, banking and wire fraud, are violations of their Compact, and therefore can be prosecuted and their gaming activities enjoined in Federal District Courts. They lost their immunity the minute they accepted wire and bank transfers on multiple occasions from a patron that was someone other than the Plaintiff.

The question is not one of sovereignty, but if the Plaintiff can bring suit as a United States Citizen.

Plaintiff argues that Case Law history is littered with suits brought by individuals when States failed to act as it pertains to issues of clean water, clean soil, protecting endangered animals, protecting parks, protecting individual constitutional rights, etc. Ergo, if Tribes have waived sovereign immunity in issues where they have violated State Compact, and States fail to bring suit, individuals have the right to bring suit in Federal Court as proscribed by that same Compact.

Furthermore, Defendants Memorandum is inaccurate. Plaintiff is not simply alleging Defendant failed to prevent him from gambling. Plaintiff is claiming Defendant breached its own contract regarding self-exclusion, breached its responsibility and duty of care; breached its premise liability and its constructive and implied contracts with respect to Plaintiff, multiple times, in allowing him to gamble after being notified he was a pathological gambler and requesting contractually, self-exclusion as a matter of Defendant's Casino Policy. Plaintiff is alleging Defendant went to great lengths in luring Tassone to their Casino to gamble including violating RICO Statutes on bank and wire fraud(18 U.S.C. § 1343 and 18 U.S.C. § 1344) and mail fraud(18 U.S.C. § 1341) and violating the Compact the Defendant has with the State of Connecticut.

The Defendant cites case law supporting their sovereignty and This Courts lack of

jurisdiction.

In citing *Chayoon v. Chao,* 355 F. 3d 141, 143(2d Cir.2004) *and Kiowa Tribe v Mfg.Techs.*, 523 U.S. 751, 754(1998), Defendant failed to show case law that was indicative or similar to this case. While *Kiowa* and *Chayoon* are both breaches of contract, neither case contemplated Tribes multiple violations of Federal RICO Statutes or Compacts they may have had with respective States'.

And Defendant's Compact with the State Of Connecticut is explicit:

(Please see Exhibit "A")"The State of Connecticut shall have jurisdiction to enforce all criminal laws of the State..."

The ultimate authority in governing the Defendant's operation's, rests with the State of Connecticut's Licensing and Gaming Board, the State Police Department and the State Liquor Association. Plaintiff asks, "What sovereign territory or nation would allow another nation or States' facilities to oversee and govern its own operations?" There are none that exist, if they are truly sovereign. A quid pro quo agreement, between the State of Connecticut and The Mashantucket Tribe, is not the definition of sovereignty that the law proscribes. Moreover, if the State of Connecticut or the State Gaming or Licensing Agency fails to prosecute violations of the State Tribal Compact, and State and Federal Rico Statutes, who is left to bring these transgressions to light?

There is no remedy in Tribal Court for Plaintiff. Beyond the inherent Conflict of Interest, Defendant has no mechanism for ruling on issues of Federal RICO violations or breaches of State Compact as they pertain to breaches of contract and duty of care. Plaintiff is a United States citizen and therefore is eligible to bring suit or his due process rights would be denied. The

State Compact is clear as it pertains to violations: Redress is in United States District or Federal Court whereby The Tribe has waived their sovereign immunity.

Additionally, In *National Farmers Union Ins. Co. v. Crow Tribe*, the Court clarified that Federal Courts have jurisdiction under 28 U.S.C. § 1331 to hear claims that a tribe has exceeded its authority.

And in *Griffith v. Choctaw Casino of Pocola*, Griffin, while attempting to enter an Indian casino, stepped into a flower bed and fell. She sued the casino for negligence in state court. The casino claimed it was immune from suit in state court, as a sovereign, and that Griffin would have to sue in Tribal Court. The court disagreed. It found that under the State-Tribal Gaming Act and The Model Tribal Gaming Compact, the tribe has granted limited consent to be sued by patrons in courts of competent jurisdiction. State district courts are courts of competent jurisdiction.

"Tribes are not sovereign at all. The United States government owns reservation land, not tribes. Tribal lands are federal territories, owned and controlled by the United States government, which has been put in reserve, similar to a military reserve, for the use of an Indian tribe. Based on our system of law, land is what sovereignty is based upon. Tribes are not "sovereign nations" because they have no sovereign control over any land holdings; there is no "nation."
Indian tribes rely almost entirely on federal government support to continue to exist, and on federal government permission to do almost anything. Tribes exist not as independent governments, but as an extension of the federal government.

