UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHEUNG YIN SUN, LONG MEI FANG, and ZONG YANG LI, *plaintiffs,* V. THE MASHANTUCKET PEQUOT GAMING ENTERPRISE, DBA FOXWOODS RESORTS CASINO, ANNE CHEN, JEFF DeCLERCK, EDWARD GASSER, GEORGE HENNINGSEN, FRANK LEONE, DETECTIVE MICHAEL ROBINSON, MICHAEL SANTAGATA, CHESTER SICARD, Individually, *defendants.*	:	NO. 3:14-CV-01098-JCH JANUARY 22, 2015

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

This is a civil rights action filed pursuant to 42 U.S.C. § 1983 by the plaintiffs, Cheung Yin Sun, Long Mei Fang and Zong Yang Li against the defendants, the Mashantucket Pequot Gaming Enterprise, DBA Foxwoods Resort Casino, its officers and employees, Anne Chen, Jeff DeClerck, Edward Gasser, George Henningsen, Frank Leone, Michael Santagata and Chester Sicard, and Connecticut State Police Detective Michael Robinson. The plaintiff claims that the defendants are liable for tort-like causes of action for fraud, conversion, false imprisonment, false arrest, and governmental taking of their private property without due process of law in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution.

The defendant, Connecticut State Police Detective Michael Robinson, seeks judgment on the pleadings in this lawsuit (1) as a result of the lack of personal

jurisdiction over the defendants as a result of insufficient service of process upon the them, (2) failure to state a claim upon which relief can be granted against the defendant Michael Robinson because the doctrine of collateral estoppel, or issue preclusion, with regard to the ownership of the gambling chips and the financial interests they represent prevents the plaintiffs from re-litigating a question which has already been fully and fairly litigated and decided against them, and (3) failure to state a claim against the defendant Michael Robinson for violation of the plaintiffs' rights to due process under the Fifth and Fourteenth Amendments.

STANDARD OF REVIEW

A case is properly dismissed for lack of jurisdiction under Federal Rules of Civil Procedure, Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. The plaintiff, as the party asserting jurisdiction, has the burden of establishing by a preponderance of the evidence that such jurisdiction exists. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000); *Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996). In analyzing a motion to dismiss pursuant to Rule 12(b)(1), the Court must "construe jurisdictional allegations liberally and take as true uncontroverted factual allegations." *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994). However, "argumentative inferences favorable to the party asserting jurisdiction should not be drawn." *Atlantic Mutual Ins. Co. v. Balfour MacLaine Int'l Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992); *see also Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994).

In ruling on a motion brought under Federal Rules of Civil Procedure, Rule 12(c), a court will apply the same standards as applicable for motions to dismiss under F.R.C.P., Rule 12(b)(6). *Hayden v. Paterson,* 593 F.3d 150, 160 (2d Cir. 2010). When ruling on a motion to dismiss under Federal Rules of Civil Procedure, Rule 12(b)(6), the court accepts the material facts alleged in the complaint as true and draws all reasonable inferences in favor of the plaintiff and against the defendants. *See Chance v. Armstrong*, 143 F.3d 698, 701 (2d Cir. 1998); *Cohen v. Koenig*, 25 F.3d 1168, 1171-72 (2d Cir. 1994); *Atlantic Mutual Ins. Co. v. Balfour Maclaine Int'l Ltd.*, *supra.* However, legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness. *Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck*, 463 F.2d 620 (2d Cir. 1972), *cert. denied*, 410 U.S. 944 (1973). The court's function on a motion to dismiss is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985).

In deciding a motion to dismiss, or in this case, a motion for judgment on the pleadings, the Court may consider: (1) facts alleged in the complaint and documents attached to it or incorporated in it by reference, (2) documents "integral" to the complaint and relied upon in it, even if not attached or incorporated by reference, (3) documents or information contained in defendant's motion papers if plaintiff has knowledge or possession of the material and relied on it in framing the complaint, (4) public disclosure documents required by law to be, and that have been, filed with government agencies,

and (5) facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence." *Lax v. 29 Woodmere Boulevard Owners, Inc.*, 812 Fed.Supp.2d 228, 233 (E.D.N.Y. 2011) (internal citations and quotations omitted). *See also, Ensign-Bickford Co. v. ICI Explosives USA, Inc.*, 817 F.Supp. 1018, 1026 (D.Conn. 1993) (Where offered, affidavits and other evidence submitted by the parties, either in support of or in opposition to a motion to dismiss under Federal Rules of Civil Procedure, Rule 12(b), may be considered by the Court); Federal Rules of Civil Procedure, Rule 10(c) (A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes).

The standard of pleading in a federal claim brought pursuant to 42 U.S.C. § 1983 was clarified by the U.S. Supreme Court in *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). Clarifying its previous decision in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), the Court succinctly set forth the following:

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. As the Court held in *Twombly*, the pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or 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.
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but

> it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.
>
> Two working principles underlie our decision in *Twombly.* First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation. Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not shown -- that the pleader is entitled to relief.

