UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHEUNG YIN SUN, et al.	:	
Plaintiffs,	:	CIVIL ACTION NO. 3:14-cv-1098 (JCH)
v.	:	
MASHANTUCKET PEQUOT GAMING ENTERPRISE, et al.,	:	
Defendants.	:	
	:	FEBRUARY 27, 2015

MEMORANDUM OF LAW IN SUPPORT OF TRIBAL DEFENDANTS' MOTION TO DISMISS

This Memorandum of Law is filed by defendants Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino (the "Tribal Gaming Enterprise"); and Anne Chen, Jeff DeClerck, Edward Gasser, George Henningsen, Frank Leone, Michael Santagata, and Chester Sicard (hereinafter collectively referred to as the "Individual Tribal Defendants"),[1] in support of the Tribal Defendants' Motion to Dismiss dated February 27, 2015, filed herewith.

Dismissal is warranted in this case on two independent and dispositive jurisdictional grounds. First, the plaintiffs cannot establish personal jurisdiction over the Tribal Defendants because they have failed to effect service upon any of them in the seven months since filing this action in July 2014. The plaintiffs further lack good cause to extend the period for making service. Second, dismissal is also required because the Court lacks subject matter jurisdiction over this action. The well-established doctrine of tribal sovereign immunity from suit applies to the Mashantucket Pequot Tribal Nation, the Mashantucket Pequot Gaming Enterprise, the

[1] For ease of reference, the "Tribal Gaming Enterprise" and the "Individual Tribal Defendants" will be referred to collectively as the "Tribal Defendants."

Mashantucket Pequot Tribal Gaming Commission and their officials, representatives and employees. *See, e.g., Chayoon v. Chao,* 355 F.3d 141, 143 (2d Cir. 2004); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357-358 (2d Cir. 2000); *Bassett v. Mashantucket Pequot Museum and Research Center Inc.*, 221 F.Supp.2d 271, 278 (D. Conn. 2002); *Worrall v. Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino*, 131 F.Supp.2d 328, 329 (D. Conn. 2001).

I. Factual and Procedural Background

On or about July 31, 2014, the Plaintiffs, three individuals, filed a complaint with this court naming the Tribal Defendants and Detective Michael Robinson ("Det. Robinson") as defendants. Twenty-one days later, on August 21, 2014, the Plaintiffs filed an amended complaint against the same defendants. *See* Amended Complaint, dated August 21, 2014 (hereinafter "Amended Complaint" or cited as "Am. Compl."). Plaintiffs failed to serve any of the Tribal Defendants with the complaint or the Amended Complaint, and, consistent with having failed to make service, Plaintiffs have failed to file any return of service or affidavit with the Court.

The Amended Complaint states that this is an action under 42 U.S.C. § 1983. Am. Compl. at ¶ 1. Plaintiffs further appear to claim that this 1983 action is based on violations of the Fifth and Fourteenth Amendments of the U.S. Constitution. *Id.* Plaintiffs allege that the Individual Tribal Defendants are either members of the Tribal Gaming Enterprise's management or "associated with the Mashantucket Pequot Tribal Nation Gaming Commission." *Id.* at ¶¶ 7 & 8. In addition to the Tribal Defendants, the Plaintiff names Det. Robinson as a defendant, alleging that he is "an officer of the Connecticut Department of Public Safety." *Id.* at ¶ 9.

