IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DOUGLAS J. LUCKERMAN

v. C.A. No. 13-185-S

NARRAGANSETT INDIAN TRIBE

MEMORANDUM IN SUPPORT OF MOTION TO CORRECT OR MODIFY THE RECORD PURUANT TO APPELLATE RULE 10(e)

Plaintiff Douglas J. Luckerman submits this memorandum in support of his Motion to Correct or Modify the Record Pursuant to Appellate Rule 10(e).

I – Introduction

This Motion is grounded in the principle that the correctness of a district court's decision is not evaluated on the basis of evidentiary material never presented to the court prior to the entry of its ruling. Equally applicable here is the principle that an appellee should not be required to address evidentiary facts on appeal which he or she did not have an opportunity to address in the district court.

Both of these principles are jeopardized by the Tribe's behavior here. The Tribe's last-minute packing of the record with evidentiary material never presented to this Court prior to its decisions is improper and unfair, and, absent correction or modification of the record, it puts Plaintiff in the position of having to address this material for the first time on appeal.

II – Relevant Background

In the relatively short life of this case, this Court has been required on two occasions to address the Tribe's contention that it did not waive its sovereign immunity in its contractual dealings with Plaintiff. The Court did so for the first time in response to the Tribe's Motion to Dismiss filed on May 13, 2013 (ECF No. 8). On August 29, 2013, the Court issued its Opinion and Order rejecting the Tribe's contentions respecting waiver of sovereign immunity (ECF No. 16). Later, on September 30, 2013, the Tribe filed its Motion for Reconsideration of the Court's August 29 ruling (ECF No. 18). On January 7, 2014, the Court issued it Opinion and Order again rejecting the Tribe's contention that it had not waived its sovereign immunity in its contractual relationships with Plaintiff (ECF No. 22).

Ten days later, on January 17, 2014, the Tribe filed a document entitled "Supplemental Exhibit in Support of Motion for Reconsideration" ("Supplemental Exhibit") (ECF No. 23).[1] The Supplemental Exhibit adds to the record a purported Tribal Council Resolution of January 25, 2005, relating to waivers of the Tribe's sovereign immunity. The Supplemental Exhibit comes with no explanation of any kind; it gives no indication as to why it was not presented earlier; and it makes no request for relief directed to this Court.[2] Seventeen minutes after filing the Supplemental Exhibit, the Tribe filed its Notice of Appeal of "all legal and factual issues and findings arising from the District Court's Opinion and Orders of August 29, 2013 and January 7, 2014" (ECF No. 24).[3]

III – Argument

A – The record on appeal consists of material before the district court at the time of its

[1] Notice of Electronic Filing showing time of filing of Supplemental Exhibit is attached as Exhibit 1.
[2] On January 22, 2014, after this Motion and Memorandum had been prepared, the undersigned received by mail a copy of the Tribe's counsel's letter to the Court dated January 17, 2014. The letter indicates, among other things, that the Supplemental Exhibit was "discovered" sometime after January 7, 2014.
[3] Notice of Electronic Filing showing time of filing of Notice of Appeal is attached as Exhibit 2.

decision. Subsequent, unilateral additions to the district court file are not part of the record on appeal and should be stricken from it.

Rule 10(a) of the Federal Rules of Appellate Procedure identifies the components of the record on appeal:

> (a) COMPOSITION OF THE RECORD ON APPEAL. The following items constitute the record on appeal:
> (1) the original papers and exhibits filed in the district court;
> (2) the transcript of proceedings, if any; and
> (3) a certified copy of the docket entries prepared by the district clerk.

As a "paper[] filed in the district court," the Supplemental Exhibit becomes part of the record on appeal unless this Court acts to address the matter. Appellate Rule 10(e) authorizes such corrective action and requires the party seeking the correction to initially make application for the same in the district court. F.R. APP. P. 10(e)(1) and (2); United States v. Pagan-Ferrer, 736 F.3d 573, 582-583 (1st Cir. 2013) ("Significantly, the rule requires that the district court settle the matter, not that it hold an evidentiary hearing.").