Ashcroft v. Iqbal, 556 U.S. at 667-678. (Internal citations, quotations and brackets omitted).

As noted by the court, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations, *id.,* 556 U.S. at 679, and that, "[o]ur decision in *Twombly* expounded the pleading standard for all civil actions ...." *Iqbal, supra,* 556 U.S. at 684.

BACKGROUND

This lawsuit stems from a December 24, 2011, incident in which the plaintiffs visited the Mashantucket Pequot Gaming Enterprises, Foxwoods Resorts Casino in Ledyard, Connecticut for the purpose of engaging in "high-stakes" gambling. The three plaintiffs put up a total of approximately $1.6 million in front money in order to play Mini-Baccarat. *See* Plaintiffs' Amended Complaint filed August 21, 2014, ¶ 11. During the course of their play, one or more of the plaintiffs requested, and were granted, permission to engage in a technique called "edge-sorting" in which certain cards were turned around so that their values could be identified by astute players, even while face-down and after being shuffled, by noting the variances in the edge designs on the backs of the cards, resulting in shifting the betting advantage in favor of the individual players. Using this technique, the plaintiffs won approximately $1.148 million in chips during a single evening of play. *See* Amended Complaint, ¶ 13. When the plaintiffs attempted to redeem their chips, Foxwoods Resorts Casino management accused them of cheating and refused to redeem their winnings. *Id.* In order to resolve the dispute, the plaintiffs agreed with the Foxwoods Resorts Casino to put their chips in escrow pending a final decision by the Mashantucket Pequot Tribal Nation Gaming Commission[1] (MPTNGC)

[1] The Mashantucket Pequot Tribal Nation has an established governmental agency called the Mashantucket Pequot Gaming Commission (the "Gaming Commission") solely devoted to protecting the integrity of the gaming operations by enforcing the Standards of Operation and Management which are based on industry standards and federal minimum internal controls established by the National Indian Gaming

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regarding the disposition of the winnings. *See* Plaintiffs' Amended Complaint filed August 21, 2014, Escrow Agreement at Exhibit D.

In the Escrow Agreement dated December 29, 2011, the plaintiffs conceded that the Mashantucket Pequot Tribal Nation Gaming Commission had jurisdiction and authority over the dispute, and that the decision of the MPTNGC would be final and non-appealable. *Id.,* at ¶¶ 3 and 4. The Connecticut State Police defendant, Detective Michael Robinson, was not a party to the Escrow Agreement. His only involvement in the case as a member of the Connecticut State Police Casino Unit, was to investigate the allegation of cheating brought to him by Foxwoods Resorts Casino Surveillance Senior Investigator Jeff DeClerck. Learning that the Casino had, in fact, "authorized and changed the proper Baccarat table procedures to acknowledge good customer service with their high-rolling patrons," Detective Robinson declined to seize the contested gambling chips or to arrest the plaintiffs. Detective Robinson closed his investigation noting "No Criminal Aspect," allowing the Casino to attempt to bring the

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Commission (NIGC). The Gaming Commission is made up of six members, led by a Chairman and five commissioners, and includes a local team of more than 30 full-time personnel. All members of the commission are appointed to staggered three-year terms by the Tribal Council. The Gaming Commission has the authority to investigate any aspect of the gaming operations to protect the public interest in the integrity of the gaming activities and to prevent improper or unlawful conduct, and further has the authority to issue fines, and deny, suspend or revoke employee licenses as appropriate. *See* the *Mashantucket (Western) Pequot Nation – Tribal Gaming Commission,* available online at http://www.mashantucket.com/gamingcommission.aspx, last visited on January 20, 2015.

whole matter to a civil conclusion. Plaintiffs' Amended Complaint filed August 21, 2014, Connecticut State Police Investigative Report 11-00692262 dated December 29, 2011 at Exhibit C.

Thereafter, Chester Sicard, MPTNGC Director of Inspections Division, investigated the incident and completed a report which concluded that the plaintiffs had violated provisions of the MPTNGC Standards of Operation and Management concerning the rules of table games at the Foxwoods Resorts Casino by altering their wagers after cards had been dealt.[2] Plaintiffs' Amended Complaint filed August 21, 2014, MPTNGC Inspection Division Director Sicard's investigative report and conclusions dated February 13, 2012 at Exhibit B. Director Sicard concluded that, as a result of their violation of the rules and regulations governing gaming at the Mashantucket Pequot Gaming Enterprise (MPGE), they were "not entitled to the chips that were 'won' while wagering at the game of Mini Baccarat," and that, "[a]s such, the chips are the property of the MPGE and are to be returned to the MPGE within ten

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[2] MPTNGC Standards of Operation and Management (SOM) A-23.02, R12, 02/18/10; Section 4 Gaming Pits and Tables; Subsection 4.6 Wagers provides:

> (e) Once a wager has been made and action has taken place with respect to that wager, a patron shall not handle, remove, or alter the wager until a decision has been rendered and implemented with respect to that wager, unless otherwise stated in the Game-Specific SOM.