The factual allegations of the Amended Complaint concern an incident the Plaintiffs claim occurred on or about December 24, 2011 at Foxwoods Resort Casino. In essence, the Plaintiffs claim that they deposited "front money" with the Tribal Gaming Enterprise in order to play Mini-Baccarat; that they won money playing Mini-Baccarat by using an advantage play strategy called edge-sorting; and that the Tribal Gaming Enterprise, through its officers and/or management representatives, refused to pay the Plaintiffs their winnings because the Tribal Gaming Enterprise determined that they had cheated. *Id.* at ¶ 11. Further, Plaintiffs claim that when they tried to redeem their winnings, the Tribal Gaming Enterprise refused to redeem them because it was a holiday; that the Plaintiffs then waited in their hotel rooms for three days to get paid; that the Tribal Gaming Enterprise security staff and management came to their room with Det. Robinson to tell them that they had cheated and to ask them to return their chips; that they explained they were not cheating and asked Det. Robinson to review the surveillance; and that Det. Robinson returned to their room after two hours to tell Plaintiff Sun and her attorney (who was on the phone) that he did not think they were cheating but could not force the Tribal Gaming Enterprise to redeem the chips. *Id.* at ¶¶ 12.

Although the Plaintiffs plainly state in Paragraph 12 that Det. Robinson agreed with Plaintiffs that they were not cheating and told them he could not force the Tribal Gaming Enterprise to redeem their chips – and they attach Det. Robinson's reports in support of these allegations – the Plaintiffs go on to contradict themselves in Paragraph 15 by stating that Det. Robinson threatened to arrest them for cheating and thereby coerced the Plaintiffs into signing an escrow agreement. The escrow agreement, attached as Exhibit D to the Amended Complaint, provides that the escrow agent will hold in escrow the chips claimed as winnings by the Plaintiffs until the Plaintiffs' complaint is resolved; that the Tribal Gaming Enterprise agreed to return the

so-called "front money" upon confirmation that the funds actually cleared and were in the Gaming Enterprise's account; and that all parties agreed that the Mashantucket Pequot Tribal Gaming Commission, the body identified as the primary regulatory body under the Federal Gaming Procedures promulgated by the U.S. Secretary of the Interior, *see* 56 Fed. Reg. 24996 (May 31, 1991), would hear and decide the Plaintiffs' complaint concerning the Tribal Gaming Enterprise's refusal to pay Plaintiffs' their winnings.

The Tribal Gaming Commission did, in fact, hear and review the plaintiff's claims. Am. Compl. ¶ 15. The Commission ultimately determined that the plaintiffs had violated the applicable rules and standards by increasing their wagers after play had commenced. *See Notice of Decision, Mashantucket Pequot Tribal Nation, Gaming Commission*, Appeal Hearing AD 12-09, pp. 11-15 (August 6, 2012) (attached to plaintiff's Amended Complaint as Exhibit B).

Having not been served, the Tribal Defendants did not appear in this matter until December 29, 2014. At that time, the Tribal Defendants immediately filed a motion to extend the time within which to file a motion to dismiss or otherwise respond to the Amended Complaint. The Court granted the Tribal Defendants' motion on December 30, 2014, giving the Tribal Defendants until February 27, 2015 to respond to the Complaint.

Det. Robinson has separately filed a Motion for Judgment on the Pleadings, dated January 22, 2015, along with a supporting memorandum, based on insufficient service of process and failure to state a claim upon which relief can be granted.

II. Legal Arguments

A. Standard of Review

1. Federal Rule of Civil Procedure 12(b)(2) and 12(b)(5)

"The lawful exercise of personal jurisdiction by a federal court requires [that] the plaintiff's service of process upon the defendant must have been procedurally proper." *Licci ex rel. Licci v. Lebanese Canadian Bank*, 673 F.3d 50, 60 (2d Cir. 2012). *See also Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104, (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."). Upon a motion pursuant to Rule 12 of the Federal Rules of Civil Procedure, "courts consider insufficient service of process as an interrelated ground on which to dismiss a case for lack of personal jurisdiction." *Perez v. Dep't of Corr.*, Case No. 3:13-CV-150 (JCH), 2013 WL 4760955, at *2 (D. Conn. Sept. 4, 2013). The plaintiff bears the burden of proving that the Court has jurisdiction over the defendant. *See Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996).