Judge Randall Challenges the "myth of tribal sovereignty"

A growing number of citizens and judges in the state are taking a critical look at federal Indian policy, questioning its constitutionality, and analyzing its effect on Indian people.
Most notably, Judge R.A. (Jim) Randall of the Minnesota Court of Appeals wrote a thoughtful dissent about the issue in the case of Cohen v. Little Six, Inc. (1996 WL 56477 Minn. App.). The case involves Sylvia Cohen, an elderly casino customer,

who was seeking compensation for medical expenses after she broke her hip when the chair she was sitting on at Mystic Lake Casino broke underneath her. The tribe successfully argued that Mrs. Cohen cannot seek damages in state court because Mystic Lake Casino is on tribal trust status land, and is therefore on sovereign soil, and the tribe cannot be sued except in their own court which is set up under their own rules, which the tribe establishes and changes as it sees fit. Judge Randall disagrees, and writes:

"Reading. . . federal cases solemnly discussing Indian sovereignty, as if it were a viable issue, I feel as if I am in a time warp, reading Dred Scott v. Sandford or Plessy v. Ferguson, as if these cases were still the law of the land. ... Any argument that American Indians are different from the rest of us and therefore, are sovereign or quasi-sovereign, and reside on sovereign or foreign land, is put to rest by our actual treatment of them, and by the fact that in 1924 by the Citizenship Act, we conferred full U.S. citizenship on American Indians. We are individual citizens of a state that is part of a highly organized federation of states, comprising one indivisible sovereign, the United States of America. ...Thus, what is strange to me, is that despite the overwhelming, undeniable fact that Minnesota Indians are full Minnesotans and full U.S. citizens, we still persist in treating American Indians on some sort of parallel tract, some sort of "separate but equal" treatment which we denounced in 1954 with Brown v. Board of Education. ...What I am talking about is attempting to formalize a parallel Indian tribal court system purporting to have equal, and at times paramount, jurisdiction over state and federal courts. ... [There are] insoluble incongruities, ...[and] justice denying anomalies that abound when we attempt to interject a third parallel race-based court system alongside our two historical court systems. ...Why do we not have "African-American courts," "Hispanic courts," Chinese courts," or "Korean courts?" ... I suggest that if we tried to establish "racially based courts," the constitutional issue of the denial of due process issue, the race-related and race-baiting issues, and the ill-will and divisiveness that would follow would serve to overcome us as a country. ...Why here, are we tolerating segregating out the American Indians by race and allowing them to maintain a parallel court system and further, subjecting non-Indians to it? To me, this is red apartheid. I believe this entire issue of 'sovereignty' rests on true red apartheid. The American Indian will never be fully integrated into this state, nor into this country, until we recognize this 'dual citizenship' for what it really is, a pancake makeup cover-up of Plessy which allowed 'separate but equal' treatment."

Judge Randall continues:

"[W]e have the power, the right, and the precedent to allow Indian economic enterprises such as gambling casinos and other businesses to operate within the framework of existing state and federal law. Do we have the will? ...[T]his state, this country, has the power and the legal right to protect any and all parts of Indian

identity, culture, tribal assets, self-determination, religion/spirituality that needs to be protected, and yet do it all within the framework of treating American Indians like we treat ourselves, as normal citizens of this state, of this country. The real issue is, do we have the will? ...We should have learned by now that this duality in America is so intrinsically evil, so intrinsically wrong, so intrinsically doomed for failure that we must grit our teeth and work through it. ...For some reason, we continue to insist that American Indians can be the last holdout, a race that is not entitled to be brought in to the fold, can be left to shift for themselves as long as, from time to time, we pat them on the head like little children and call them sovereign. 'Sovereignty' is just one more indignity, one more outright lie that we continue to foist on American citizens, the American Indian."