See Plaintiffs' Amended Complaint filed August 21, 2014, MPTNGC Inspection Division Director Sicard's investigative report and conclusions dated February 13, 2012 at Exhibit B.

business days." *Id.* In his report, Director Sicard indicated that, if the plaintiffs disagreed with his decision, they were entitled to request an Administrative Hearing on the matter from the Mashantucket Pequot Tribal Nation Gaming Commission within ten business days.

The plaintiffs filed a timely administrative appeal from Director Sicard's decision, and were granted a *de novo* hearing before the full Commission. *See* Notice of Decision, *In the Matter of Appeal Hearing AD 12-09,* Mashantucket Pequot Tribal Nation Gaming Commission (August 6, 2012), p. 2, (appended to the Plaintiffs' Amended Complaint filed August 21, 2014 at Exhibit B. The July 10, 2012 hearing encompassed three days of testimony from four witnesses, as well as the introduction of various documentary and video evidence, concluding with closing arguments on July 13, 2012. The opinion of the Gaming Commission included detailed findings of fact outlining the specific nature of the card play during the relevant evening of gambling, including that the plaintiffs requested modification of table rules and practices, professing the reasons therefor as based on their "superstitions," and that table personnel and floor supervisors allowed the modifications to the game rules requested by the plaintiffs, including edge-sorting the cards and "past-posting" their wagers,[3] as routine "concessions" granted to

[3] "Past-posting" involves the alteration of wagers after the cards have been dealt. The practice includes changing the side of the bet from/to the "Banker" or "Player," increasing the original bet, or making initial wagers after the cards are dealt face-down, but before their values are revealed. *See* Notice of Decision, *In the Matter of Appeal Hearing AD 12-09,* Mashantucket Pequot Tribal Nation Gaming Commission (August 6,

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high-roller patrons (apparently without knowledge of the plaintiffs' true reason underlying the requested modifications) in the commonly held belief that baccarat was a pure game of chance and that, "all things being equal, systems do not generally work with baccarat." *Notice of Decision,* Appendix B to the Amended Complaint, p. 13, n. 14. The Commission decision noted that the effect of the concessions requested by the plaintiffs and granted by MPGE staff was to alter the normal 1%± house edge to a 20%± edge in favor of the players. *Id.,* at p. 13. Finding that the plaintiffs engaged in "improper and unlawful conduct," and citing Title 3 (Gaming), §§ 7(b)(2) and 7(b)(14), of the Mashantucket Pequot Tribal Code,[4] the Mashantucket Pequot Tribal Gaming

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2012), p. 2, (appended to the Plaintiffs' Amended Complaint filed August 21, 2014 at Exhibit B, pp. 6-7; and Note 2, *supra*.

[4] Title 3, Section 7 of the Mashantucket Pequot Tribal Code, entitled "Tribal Gaming Commission," provides, in relevant part, as follows:

> b. Powers and duties of Commission. The Commission shall have the following powers and duties:
>
> (2) The Commission may on its own initiative investigate any aspect of the operations of the Enterprise in order to protect the public interest in the integrity of such gaming activities and to prevent improper or unlawful conduct in the course of such gaming activities, and shall investigate any report of a failure of the Enterprise to comply with the provisions of the Compact or this Law and may require the Enterprise to take any corrective action deemed necessary by the Commission upon such terms and conditions as the Commission may determine appropriate. The Commission may compel any person employed by or doing business with the Enterprise to appear before it and to provide such information,

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Commission, sitting *en banc,* ruled that the subject gaming cheques/plaques be returned to the MPGE. *Id.,* at p. 15. This lawsuit followed.

ARGUMENT

I. THIS COURT LACKS PERSONAL JURISDICTION OVER THE DEFENDANT, MICHAEL ROBINSON, DUE TO INSUFFICIENT SERVICE OF PROCESS.

The party who seeks to invoke a court's jurisdiction bears the burden of establishing that jurisdiction. *Thompson v. County of Franklin,* 15 F.3d 245, 249 (2d Cir. 1994) (*citing Warth v. Seldin,* 422 U.S. 490, 518 (1975)). Where lack of personal jurisdiction is alleged, the plaintiff bears the burden of establishing such jurisdiction over each defendant. *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.,* 84 F.3d

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> documents or other materials as may be in their possession to assist in any such investigation.
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> . . . .
>
> (14) The Commission may receive any complaint from an employee of the Enterprise or any member of the public who is or claims to be adversely affected by an act or omission of the Enterprise which is asserted to violate this Law, the Compact, or the Standards of Management and Operation adopted pursuant to this Law, and may upon consideration of such complaint order such remedial action as it deems appropriate to bring the Enterprise into compliance with such provisions. The Commission may for this purpose, in its sole discretion, conduct a hearing and receive evidence with regard to such complaint if it deems an evidentiary proceeding useful in the resolution of such complaint.
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> (Underlining in original).