Where, as here, jurisdiction is based on a federal question, "a federal court applies the forum state's personal jurisdiction rules if the federal statute does not specifically provide for national service of process." *PDK Labs v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir.1997). Accordingly, Connecticut's personal jurisdiction rules apply here. *See* 42 U.S.C. § 1983 (containing no provision for service beyond state borders); *Omni Capital*, 484 U.S. at 105 (recognizing same).

2. Federal Rule of Civil Procedure 12(b)(1)

Since "immunity is a limitation on federal court jurisdiction, a motion to dismiss based on tribal immunity is appropriately examined under Fed. R. Civ. P. 12(b)(1)." *Bassett v.*

Mashantucket Pequot Museum and Research Center Inc., 221 F. Supp. 2d 271, 276 (D. Conn. 2002) (citing *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 84 (2d Cir. 2001) and *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000)). "Once challenged, the burden of establishing a federal court's subject matter jurisdiction under Rule 12(b)(1) rests on the party asserting jurisdiction." *Worrall v. Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino*, 131 F. Supp. 2d 328, 329 (D. Conn. 2001). "In deciding a Rule 12(b)(1) motion, the court construes the complaint broadly and liberally in conformity with the principle set out in Rule 8(f), Fed. R. Civ. P., but argumentative inferences favorable to the pleader will not be drawn." *Romanella v. Hayward*, 933 F. Supp. 163, 164-165 (D. Conn. 1996). "The mover and the pleader may use affidavits and other materials beyond the pleadings themselves in support of or in opposition to a challenge to subject matter jurisdiction." *Worrall*, 131 F. Supp. 2d at 329.

B. The Plaintiffs' Complaint Against the Tribal Defendants Must Be Dismissed Because this Court lacks both Personal and Subject Matter and Jurisdiction.

1. This Court Lacks Personal Jurisdiction Over the Tribal Defendants Due to Plaintiffs' Failure to Serve the Tribal Defendants as Required by the Federal Rules of Civil Procedure.

Rule 4 of the Federal Rules of Civil Procedure enumerates the ways in which the plaintiffs could have made service upon the Tribal Defendants. As to the Individual Tribal Defendants, the plaintiffs could have served them by: (1) "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made"; or (2) by "delivering a copy of the summons and of the complaint to the individual personally, leaving a copy of each at the individual's dwelling or usual place of abode . . . or delivering a copy of each to an agent authorized by appointment or

by law to receive service of process." Fed. R. Civ. P. 4(e).[2] The Tribal Gaming Enterprise, as an arm of the Tribal Government of the Mashantucket Pequot Tribe, is a sovereign entity. The Federal Rules of Civil Procedure do not directly address service on an Indian tribe or its arms, subdivisions, or agencies. The most analogous service under the Federal Rules applies to other sovereigns such as state and local governments or the federal government. *See, e.g.*, Fed. R. Civ. P. 4 (i)&(j). To effect service under 4(j), the plaintiffs could have: (1) "deliver[ed] a copy of the summons and of the complaint to its chief executive officer"; or (2) "serv[ed] a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant." Fed. R. Civ. P. 4(j).[3]

The initial Complaint was filed on July 31, 2014. The plaintiffs had 120 days from the filing of their Complaint to serve the defendants. *See* Fed. R. Civ. P. 4(m). The plaintiffs failed to effect – or even to attempt – valid service on any of the Tribal Defendants, despite ample opportunity and an extended period of time. In fact, despite explicit notice from the defendants

[2] The Tribal Defendants note that Rule 4(e)(1), which contemplates service in a manner permitted by "the state where the district court is located or where service is made" could refer, in this instance, to the laws of the State of Connecticut or the laws of the Mashantucket Pequot Tribal Nation for service on the Mashantucket Pequot Reservation. With respect to the service of individuals, Connecticut law and the Mashantucket Pequot Rules of Civil Procedure permit personal or abode service, in much the same manner as Rule 4(e)(2). *See* Conn. Gen. Stat. § 52-57a (providing 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."); Mashantucket Pequot R. Civ. P. 4(d) (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"). Regardless of which provision may apply to the Individual Tribal Defendants, who appear to have been sued in their official capacities, it remains clear that no acceptable form of service was made in this case.