Judge Randall goes on to say that the important goals of protecting Indian culture, spirituality, self-determination, freedom, and way of life can best be done within the state and federal systems, in which we protect these same freedoms for all citizens of all colors. He points out that the Amish, and other sub-groups with diverse cultures, thrive within our state and federal jurisdictions."[1]

1 **"Sovereignty and Civil Rights" by Julie Shortridge.**

ADDITIONAL ARGUMENTS

In Response To Defendants Motion to Dismiss, allow me to make the following, additional arguments:

A. RICO VIOLATIONS

Foxwoods violated Federal Rico Statutes 18 U.S.C. § 1341, 18 U.S.C. § 1343 and 18 U.S.C. § 1344. Whether it was willful or negligent, it is still criminal. There is no recourse to sue for these violations as they pertain to breaches of contract and duty of care in Tribal Court. This is an issue of Federal magnitude and of Fourteenth Amendment rights of individuals. Additionally, it would create a huge conflict of interest. Why would Tribal Court admit they broke the law that they don't feel governs them? Why would it be in their interest to do so?

While the decision in *Wright v Colville Tribal Enterprises Corp*, affirmed that Indian corporations owned by Tribal governments and created under Tribal law stand immune from suit absent express waiver of that immunity by the Tribe or U.S. Congress, Wright had no violations of Federal Rico Statutes. Furthermore, the minority dissent made clear two things: One, it notified tribes that they should consider promulgating and following laws that confer rights and opportunity for redress—tribal, state and federal judges increasingly "doubt the wisdom of perpetuating the (immunity) doctrine," suggesting to Congress "a need to abrogate tribal immunity. Secondly, once a dismissal motion is filed, the Tribe relinquishes control over the outcome of a lawsuit to the judicial system.

> ***"In Wright v Colville Tribal Enterprises, the fate of tribal immunity in Washington(and beyond) was left to States Appellate Courts. Tribes can no longer automatically assert sovereign immunity in tort litigation particularly cases arising out of tribal casinos. Furthermore Indian laws and codes are lacking and inherently unfair to non-Indians.***
>
> ***So-called "IRA tribes" must cautiously appreciate the risk that courts could construe the "sue and be sued" language in Section 17 charters as a tribal immunity waiver and thus make tribal treasuries vulnerable to court judgments arising from Section 17 business activities. The Ninth Circuit Court of Appeals recently held that such language did operate to waive a tribal housing authority's immunity, in Marceau v. Blackfeet Tribal Housing Authority, 455 F.3d 974 (9th Cir 2006).***
>
> ***Although the "sue and be sued" language at issue in Marceau reads slightly different than that in Section 17 charters, that case illustrates how courts can and will construe such federally imposed, boilerplate language to allow suit against tribal sovereigns. Accordingly, IRA tribes should reconsider doing business under their Section 17 corporate charter in favor of pursuing economic development activities as a Section 16 (or other) entity."2***

It seems wholly unfair for tribes to be able to advertise and market to lure and prey outside their sovereignty only to claim the "sanctity of immunity when they are called on the carpet for redress."

In *Krystal Energy Company v Navajo Nation*, the appellate court abrogated Indian sovereign immunity as it pertains to bankruptcy code. (see exhibit "B")

> *Dry Creek Lodge, Inc. v. Arapaho & Shoshone Tribes*[28] involved non-Indian property within a reservation that for 80 years had been served by a small access road across an allotment. The tribal council directed that the road be blocked to shut down a new development. Plaintiffs were refused access to the tribal court but obtained a temporary restraining order from the federal court. A jury entered a damages judgment against the tribe. Shortly thereafter the Supreme Court ruled in *Santa Clara Pueblo v. Martinez*[29] that the Indian Civil Rights Act of 1968 did not expressly waive tribal sovereign immunity from suit in federal court or create a substantive claim that could be asserted in federal court. Nevertheless, the court of appeals reversed the lower court's dismissal of the action on sovereign immunity grounds, holding "[t]here must exist a remedy for parties in the position of plaintiffs to have the dispute resolved in an orderly manner. To hold that they have access to no court is to hold that they have constitutional rights but have no remedy."[30] (In *Ramey Constr. Co. v. Apache Tribe*[31] the same court essentially limited *Dry Creek* to its facts. In *White v. Pueblo of San Juan*[32] the court distinguished *Dry Creek*

because the plaintiff in *White* had not sought a remedy in a tribal forum open to him. *Dry Creek* has been rejected in other federal circuits as well.)3

B. THE ELEVENTH AND FOURTEENTH AMENDMENTS

Typically Judges who are asked to dismiss a suit against a tribal government or entity are primarily concerned about whether the tribal government would otherwise afford the Plaintiff some form of due process of law—i.e., "constitutional rights to access to the courts and to trial by jury."