560, 566 (2d Cir. 1996). The plaintiff cannot carry that burden with regard to the establishment of this Court's personal jurisdiction over the defendants in this case.

Subsection (e) of Rule 4 of the Federal Rules of Civil Procedure provides as follows:

> Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:
>
> (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or
>
> (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Id.

With reference to Rule 4, Conn. Gen. Stat. § 52-57(a) provides, in pertinent part, that "process in any civil action shall be served by leaving a true and attested copy of it, including the declaration or complaint, with the defendant, or at his usual place of abode, in this state." Under Connecticut law, process which is merely handed (or mailed) to an agent of an individual defendant at his place of business is void. *See United States Guarantee Company v. Giarelli*, 14 Conn. Sup. 400 (1947). Absent proper service of process, the court to which such process is returnable lacks

jurisdiction over the person of the defendant. *Hyde v. Richard*, 145 Conn. 24, 138 A.2d 527 (1958); *Cugno v. Kaelin*, 138 Conn. 341, 84 A.2d 576 (1951). Finally, F.R.C.P., Rule 4(m) provides that

> [i]f service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time, provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

Id.

Rule 4 deals with service of original process, which is the means by which the court secures jurisdiction over the defendant's person. Without jurisdiction over the person, the court cannot render a valid judgment against him. Such a judgment, absent personal jurisdiction, violates due process. *See, generally, Shaffer v. Heitner*, 433 U.S. 186 (1977); *McDonald v. Mabee*, 243 U.S. 90 (1917); *Pennoyer v. Neff*, 95 U.S. 714 (1877).

> Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied. "[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-45, 66 S.Ct. 242, 245-46, 90 L.Ed. 185 (1946). Thus, before a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient

> relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant.

Omni Capitol Intern v. Rudolph Wolff & Co., Ltd., 484 U.S. 97, 103 (1987).

The instant amended complaint was filed on July 31, 2014. To date, the plaintiff has failed to properly serve a summons and complaint upon the defendants, and specifically, Connecticut State Police Detective Michael Robinson. The mere mailing of a copy of the summons and complaint to the defendant at his work address, *see* affidavit of Michael Robinson attached hereto at Tab A, does not meet the requirements of either F.R.C.P., Rule 4 or those of Connecticut law, through which to establish personal jurisdiction over a defendant. Indeed, more than 120 days since the filing of the lawsuit has passed, and no defendant has been served with process. As a result the lawsuit should be dismissed. Even if the lawsuit itself is not dismissed in its entirety, at the very least, failure to serve this defendant with a summons and complaint within 120 days of filing the complaint requires dismissal of this action as against him. *See* Rule 4, F.R.C.P., *supra; Carmona Pacheco v. Betancourt Y. Lebron*, 820 F.Supp. 45 (D. Puerto Rico 1993).

II. THIS ACTION FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST THE DEFENDANT MICHAEL ROBINSON BECAUSE THE DOCTRINE OF COLLATERAL ESTOPPEL, WITH REGARD TO THE OWNERSHIP OF THE GAMBLING CHIPS AND THE FINANCIAL INTERESTS THEY REPRESENT, PREVENTS THE PLAINTIFFS FROM RELITIGATING A QUESTION WHICH HAS ALREADY BEEN FULLY AND FAIRLY LITIGATED AND DECIDED AGAINST THEM.

Central to all of the plaintiff's claims against the defendants is their persistent claim to the rightful ownership of the gaming chips valued at approximately $1.148 million. To their detriment, however, that same claim was already fully and fairly litigated by the plaintiffs before the Mashantucket Pequot Tribal Nation Gaming Commission on appeal from the denial of their claim to ownership of the contested gambling chips by MPTNGC Inspection Division Director Chester Sicard. *See* Amended Complaint at Exhibits A and B. The plaintiffs are now collaterally estopped from raising the same ownership issue again in this action. As all of the plaintiff's claims rest squarely upon their claim to ownership of the chips, and as that fact has already been fully and fairly litigated, and found against them, judgment must be issued in favor of the defendants for their failure to state a justiciable claim.

The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as "res judicata." Under the doctrine of claim preclusion, a final judgment forecloses "successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *New Hampshire v. Maine,* 532 U.S. 742, 748 (2001). Issue preclusion, in contrast, bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid

court determination essential to the prior judgment," even if the issue recurs in the context of a different claim. *Id.,* 532 U.S. at 748–749. By "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate," these two doctrines protect against "the expense and vexation attending multiple lawsuits, conserve[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States,* 440 U.S. 147, 153–154 (1979).

Issue preclusion, or the doctrine of collateral estoppel, provides that " 'once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Burgos v. Hopkins,* 14 F.3d 787, 789 (2d Cir. 1994) (quoting *Allen v. McCurry,* 449 U.S. 90, 94 (1980)). A party is barred by issue preclusion from relitigating an issue if a four-part test is met: (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits. *Boguslavsky v. Kaplan,* 159 F.3d 715, 720 (2d Cir. 1998).