[3] Rule 4(e)(1) contemplates service in a manner permitted by "that state's law." As noted above, *see* n.2, whether this provision would call for application of the laws of the State of Connecticut or those of the Mashantucket Pequot Tribal Nation is irrelevant, as the plaintiffs have not made any service on the Tribal Gaming Enterprise in this case.

in December 2014 concerning the lack of service, the plaintiffs to this day two months later still have not effected service. Accordingly, the case against the Tribal Defendants should be dismissed for lack of personal jurisdiction.

a. None of the Tribal Defendants Was Served.

Because none of the Tribal Defendants was served, the plaintiffs will be unable to carry their burden to prove personal jurisdiction. *See Robertson-Ceco Corp.*, 84 F.3d at 567. The Tribal Defendants did not receive a summons, the initial complaint, or any other document related to this case by hand delivery. Undersigned counsel understands that the only paper related to this case that has been provided to any of the Tribal Defendants since the action was filed in July 2014 is a copy of the Amended Complaint, which four of the individual defendants received by regular mail. In other words, no defendant was ever served the Complaint and summons that commenced the action. The simple mailing of a complaint is insufficient to invoke personal jurisdiction over a defendant under federal law, *see, e.g.*, *Obot v. Citibank South Dakota, N.A.*, 347 Fed. Appx. 658, 659-60 (2d Cir. 2009) (holding that attempt to serve corporation by mail was not effective where state law required personal service of corporation's officer or agent), Connecticut law, *see Colon v. McFadden*, Case No. NNHCV106014203, 2010 WL 5672750, at *3 (Conn. Super. Dec. 29, 2010) (applying Connecticut law and determining that, unless defendant is "a partnership or voluntary association [or] the action is . . . for child support[,] [n]o other provision in the General Statutes permits service of process on the Secretary of the State and/or by certified mail for individuals residing in Connecticut"), and Tribal law.

See Mash. Peq. Civ. P. Rule 4.[4] Neither does tribal law permit service by regular mail. *See* Mashantucket Pequot R. Civ. P. 4(d).

The mere mailing of a subsequent pleading – without ever having served a summons and initial complaint – does nothing to effect service. The Individual Tribal Defendants, who appear to have been named in their official capacities, *see* Dkt. # 8 (Amended Complaint, ¶¶ 7&8 suggesting that service would be appropriate at their usual place of business), did not receive personal or abode service. Neither was the Tribal Gaming Enterprise served in any of the ways in which service is allowed against a sovereign entity.[5] The Tribal Defendants submit that the plaintiffs will not be able to show any meaningful attempt to serve the defendants, much less to carry their burden to prove proper service on each defendant upon whom they purport to have asserted personal jurisdiction, as the law requires. *See Robertson-Ceco Corp.*, 84 F.3d at 567.

b. Because No Good Cause Exists For The Failure to Serve the Tribal Defendants, the Case Should Be Dismissed.

The failure to serve the Tribal Defendants requires dismissal. *See* Fed. R. Civ. P. 4(m). Rule 4 permits the Court to "extend the time for service for an appropriate period," but only when "the plaintiff shows good cause for the failure." *Id.* No such "good cause" exists in this case.

"Good cause for failure to comply with Rule 4(m) is generally found only in exceptional circumstances where the plaintiff's failure to serve process in a timely manner was the result of

[4] For the convenience of the Court, the Tribal Defendants note that the applicable Tribal Laws are available through West Publishing, on Westlaw, and at the Tribe's website: www.mptnlaw.org.

