

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF RHODE ISLAND**

**DOUGLAS J. LUCKERMAN**  
**Plaintiff**

**v.**

**CA 13-185 S**

**NARRAGANSETT INDIAN TRIBE**  
**Defendant**

**NARRAGANSETT INDIAN TRIBE'S  
MEMORANDUM IN RESPONSE TO DEFENDANT'S  
MOTION TO CORRECT OR MODIFY THE RECORD**

**Brief Travel of the Case**

The Narragansett Indian Tribe (the Tribe) has appealed a denial of its Motion to Dismiss a contract claim brought by the Defendant Douglas J. Luckerman (Luckerman) on the basis that the Tribe had not waived its inherent right of tribal sovereign immunity. The District Court entered its Opinion and Order on August 29, 2013, denying the motion to which the Tribe filed a timely Motion for Reconsideration on September 30, 2013. The Tribe also filed at that time a Motion to Extend Time in which it could file an appeal. The Motion to Extend Time was granted extending the period of appeal for a period of ten (10) days after the District Court ruled on the Motion for Reconsideration. The Court denied the Motion for Reconsideration on January 7, 2014.

On or about January 15, 2014, a Tribal Council Resolution of January 5, 2005, was discovered which sets forth the procedure by which the Tribe could waive its sovereign immunity from suit. [Exhibit 1]. The Tribal Council Resolution was filed with the District Court on January 17, 2014, the date on which the Tribe had to file its appeal with the Court of Appeals.

Luckerman filed in the District Court his Motion to Correct or Modify the Record on January 22, 2014. There is no separate docket entry in the First Circuit Court record but it is believed the Motion was transmitted to the First Circuit by the District Court by way of a correspondence dated January 24, 2014 and docketed on January 27, 2014, as *Supplemental Record*.

### **Argument**

In general, Rule 10(e) of the Federal Rules of Appellate Procedure permits the District Court to amend or modify its record on appeal. *See, United States v. Pagan-Ferrer*, 736 F.3d 573 (1<sup>st</sup> Cir. 2013). While the appellate court in extraordinary circumstances has “the inherent equitable power to allow supplementation of the appellate record if it is in the interest of justice.” *CSX Transportation v. Garden City*, 235 F.3d 1325, 1330 (11<sup>th</sup> Cir. 2000).

The last minute discovery of the Tribal Council Resolution, the fact that the Tribe’s Motion for Reconsideration had already been denied and the pending appellate deadline where all relevant factors in the filing of the Supplemental Record. Counsel erred by filing prematurely its Supplemental Exhibit in Support of Motion for Reconsideration without also filing a Rule 10 (e) Motion to Supplement the Record. However, the clear intent is the same as filing a Rule 10(e) Motion, to wit, to modify the record for appeal.

The Tribe’s respectfully requests that its response herein be considered as a Motion to Supplement the Record. The First Circuit recently in *Pagan-Ferrer*, held that a “motion to supplement the record must be denied where appellant knew of but failed to introduce the relevant evidence at trial . . . “ Unlike the facts in *Pagan-Ferrer*, 736 F.3d

\_\_\_\_\_, the Tribal Counsel Resolution at issue here was neither known to exist nor available for submission to the District Court prior to the January 7, 2014, denial of the Tribe's Motion for Reconsideration.

While the Tribal Council Resolution itself was not available to the Court or the parties, the issue of how the Tribe's immunity could be waived was thoroughly addressed and the Tribal Council Resolution is consistent with the Tribe position that a valid waiver required explicit action by the Tribal Government, which is comprised of the Chief Sachem and the Tribal Council.

### **Conclusion**

The Tribe herein respectfully requests that Defendant's Objection be denied and that Plaintiff's Supplemental Exhibit in Support of Motion for Reconsideration be deemed as part of the record to the Tribe's pending appeal.

Respectfully submitted,

NARRAGANSETT INDIAN TRIBE

/s/ John F. Killoy, Jr.

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### **CERTIFICATION**

I hereby certify that I filed the within on the 10th day of February 2014, and that notice will be sent via the ECF system Notice of Electronic Filing (NEF) to the above-named counsel who are registered participants identified on the Mailing Information for Case No. 13-185-S.

/s/ John F. Killoy, Jr.

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John F. Killoy, Jr., Esq. (#3761)