When issue preclusion is used defensively, as here, mutuality of parties is not required; issue preclusion may be applied as long as the party against whom issue preclusion is asserted had a full and fair opportunity to litigate the issues in the prior case. *See ACLI Gov't Sec., Inc. v. Rhoades,* 963 F.2d 530, 533 (2d Cir. 1992) (citing

Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326–31 (1979) and *Blonder–Tongue Lab., Inc. v. University of Illinois Foundation,* 402 U.S. 313, 328–30 (1971)); *see also,* 18A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4464(2d.) (noting that the federal court have abandoned the traditional rule that claim preclusion could not be used by nonparties and instead notes that "courts have adopted a rule that nonmutual issue preclusion is permitted unless it would be unfair). To determine whether an issue has been "actually litigated" for issue preclusion purposes, the Court reviews the record in the prior case to ensure that the issue has been submitted to the trier of fact for determination. *See Wilder v. Thomas,* 854 F.2d 605, 619 (2d Cir. 1988). Issue preclusion may apply, however, even where the second lawsuit seeks different relief. *See, e.g., Rivera v. Doe,* No. 3:09-CV-0007 (CSH), 2011 WL 1134221 at *6 (D.Conn. 2011); *Flemming v. Goord,* No. 06–CV–26, 2008 WL 4532506 at *3 (N.D.N.Y 2008).

The doctrine of issue preclusion is no less applicable to the decisions of Indian Tribal Courts than it is to other courts. *See, e.g., Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9, 19 (1987) (Unless a federal court determines that the tribal court lacked jurisdiction, proper deference to the tribal court system precludes relitigation of issues raised and resolved in the tribal courts*); Drumm v. Brown,* 245 Conn. 657, 676, 716 A.2d 50 (1998) (If it is determined that the tribal court did not exceed its jurisdiction, the tribal court's determinations will receive no review). "When a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties

have had an adequate opportunity to litigate, federal courts must give the agency's fact-finding the same preclusive effect to which it would be entitled in the State's courts." *University of Tennessee v. Elliott,* 478 U.S. 788, 799 (1986) (internal citation and quotations omitted). *See also, Hohmann v. GTech Corp.*, 910 F.Supp.2d 400, 408 (D.Conn. 2012) (quoting *State v. Barlow,* 30 Conn.App. 36, 40, 618 A.2d 579 (1993) (An administrative board, acting in a judicial capacity, may render a decision that qualifies as a prior determination for purposes of collateral estoppel). The decisions of administrative boards have been granted preclusive effect even where the board did not employ common law or statutory rules of evidence. *Id., citing Sellers v. Sellers Garage, Inc.,* 110 Conn.App. 114-117, 954 A.2d 235 (2008).

The same rule applies to properly constituted administrative tribunals such as the Mashantucket Pequot Tribal Nation Gaming Commission. As succinctly laid out by the court in *Golden Hill Paugussett Tribe v. Rell,* 463 F.Supp.2d 192, 198-199 (D.Conn. 2006),

> We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose. In order for collateral estoppel to apply to an adjudicative determination, [f]irst, the issue as to which preclusion is sought must be identical to the issue decided in the prior proceeding. Issues of fact may bear the same label without being identical. They are not identical if the legal standards governing their resolution are significantly

> different. Further, even if the issues in the two proceedings are identical, a decision by an administrative agency cannot be the basis for collateral estoppel unless it was an adjudicative decision. An agency action granting or denying a privilege is not an adjudicative decision unless the agency has made its decision using procedures substantially similar to those employed by the courts.

Id. (Internal citations and quotations omitted).

In determining whether an agency action constitutes an "adjudicative" or "judicial" decision, the Second Circuit has considered the factors set out in the Restatement (Second) of Judgments § 83(2). *See Delamater v. Schweiker,* 721 F.2d 50, 53–54 (2d Cir.1983). Section 83(2) provides that:

> An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including: (a) Adequate notice to persons who are to be bound by the adjudication, ... (b) The right on behalf of party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties; (c) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specified transaction, situation, or status, or a specific series thereof; (d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and (e) Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

A simple reading of the decision of the MPTNGC appended to the plaintiff's Amended Complaint as Exhibit B compels the conclusion that its decision evidences all

of the hallmarks of a properly constituted adjudicative proceeding at which all of the parties had the opportunity to introduce, examine and cross-examine witnesses, introduce documentary and video evidence and submit arguments before the tribunal before a final decision was reached. The plaintiffs agreed to resolve their issue concerning the ownership of the contested gaming chips in this forum. See Plaintiffs' Amended Complaint filed August 21, 2014, Escrow Agreement at Exhibit D. While the plaintiffs allege in their complaint that "[t]his entire 'Agreement" is a sham," and that "Plaintiffs never voluntarily or willingly agreed to any of these terms," *See* Amended Complaint, ¶ 15, these are precisely the sort of threadbare, conclusory allegations deemed insufficient upon which to base a viable claim under *Ashcroft v. Iqbal, supra.* Moreover, these claims on the part of the plaintiffs are directly contradicted by the exhibits to their own Amended Complaint. The Escrow Agreement is clear and detailed in every respect, and was signed by each of the three plaintiffs. While the plaintiffs agreed that their claims would be heard by the MPTNGC, and that the decision of the Gaming Commission would be final and non-appealable, it is clear therefrom that the plaintiffs never raised a claim that they had been somehow forced to sign the underlying Escrow Agreement against their will. As a result, they should not now be heard to raise this claim, for the first time, in the present action when it could have been resolved previously.