[5] A further demonstration of the complete lack of service or compliance with court rules is the failure of the plaintiffs to comply with Fed. R. Civ. P. Rule 4(l), which requires proof of service "be made to the court." Our review of the on-line court docket shows no such proof filed with the court.

circumstances beyond its control." *Pellela v. Herron*, Case No. 3:06CV1484 (AWT), 2008 WL 2468526, at *2 (D. Conn. June 17, 2008) (emphasis added). In determining whether such "exceptional circumstances" are present to justify an extension, "[c]ourts generally consider three factors to determine whether such good cause exists: "(1) whether the delay resulted from inadvertence or whether a reasonable effort to effect service has occurred, (2) prejudice to the defendant, and (3) whether the plaintiff has moved for an enlargement of time to effect service under Rule 6(b) of the Federal Rules of Civil Procedure." *Echevarria v. Department of Correctional Services of N.Y. City*, 48 F. Supp. 2d 388, 392 (S.D.N.Y. 1999). Notably, "[a]n attorney's inadvertence, neglect, mistake, or misplaced reliance does not constitute good cause for the purposes of Rule 4(m)." *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 658 (S.D.N.Y.1998).

Far from making a "reasonable effort" to effect service or seeking "an enlargement of time" to do so, the plaintiffs and their counsel have blatantly ignored their obligations to effect service and establish jurisdiction. This case was filed seven months ago, on July 31, 2014. No apparent attempt to effect proper service was made with the Tribal Defendants, nor with the remaining defendant, Det. Robinson. *See* Dkt. # 20-21 (Det. Robinson's motion for judgment on the pleadings and memorandum in support, averring plaintiffs' failure to effect valid service upon him). The plaintiffs never moved for any extension of time to make service. After the Tribal Defendants entered appearances in December, they filed a motion requesting a deadline to file this motion, specifically noting that "[n]either . . . complaint [had been] served upon any of the [Tribal Defendants] as required by Rule 4 of the Federal Rules of Civil Procedure." Dkt. # 15, p. 1. Similarly, counsel for Det. Robinson filed a motion for judgment on the pleadings in January 2015, noting that Det. Robinson had not been validly served. Despite the lack of service

having been made clear to the plaintiffs on multiple occasions beginning as early as December 30, 2014, the plaintiffs still have not made any attempt to effect service. At no time in the seven months that this case has been pending have the plaintiffs made any effort to seek an extension or enlargement of time to serve the defendants.

Aside from ignoring these basic service requirements, the plaintiffs and their counsel have flouted the rules of Court at every turn. For the vast majority of the last seven months, the plaintiffs ignored their obligations under Rule 26(f) to arrange for an initial report in this case. After counsel for the defendants appeared, without having been served, the defendants compiled a draft report and sent it to counsel for the plaintiffs on January 9, 2015. *See* Email from Attorney Sarnoski to All Counsel, attached hereto as Exhibit 1. The plaintiffs refused to take any action with respect to filing the 26(f) report, or make any response at all, until this Court ordered the plaintiffs' counsel, during a Telephonic Status Conference in this case on February 11, to submit the report within one week. *See* Dkt. # 26. When they finally did file a report, the plaintiffs ignored the defendants' proposed deadlines and statements, and instead submitted a 26(f) "report" replete with blank spaces instead of deadlines. *See* Dkt. # 29. Moreover, one of the plaintiffs' attorneys, Attorney Vining, has purported to represent the plaintiffs at a Telephonic Status Conference and throughout the pendency of this action without securing admission as a visiting attorney pursuant to this Court's rules, despite the Court's instructions to do so.[6]

[6] In fact, the plaintiffs amended complaint states above Attorney Vining's signature that a pro hac vice motion is pending. Review of the on line docket of this Court shows that no such motion was filed or pending at the time of the filing of the Amended Complaint and was only filed when this Court ordered the plaintiffs to do so at the telephonic conference held on February 15, 2015.