Record corrections, however, whether by way of addition or deletion, are intended to conform the record to the material presented to the district court. Rule 10(e) is not a device for supplementing the record or otherwise adding material never presented to the district court:

> Under Rule 10(e) of the Federal Rules of Appellate Procedure the trial court is authorized to correct the record on appeal when a dispute arises as to whether the record truly disclosed what occurred in the trial court. Thus, Moore's Federal Practice recommends that a party should seek correction of the record in the district court when there are papers present in the file which "were not in fact presented to the district court." See 9 Moore's Federal Practice P 210.08(1) at 10-47 n. 6, citing Belt v. Holton, 197 F.2d 579 (D.C. Cir. 1952); United States v. Brookhaven, 134 F.2d 442, 447 (5th Cir. 1943). This procedure establishes "an appropriate device for having the district court declare that certain matters were not before it." 9 Moore's Federal Practice P 210.08(1) at 10-47 n. 6.

In re Saco Local Development Corp., 13 B.R. 226, 228 (Bankr. D. Me. 1981) (brief filed with the Bankruptcy Appellate Panel and deposition transcripts not filed with the bankruptcy court until more than one month after entry of the order appealed from could not be part of the record on appeal) (emphasis added).

Other First Circuit cases are to the same effect. In United States v. Rivera-Rosario, 300 F.3d 1, 9 (1st Cir. 2002), for example, the court ruled that an English translation of audiotapes presented to the jury in Spanish could not be added to the record on appeal:

> The trial judge never reviewed the English translation that the government now seeks to introduce; the jury neither heard nor read it; and the translation was never marked as an exhibit or filed in the District Court.

Id. at 9. Similarly, in Belber v. Lipson, 905 F.2d 549 (1st Cir. 1990), the court rejected an effort to add a deposition transcript to the record:

> [A] 10(e) motion is designed to only supplement the record on appeal so that it accurately reflects what occurred before the district court. It is not a procedure for putting additional evidence, no matter how relevant, before the court of appeals that was not before the district court.

Id. at 551 n. 1. Finally, in Romero-Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981), the court declined to consider a clearly relevant biological study received by the Navy after the entry of judgment in the district court, finding that to do otherwise would be contrary to Appellate Rule 10(a), and would

> preclude the district court from considering evidence that both this court, and Congress, deem essential to a complete decision of the issue. Moreover, the [plaintiff] Commonwealth should have the opportunity to challenge the adequacy of the biological opinion, both in terms of its factual basis and its recommendations.

Id. at 858.

B – The Supplemental Exhibit is not properly part of the record on appeal because it was not presented to this Court prior to the orders from which the Tribe appeals, and Plaintiff never had an opportunity to address it.

The Supplemental Exhibit was filed on January 17, 2014, more than four months after this Court's Opinion and Order of August 29, 2013, denying the Tribe's Motion to Dismiss, and ten days after the Court's Opinion and Order of January 7, 2014, denying the Tribe's Motion for Reconsideration. As a consequence, the Supplemental Exhibit was not before the Court and was not considered by the Court. Plaintiff received the Supplemental Exhibit at precisely the same time, i.e., when it was filed with the Court on January 17, 2014. As a consequence, he too never had an opportunity to review or comment on it before the Court entered its orders of August 29, 2013, and January 17, 2014.

III – Conclusion

Despite its post-decision filing by the Tribe, the Supplemental Exhibit is not properly part of the record in this case and should not be part of the record on appeal. Accordingly, Plaintiff urges the Court to correct the record by striking the Supplemental Exhibit.

Respectfully submitted,

Douglas J. Luckerman
By his attorneys,

/s/ Anthony F. Muri
Anthony F. Muri (R.I. Bar No. 539)
MURI ASSOCIATES LLC
10 Weybosset Street
Providence, RI 02903
(401) 421-7300 Voice
(401) 421-7352 Fax

amuri@murilaw.com

/s/ Albert L. Farrah, Jr.
Albert L. Farrah, Jr. (*pro hac vice*)
Farrah and Farrah
Two Elm Square
Andover, MA 01810
(617) 694 1549

alf@farrah-law.com

CERTIFICATE OF SERVICE

In accordance with the provisions of LR Cv 5.1(a) of the Local Rules of this Court, I hereby certify that this Memorandum was filed electronically, that it available for viewing and downloading from the ECF system, and that each of the parties was served by means of the ECF system.

/s/ Anthony F. Muri
Anthony F. Muri