The issue concerning the ownership of the contested gaming chips was the central, if not the sole, issue adjudicated by the Mashantucket Pequot Tribal Nation

Gaming Commission in its decision attached to the plaintiff's Amended Complaint as Exhibit B. It was decided against the plaintiffs. That being the case, all of the plaintiff's claims of wrongdoing against Detective Michael Robinson of the Connecticut State Police must fail. Without a viable property interest in the contested gambling chips, there can be no seizure, no fraud, no conversion and no unlawful government taking of the plaintiff's property as alleged. As a result, judgment must be entered in favor of the defendant on these claims.

III. THE PLAINTIFFS HAVE FAILED TO STATE A CLAIM AGAINST THE DEFENDANT MICHAEL ROBINSON FOR VIOLATION OF THEIR RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

Apart from the preclusive effect of the decision of the MPTNGC argued above, the plaintiffs have failed to state a claim for violation of their constitutional rights under the due process clauses of the Fifth and Fourteenth Amendments. While the plaintiffs do not clearly articulate whether their constitutional claims are grounded in procedural or substantive due process, it is of no matter. In either case, the result is the same. Since the claim arises in the alleged unlawful seizure of the plaintiffs' gaming chips by Detective Robinson, it is the Fourth Amendment and its standard of objective reasonableness, and not the murky tenets of the due process clauses of the Fifth and Fourteenth Amendments which rightfully determine the outcome of this dispute. Since the plaintiff has failed to raise a Fourth Amendment claim, judgment as a matter of law should be entered in favor of Detective Michael Robinson on the plaintiff's claims raised under the Fifth and Fourteenth Amendments.

A. The Due Process Analysis

As for the plaintiff's due process claim raised under the Fifth Amendment to the U.S. Constitution, such claims do not limit the actions of state officials. *See Brock v. North Carolina,* 344 U.S. 424, 426 (1953); *Ambrose v. City of New York,* 623 F.Supp.2d 454, 466-467 (S.D.N.Y. 2009). The Due Process Clause of the Fifth Amendment operates only as a restraint on the national government. Allegations of federal action are required to state a claim for deprivation of due process in violation of the Fifth Amendment. *See, e.g., Junior Chamber of Commerce v. Missouri State Junior Chamber of Commerce,* 508 F.2d 1031 (8th Cir. 1975); *Flowers v. Webb,* 575 F.Supp. 1450, 1456 (E.D.N.Y. 1983). There are no such allegations made in the instant complaint. Accordingly, the plaintiff's putative Fifth Amendment due process claim must fail.

The Due Process Clause of the Fourteenth Amendment provides, at a minimum, three different types of constitutional protections. It incorporates and makes applicable to the states specific protections embodied in the Bill of Rights; it guarantees a right to what has been termed "'substantive due process' which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them;'" and it provides a right to "procedural due process," in providing a constitutionally-required minimum of procedural safeguards in connection with a deprivation of life, liberty or property by the State. *Daniels v. Williams,* 474 U.S. 327, 337 (1986) (Stevens, J., concurring); *see also, Temkin v. Frederick County*

Commissioners, 945 F.2d 716, 720 n.4 (4th Cir. 1991), *cert. denied,* 502 U.S.1095 (1992). Here, we are concerned only with claims regarding alleged violations of the plaintiff's right to substantive and procedural due process.

1. Substantive Due Process

It is axiomatic that § 1983, standing alone, vests no substantive rights upon a plaintiff; it merely provides a remedy for deprivations of rights found elsewhere in the Constitution or in federal laws. *Baker v. McCollan,* 443 U.S. 137, 144 n.3 (1979); *see also, Albright v. Oliver,* 510 U.S. 266, (1994). Consequently, the first step in any such claim is to identify the specific constitutional right allegedly infringed. *Albright v. Oliver, supra, citing, Graham v. Connor,* 490 U.S. 386, 394(1989), and *Baker v. McCollan,* 443 U.S. at 140.

Generally speaking, "the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision-making in this uncharted area are scarce and open-ended." *Collins v. Harker Heights,* 503 U.S. 115 (1992). It has thus admonished the lower courts to "exercise the utmost care" when establishing substantive due process claims not explicitly supported by existing case law, *id.,* and directed that "[w]here a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver,* 510 U.S. at 273 (quoting *Graham v. Connor,* 490 U.S. at 395). This well-established principle of

constitutional jurisprudence is dispositive of the substantive due process claims under consideration herein.