By taking no action to effect valid service or to seek any extension, and by ignoring other rules and orders of this Court, the plaintiffs are quite far afield from cases where the Court has excused a failure to make service. In *Pellela*, Judge Thompson found that a plaintiff who had failed to effect service was entitled to an extension, rather than dismissal, because the plaintiff had made diligent efforts to make service. *See* 2008 WL 2468526 at *2-*3. The defendant in that case had been on active military duty, and was believed to be out of the country, such that the case was stayed. *Id.* at *2. During that period of time, "the plaintiff filed periodic status reports [with the Court] to inform the court of her efforts to locate and serve the defendant." *Id.* When the plaintiff's investigator determined that the defendant had returned to the country, the plaintiff sought a motion to issue a new summons, then served the defendant "shortly thereafter." *Id.* The Court denied a subsequent motion to dismiss "[i]n view of the plaintiff's efforts to locate the defendant" and the plaintiff's "reasonable, good-faith belief" that the defendant had been out of the country on active military duty. *Id.* at *2-*3.

The plaintiffs have taken none of those steps here. They neither made viable attempts to serve the Tribal Defendants, nor sought any stay or extension to try to do so. This Court will dismiss actions where the plaintiffs have not made service and "have neither sought an extension of time, nor demonstrated good cause for such an extension." *Davis v. Mara*, 587 F. Supp. 2d 422, 429 (D. Conn. 2008). *See also Traylor v. Awwa*, Case No. 3:11-cv-132 (AWT), 2014 WL 555358, at *3-*4 (D. Conn. Feb. 10, 2014). Second Circuit precedent has followed suit. *See, e.g.*, *Gerena v. Korb*, 617 F.3d 197, 201 (2d Cir. 2010) (affirming dismissal where plaintiff served defendant well after the 120-day deadline and "had neither sought nor received an extension of time to serve [the defendant]"); *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 508-509 (2d Cir. 2006) (affirming dismissal where plaintiff "made no showing whatever as to any

effort on her part to effect personal service on [the defendants] . . . [and] also made no effort to show good cause for her failure and never requested an extension of time"). Dismissal is the just course on these facts.

2. *This Court Lacks Subject Matter Jurisdiction Over the Complaint Filed Against the Tribal Defendants Due to Tribal Sovereign Immunity From Suit.*

The United States Supreme Court has repeatedly held that Indian tribes are immune from suit absent an unequivocally expressed abrogation by the U.S. Congress or a clear waiver by the tribe. *Michigan v. Bay Mills Indian Community*, ___ U.S. ___, 134 S.Ct. 2024, 2030-31, 188 L. Ed. 2d 1071 (2014); *C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001); *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). The Supreme Court most recently re-affirmed this doctrine less than a year ago in a case brought by the State of Michigan against the Bay Mills Indian Community in an effort to stop gaming that the State believed was outside Indian country and violated the federal Indian Gaming Regulatory Act. *See Bay Mills Indian Community*, 134 S.Ct. at 2030-31. There, in finding that tribal sovereign immunity barred the suit, the Court explained:

> Among the core aspects of sovereignty that tribes possess – subject again to congressional action – is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. 1670, 56 L.Ed.2d 106. That immunity, we have explained, is 'a necessary corollary to Indian sovereignty and self-governance.' *Three Affiliated Tribes of Fort Berthold Reservation v. World Eng'g, P.C.*, 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986)). . . . Thus, we have time and again treated the "doctrine of tribal immunity [as] settled law and dismissed any suit against a tribe absent congressional authorization (or a waiver). *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

Id. at 2030-31.