The Eleventh Amendment protects sovereign states and governments from being sued. However in *Ex Parte Young,* the Supreme Court allowed states sovereign immunity to be waived if they acted unconstitutionally. By denying me an opportunity to argue this case before an impartial jury of my peers, where the Defendant has been alleged to have violated Federal Law, it would be a violation of my due process rights.

Ex parte Young allows Federal Courts to enjoin the enforcement of unconstitutional state (or federal) statutes on the theory that "immunity does not extend to a person who acts for the state, but [who] acts unconstitutionally, because the state is powerless to authorize the person to act in violation of the Constitution." Althouse, *Tapping the State Court Resource*, 44 Vand. L. Rev. 953, 973 (1991).

"The Eleventh Amendment, which was the first Constitutional amendment after the adoption of the Bill of Rights, was adopted following the Supreme Court's ruling in *Chisholm v. Georgia*, 2 U.S. 419 (1793). In *Chisholm*, the Court ruled that federal courts had the authority to hear cases in law and equity brought by private citizens against states and that states did not enjoy sovereign immunity from suits made by citizens of other states in federal court. Thus, the amendment clarified Article III, Section 2 of the Constitution, which gave diversity jurisdiction to the judiciary to hear cases "between a state and citizens of another state.

2 **Gabriel Galanda from the Indian Gaming Regulatory Commission**
3 **TurtleTalk WorldPress**

The amendment's text does not mention suits brought against a state by its *own* citizens. However, in *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court ruled that the amendment reflects a broader principle of sovereign immunity. As Justice Anthony Kennedy, writing for a five Justice majority, stated in *Alden v. Maine*, 527 U.S. 706 (1999):

[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself....Nor can we conclude that the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers.[1]

Writing for a four-Justice dissent in *Alden*, Justice David Souter said the states surrendered their sovereign immunity when they ratified the Constitution. The dissenting justices read the amendment's text as reflecting a narrow form of sovereign immunity that limited only the diversity jurisdiction of the federal courts. They concluded that the states are not insulated from suits by individuals by either the Eleventh Amendment in particular or the Constitution in general.[2]

Although the Eleventh Amendment immunizes states from suit for money damages or equitable relief without their consent, in *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court ruled that federal courts may enjoin state officials from violating federal law. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Supreme Court ruled that Congress may abrogate state immunity from suit under Section 5 of the Fourteenth Amendment. In *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), the Court ruled the Congress could do the same regarding bankruptcy cases by way of Article I, Section 8, Clause 4 of the Constitution. Also, in *Lapides v. Board of Regents of Univ. System of Ga.*, 535 U.S. 613 (2002), the Supreme Court ruled that a state voluntarily waives the Eleventh Amendment when it invokes a federal court's removal jurisdiction.

Under the abrogation doctrine, while Congress cannot use its Article I powers to subject states to lawsuits in either federal courts, *Seminole Tribe v. Florida*, or *a fortiori* its own courts, *Alden*, supra, it *can* abrogate a state's sovereign immunity pursuant to the powers granted to it by §5 of the Fourteenth Amendment, and thus subject them to lawsuits. *Seminole*, supra; *Fitzpatrick v. Bitzer*. However:

- The court requires "a clear legislative statement" of intent to abrogate sovereignty, *Blatchford*, supra; *Seminole*, supra.
- Because Congress' power under §5 is only "the power 'to enforce,' not the power to determine what constitutes a constitutional violation," for the abrogation to be valid, the statute must be remedial or protective of a right protected by the Fourteenth Amendment and "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," *City of Boerne v. Flores*. But "[t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch." *Kimel v. Florida Board of Regents*. Simply put: "Under the *City of Boerne* doctrine, courts must ask whether a statutory remedy has 'congruence and proportionality' to violations of Section 1 rights, as those rights are defined by courts."