The Supreme Court has made it crystal clear that "all claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a 'substantive due process' approach." *Graham v. Connor,* 490 U.S. at 395 (emphasis in original). *Accord, Dodd v. City of Norwich,* 827 F.2d at 3; *Troublefield v. City of Harrisburg,* 789 F.Supp. 160, 166-67 (M.D.Pa.1992); *Glasco v. Ballard,* 768 F.Supp. 176, 180 (E.D.Va. 1991). The courts have similarly relegated claims of false arrest and malicious prosecution to a Fourth Amendment analysis.[5] *See, e.g., United States v. Hensley,* 469 U.S. 221, 231 (1985); *Illinois v. Gates,* 462 U.S. 213, 238 (1983); *Singer v. Fulton County Sheriff's Department,* 63 F.3d 110 (2d Cir. 1995), *cert. denied,* 517 U.S. 1189 (1996). The same analysis pertains to the alleged seizure of the plaintiffs' gaming chips by Detective Robinson during the course of his investigation into allegations that the plaintiffs engaged in cheating during their gambling activities at Foxwoods Resorts Casino. As a result, the plaintiff's claims sounding in substantive due process under the Fourteenth Amendment fail.

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[5] Regardless, the plaintiffs' claims of false arrest and false imprisonment are fatally undermined by Detective Robinson's investigative report attached to the Amended Complaint as Exhibit C. The report makes clear that the plaintiffs were never arrested or otherwise imprisoned by this defendant. *See also,* Amended Complaint, ¶ 12.

2. Procedural Due Process

To assert a violation of procedural due process rights, a plaintiff must first identify a property right, second show that the state has deprived him of that right, and third show that the deprivation was effected without due process. *Local 342, Long Island Public Service Employees, UMD, ILA, AFLCIO v. Town Bd. of Huntington,* 31 F.3d 1191, 1194 (2d Cir. 1994) (citation omitted). Notice and an opportunity to be heard are the hallmarks of due process. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Brody v. Village of Port Chester,* 434 F.3d 121, 131 (2d Cir. 2005) (holding that "if reasonable notice and opportunity for a hearing are given, due process will be satisfied").

Ordinarily, the Constitution requires some kind of a hearing before the State deprives a person of liberty or property. *New Windsor Volunteer Ambulance Corps, Inc. v. Meyers,* 442 F.3d 101, 115 (2d Cir. 2006) (quoting *Zinermon v. Burch,* 494 U.S. 113, 127 (1990)) (emphasis in original); *see also, WWBITV, Inc. v. Village of Rouses Point,* 589 F.3d 46, 50 (2d Cir. 2009) ("Due process requires that before state actors deprive a person of her property, they offer her a meaningful opportunity to be heard."). However, due process is flexible and calls for such procedural protections as the particular situation demands. *Brody, supra,* 434 F.3d at 134 (quoting *Morrissey v. Brewer,* 408

U.S. 471, 481 (1972)). The familiar three-factor test set forth in *Mathews v. Eldridge,* 424 U.S. 319 (1976), balancing the private interest, risk of erroneous deprivation, and public interest, "provides guidance in determining whether to tolerate an exception to the rule requiring predeprivation notice and hearing." *Nnebe v. Daus,* 644 F.3d 147, 158 (2d Cir. 2011) (internal quotation marks and citations omitted). For instance, "[w]hen the state conduct in question is random and unauthorized, the state satisfies procedural due process requirements so long as it provides meaningful post-deprivation remedy." *Rivera–Powell v. N.Y.C. Bd. of Elections,* 470 F.3d 458, 465 (2d Cir. 2006).

Additionally, "in emergency situations a state may satisfy the requirements of procedural due process merely by making available 'some meaningful means by which to assess the propriety of the State's action at some time after the initial taking.'" *WWBITV v. Village of Rouses Point,* 589 F.3d 46, 50 (2d Cir. 2009) (quoting *Parratt v. Taylor,* 451 U.S. 527, 539 (1981), *overruled on other grounds by Daniels v. Williams,* 474 U.S. 327 (1986)) (Where there is an emergency requiring quick action and where meaningful pre-deprivation process would be impractical, the government is relieved of its usual obligation to provide a hearing, as long as there is an adequate procedure in place to assess the propriety of the deprivation afterwards).

Here, Detective Robinson was clearly not a party to, nor in any way in control of, the Escrow Agreement between the plaintiffs and the Mashantucket Pequot Tribal Nation Gaming Enterprises, or the proceedings conducted by the MPTNGC. As such, there appears to have been no "state action" to even form the basis of a claim for

deprivation of the plaintiffs' due process rights by this defendant. Regardless, the rapidly evolving circumstances with which the defendants were confronted precluded the utilization of any meaningful pre-deprivation remedy. Rather, the safeguarding of all of the parties' interests in the ownership of the disputed gambling chips through the use of the Escrow Agreement, and reference of the dispute to the MPTNGC provided adequate procedural due process to resolve the parties' differences within the confines of constitutional requirements.