The Court of Appeals for the Second Circuit and District Court for the District of Connecticut have followed this clear Supreme Court precedent in finding that the Mashantucket Pequot Tribe, as a federally recognized Indian tribe,[7] is immune from unconsented suit. *See, e.g., Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357-358 (2d Cir. 2000); *Tassone v. Foxwoods Resort Casino*, Case No. 3:11-CV-1718 (WWE), 2012 U.S. Dist. LEXIS 71882 (D. Conn. May 23, 2012),[8] *aff'd, Tassone v. Foxwoods Resort Casino*, 519 Fed. Appx. 27, 2013 U.S. App. LEXIS 11138 (2d Cir. 2013); *Bruce H. Barnes v. Mashantucket Pequot Tribal Nation*, Case No. 3:07-CV-693 (RNC), 2007 U.S. Dist. LEXIS 15591; 100 Fair Empl. Prac. Cas. (BNA) 351; 19 Am. Disabilities Cas. (BNA) 309 (D. Conn. March 3, 2007); *Worrall v. Mashantucket Pequot Gaming Enterprise*, 131 F. Supp. 2d 328, 331 (D. Conn. 2001); *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996); *see also Sevastian v. Sevastian*, 73 Conn. App. 605 (2002) (Connecticut Appellate Court followed clear U.S. Supreme Court precedent and found the Mashantucket Pequot Tribe immune from suit in State Court).

"Tribal immunity also applies to entities, such as Foxwoods Resort Casino, that are arms, agencies or subdivisions of the tribe. *See Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004); *see also Bassett*, 204 F.3d at 357-58; *Worrall v. Mashantucket Pequot Gaming Enter.*, 131 F.Supp.2d 328, 331 (D. Conn. 2001)." *Tassone v. Foxwoods Resort Casino*, 519 Fed.Appx. 27, 28, 2013 U.S. App. LEXIS 11138, *3 (2d Cir. 2013); *see also* Affidavit of Jackson T. King, Jr., General Counsel Supporting Motion to Dismiss, dated March 26, 2015, ¶6, attached hereto as

[7] *See* 25 U.S.C. § 1758; *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 175 (2d Cir. 1996); *Mashantucket Pequot Tribe v. Redican*, 309 F.Supp.2d 309, 311 (2004).

[8] All unpublished decisions are attached hereto as Exhibit 3.

Exhibit 2. In *Worrall*, the District Court for the District of Connecticut addressed, among other issues, this issue and found that the Tribal Gaming Enterprise, as an arm of the Mashantucket Pequot Tribe, is immune from suit to the same extent as the Tribe. *See Worrall*, 131 F.Supp.2d at 330-331; *see also Bassett,* 204 F.3d at 358 (noting that if tribal museum was determined to be agency of the tribe, it would be immune from suit); *accord Greenidge v. Volvo Car Finance, Inc.*, 2000 Conn.Super. LEXIS 2240 at *9-10 (Conn. Superior Court August 25, 2000) (dismissing third party claims against the Mashantucket Pequot Gaming Enterprise on the ground that it is an arm of tribal government and therefore immune from suit); *see also Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) (finding that the housing authority, as an arm of the Tribe, enjoys sovereign immunity from suit to same extent as Tribe).

Similar to the Tribal Gaming Enterprise, the Mashantucket Pequot Tribal Gaming Commission is a subdivision or agency of the Mashantucket Pequot Tribe. *See* 3 M.P.T.L. ch. 1, Section 7(a)&(b)(establishing the Tribal Gaming Commission as the primary regulatory body of the Tribe charged with the oversight and regulation of gaming operations on the Reservation); *see also* King Affidavit, Ex. 2, ¶8. While the Tribal Gaming Commission, as an agency or entity is not named as a defendant in this suit, the plaintiffs allege that certain of the Individual Tribal Defendants are "associated with" the Tribal Gaming Commission. *See* Am. Compl., ¶ 8 (alleging that Edward Gasser, George Henningsen, Chester Sicard, and Michael Santagata are associated with the Tribal Gaming Commission).