Althouse, *Vanguard States, Laggard States: Federalism & Constitutional Rights*, 152 U. Pa. L. Rev. 1745, 1780 (2004)

- States can expressly waive sovereign immunity, but do not do so implicitly simply by participating in a commercial enterprise where Congress subjects market participants to lawsuits. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*."4

Courts and Federal Judges have always held the power of judicial review—I only have to cite *Marbury v Madison* to confirm this. And the Defendant avails itself of the United States Court System as often as possible to remedy issues. Again, section from State/Tribal Compact:

> (c) Default provisions for appeal of State administrative actions. Whenever in this Compact it is provided that decisions of State administrative actions may be appealed to the Superior Court of Connecticut in the manner provided for appeal of agency actions subject to judicial review, in the event that such Court lacks jurisdiction to entertain such appeal, then the action shall be subject to appeal to an arbitrator designated in accordance with the procedures of the American Arbitration Association. The procedures for such arbitration shall be governed by the rules of the American Arbitration Association. The arbitration shall be decided in accordance with the provisions of this Compact and, to the extent consistent with such provisions, in accordance with the principles generally applicable under Connecticut law to review of final administrative decisions subject to judicial review.

Defendant's sovereignty is abrogated every time they bring suit in United States District Court or Connecticut Court.

4 **Morisset, Schlosser & Jozwiak**

C. **DRAM SHOP CASE LAW**

Plaintiff argues that Congress abrogated tribal immunity from suits "dramshop" liability when it enacted 18 USC 1161. States regulate alcohol on Indian property as specified in (exhibit a) compact. Therefore Indian businesses that serve alcohol are now responsible for the repercussions of knowingly serving alcohol to patrons and those patrons getting into trouble outside the reservation. And uniformly Indian Tribes have increased insurance liability limits knowing Plaintiffs in several states have argued this issue, relying on the statute and the Supreme Court's opinion in *Rice v. Rehner*.

Plaintiff argues that there is no difference between serving alcohol to intoxicated patrons and knowingly allowing, enticing, promoting and illegally conspiring to have a patron gamble that has a problem or has asked to be self- excluded. Casino's, like alcohol establishments, are responsible----legally.

In *Bittle v Bahe*, the Oklahoma Supreme Court ruled and held that 18 USC 1161 waives tribal immunity from suit, "the dram shop liability" and confers "conformity with all liquor laws with both the state in which such transactions occur..."

> "Turning to the federal statute, 18 U.S.C. § 1161, *Rice v. Rehner* reviewed the legislative history and found congressional intent 1) to remove the discriminatory federal prohibition against intoxicating liquor in Indian country, 2) to have state laws of their own force govern tribal liquor transactions, and 3) to require Indians to comply with state liquor laws in every regard. 463 U.S. at 726-727, 103 S.Ct. at 3299-3300. *Rice v. Rehner* mentioned that in official and unofficial reports to the House of Representatives, the Department of Interior stated that the "federal prohibition would be lifted only if liquor 'transactions are in conformity with the ordinances of the tribe concerned and are not contrary to State law.'" 463 U.S. at 727, 103 S.Ct. at 3300. Congress, however, did not use the Department's language "not contrary to state law," instead Congress used the language "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." *Rice v. Rehner* referred to a 1954 administrative opinion of the Solicitor of the Interior assuming that § 1161 would result in state prosecutions and noted the Department of Interior changed its opinion in 1971. 463 U.S. at 730, n. 13, 103 S.Ct. at 3301, n.13. The *Rice v. Rehner* dissent relied on the 1971 opinion that the intent of § 1161 was merely to require the use of state liquor laws as the standard of measurement to define lawful and unlawful activity on the reservation. Rejecting the 1971 opinion, *Rice v. Rehner* said:

It is clear then that Congress viewed § 1161 as abolishing federal prohibition, and as legalizing Indian liquor transactions as long as those transactions conformed both with tribal ordinance and state law. It is also clear that Congress contemplated that its absolute but not exclusive power to regulate Indian liquor transactions would be delegated to the tribes themselves, and to the States, which historically shared concurrent jurisdiction with the federal government in this area. Early administrative practice and our prior decision in *United States v. Mazurie, supra* [419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975)], confirm this understanding of § 1161." 5

D. ARBITRATION

In *C & L Enterprises, Inc. v. Citizen Band, Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001)*, the Supreme Court of the United States held that sovereigns are not immune under the Federal Arbitration Act. Since arbitration is a matter of contract between the parties, agreeing to participate in arbitration constitutes consent to be subject to the arbitrator's jurisdiction, thus constituting a voluntary waiver of immunity

5 **CASELAW/FINDLAW**

CONCLUSION

If we are to allow tribes to behave in vacuums where their profit motive is king, even as they violate Federal Law and State Compacts while usurping United States citizens' individual rights to due process, then we are allowing a monster to go unchecked.