Apart from the foregoing, the decision of the MPTNGC depriving the plaintiffs of any interest in the disputed gaming chips which are the subject of the instant claims, and which is entitled to preclusive effect as already argued in this brief, fatally undermines their claims for protection under the due process clauses of either the Fifth or the Fourteenth Amendments. This decision is likewise fatal to any claim that the plaintiffs' may wish to raise under the Fourth Amendment. As a result, judgment as a matter of law should be entered in favor of the defendant, Detective Michael Robinson.

CONCLUSION

For all of the foregoing reasons, the defendant Detective Michael Robinson respectfully requests that this action be dismissed.

DEFENDANT
Michael Robinson

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ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2015 a copy of foregoing notice was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. Additionally, a copy of this memorandum was mailed, first class, postage pre-paid to the following:

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EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHEUNG YIN SUN, LONG MEI FANG, and ZONG YANG LI, *plaintiffs,*	:	NO. 3:14-CV-01098-VLB
V.	:	
THE MASHANTUCKET PEQUOT GAMING ENTERPRISE, DBA FOXWOODS RESORTS CASINO, ANNE CHEN, JEFF DeCLERCK, EDWARD GASSER, GEORGE HENNINGSEN, FRANK LEONE, DETECTIVE MICHAEL ROBINSON, MICHAEL SANTAGATA, CHESTER SICARD, Individually, *defendants.*	:	DECEMBER 10, 2014

AFFIDAVIT OF MICHAEL ROBINSON

I, Michael Lavius Robinson, being of sound mind and legal age, and having been duly sworn, do hereby depose and say:

1. For the purposes of identification, my full name is Michael Lavius Robinson. I am currently employed by the State of Connecticut, Department of Emergency Services and Public Protection. I have been so employed for about fifteen years. I am currently assigned to the State Police Background Unit. I have been so assigned for approximately three months. Prior to that, I was assigned to the State Police Casino Unit. I was so assigned for about four years.

2. In 2011, I held the rank of Detective / Trooper First Class and was assigned to the State Police Casino Unit at the Mashantucket Pequot Gaming Enterprises at the Foxwoods Resorts Casino in Ledyard, Connecticut.

3. On December 26, 2011, I investigated allegations of cheating at the gaming table brought to my attention by Mashantucket Pequot Gaming Enterprises Senior Security investigator Jeffrey DeClerck. Although I interviewed three Chinese nationals who were suspected of cheating at the Baccarat tables, spoke with gaming employees, and reviewed casino security videotapes related to the allegations of cheating, the investigation was closed without any arrests being made.

4. On Tuesday, October 21, 2014, a copy of a civil complaint naming me as a defendant in a civil lawsuit brought by the three Chinese nationals stemming from this cheating investigation was placed in my interdepartmental mailbox at the State Police Background Unit. I was never personally served with a copy of a summons or complaint related to this lawsuit. The envelope in which the paperwork related to the lawsuit was contained was addressed to the Casino Unit and dated Wednesday, August 27, 2014. However, at the time, I was no longer assigned to that unit. A copy of the envelope in which the lawsuit paperwork was mailed is attached to this affidavit.

I have read the foregoing affidavit consisting of two pages. It is true and accurate to the best of my knowledge.

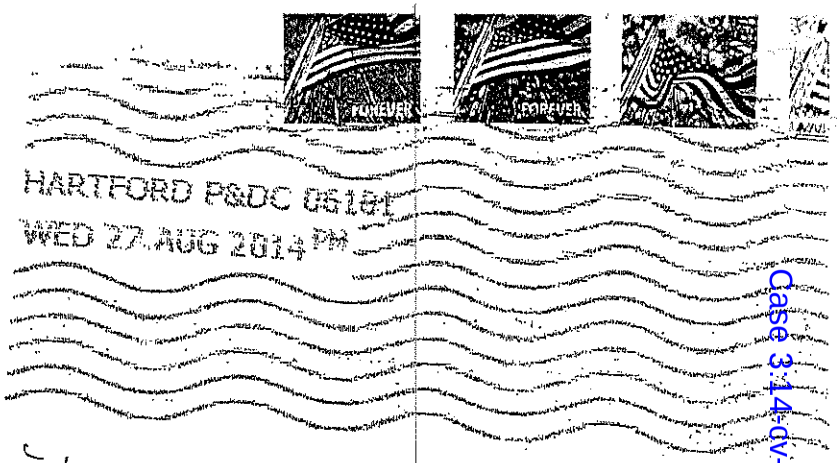
Michael L. Robinson

Subscribed and sworn to before me this 10th day of December, 2014.

Notary Public

LINDA T. HAWES NOTARY PUBLIC MY COMMISSION EXPIRES 11/30/18 STATE OF CONNECTICUT

5 State Street
London, CT 06320



c/o Background Unit.
Detective Michael Robinson
Dept. of Emergency Services & Public Protection
Division of State Police
1111 Country Club Road
Middletown, CT 06457

~~CLOSED~~