This is not a question of sovereignty. Defendant affirmed as much in their Memorandum to Dismiss. The Defendant abrogated their sovereign immunity when they violated their Compact with the State of Connecticut.

As stated earlier in this brief, when deciding a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court must accept as true all factual allegations in the complaint and must draw inferences in a light most favorable to the plaintiff.

Judge Randall has said this far better than me:

"**"Reading. . . federal cases solemnly discussing Indian sovereignty, as if it were a viable issue, I feel as if I am in a time warp, reading Dred Scott v. Sandford or Plessy v. Ferguson, as if these cases were still the law of the land. ... Any argument that American Indians are different from the rest of us and therefore, are sovereign or quasi-sovereign, and reside on sovereign or foreign land, is put to rest by our actual treatment of them, and by the fact that in 1924 by the Citizenship Act, we conferred full U.S. citizenship on American Indians. We are individual citizens of a state that is part of a highly organized federation of states, comprising one indivisible sovereign, the United States of America."**

Defendant is using their sovereignty as some god given inalienable right to do

illegal things under the cover of some ill-defined, ill conceived, ill-enforced, Code of Indian behavior. It's like me saying, "I am sovereign under the eyes of the Land and of God and I am going to set up my own Nation and Court and casino. Would this allow me to commit illegal acts that reasonable men and women, excluding the Defendant, agree are against the moral law, the United States law, and God's law?

Defendant can't have it both ways. It can't lob bombs, advertise, send mass mailings to U.S. citizens outside their territory and especially to prey on those that they know are the weakest and most vulnerable members of society and who have asked to be excluded from these mailings, and then fall back on the sanctity of sovereignty. It's a double edge sword and it should not be allowed to cut both ways. The Compact with the State of Connecticut was drafted for these instances where Defendant violates State and Federal Law and by doing so, clearly abrogates their intended immunity. Why else would oversight be with the Gaming Commission, the Licensing Board, The Liquor Board and State Police? These are services typically rendered for United States Citizens who pay taxes.

Venue is proper in this judicial district, pursuant to 28 U.S.C. § 1391(b) and (c), because Plaintiff resides and is a resident of The United States, and has no other recourse but to bring suit in this court. All or a substantial part of the events or omissions giving rise to Plaintiff's claims occurred adjoining this judicial district, including but not limited to, mail delivered within and outside this District but wholly within United States Territory and therefore, and as elaborated further in item 5, this is the correct venue.

As such, the Court has jurisdiction over the subject matter of Count I of this

proceeding pursuant to 28 U.S.C. § 1331. The Court has jurisdiction over the subject matter of the remaining Counts of this action pursuant to 28 U.S.C. § 1367, as the claims set forth in each of those Counts are so related to the claims set forth in Count I that they form part of the same case or controversy under Article III of the United States Constitution.

WHEREFORE, Plaintiff, Bruce E. Tassone, represented pro see, requests Defendants Motion to Dismiss be denied, Discovery to Begin and allow Trial to set forth fact and judgment.

Respectfully submitted,

Bruce Tassone, Plaintiff

Post Office Box 433
North Adams, Ma 01247
Phone: (413) 664-9420

DATED this 5th day of March, 2012.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Plaintiff's Response in Opposition to Defendant's Motion to Dismiss For Lack of Jurisdiction, dated March 6th, 2012, was this day served upon Plaintiff's attorney, by mailing same, first class postage prepaid, to:

Cassie N. Jameson

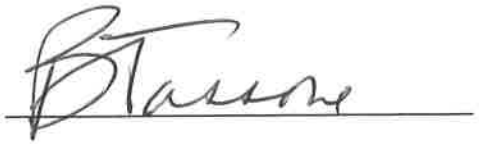
Brown Jacobson, P.C.

PO Box 391

Norwich, Ct. 06360

Signed under the pains and penalties of perjury.

Dated March 6th, 2012



Bruce Tassone, Defendant