The Second Circuit and District Court have also explained and held that plaintiffs "cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the

complaint does not allege they acted outside the scope of their authority." *Chayoon v. Chao*, 355 F.3d at 143; *See also Bassett,* 221 F.Supp.2d at 280-281; *Romanella*, 933 F.Supp. 163, 167-68; *Accord, Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 308-310 (N.D.N.Y. 2003) (following *Bassett*'s reasoning to dismiss claims against individual tribal defendants allegedly sued in their individual capacities); *Chayoon v. Sherlock*, 89 Conn. App. 821, 828-829 (2005) (finding individual employees and officials of the Mashantucket Pequot Gaming Enterprise immune from suit citing *Bassett* for support). The district court decision in *Bassett* explained that "a claim for damages against a tribal official lies outside the scope of tribal immunity only where the complaint pleads – and it is shown – that a tribal official acted beyond the scope of his authority to act on behalf of the Tribe." *Bassett*, 221 F.Supp.2d at 280.

Further, "[c]laimants may not simply describe their claims against a tribal official as in his "individual capacity" in order to eliminate tribal immunity. . . . Permitting such a description to affect tribal immunity would eviscerate its protections and ultimately subject Tribes to damages actions for every violation of state or federal law. The sounder approach is to examine the actions of the individual tribal defendants. Thus the Court holds that a tribal official – even if sued in his "individual capacity" – is only "stripped" of tribal immunity when he acts 'manifestly or palpably beyond his authority . . . .' Bassett, 204 F.3d at 359 (quoting Doe, 81 F.3d at 1210)." *Bassett*, 221 F.Supp.2d at 280.

Finally, a plaintiff must do more than allege that the Individual Tribal Defendants violated state or federal law "in order to state a claim that the individuals acted beyond the scope of authority; it would be tantamount to eliminating tribal immunity from damages actions because a plaintiff must always allege a wrong in order to state a claim for relief." *Id.* at 281. The *Bassett* Court further held that "to state a claim for damages against [individual tribal

defendants], the plaintiffs would have to allege and prove that [the individual tribal defendants] acted 'without any colorable claim of authority,' apart from whether they acted in violation of federal or state law." *Id.* (distinguishing and/or disagreeing with earlier District of Connecticut decision in *Wallett v. Anderson*, 198 F.R.D. 20, 24 (D. Conn. 2000)).

In the Amended Complaint filed with this Court, the plaintiffs name the Tribal Gaming Enterprise as a defendant and claim that it refused to pay them winnings that they allege were owed to them in or around December 24, 2011. Am. Compl. at ¶ 11. In an obvious attempt to avoid the jurisdictional bar of tribal sovereign immunity from suit, the plaintiffs also name individuals who were employed or acted on behalf of the Tribal Gaming Enterprise, represented the Tribal Gaming Enterprise before the Mashantucket Pequot Tribal Gaming Commission,[9] and the Chair and Director of the Tribal Gaming Commission who each rendered decisions. Am. Compl. at ¶¶ 7&8. There is no allegation that the Individual Tribal Defendants acted outside the scope of their authority on behalf of the Tribal Gaming Enterprise, the Tribal Nation, or the Mashantucket Pequot Tribal Gaming Commission. Rather, the plaintiffs are attempting to circumvent the jurisdictional bar by naming the Individual Tribal Defendants because of their positions with the Tribal Gaming Enterprise or Tribal Gaming Commission. *See, e.g.* Am. Compl. at ¶¶ 7&8 (even plaintiffs seem to acknowledge the nature of their claims as official capacity claims by alleging that service of process can/should be made at the Individual Tribal Defendants' usual place of business). As the Second Circuit stated in *Chayoon v. Chao*, a plaintiff "cannot circumvent tribal immunity by merely naming officers or employees of the

[9] Courts have found that attorneys, both employed and outside counsel, are cloaked with tribal immunity when acting as a representative of the tribe and within the scope of authority. *See, e.g., Catskill Dev., LLC v. park Place Entertainment Corp.*, 206 F.R.D. 78, 91 (S.D.N.Y. 2002) (collecting cases addressing attorneys as tribal representatives and their immunity from suit).

Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority." *Chayoon v. Chao*, 355 F.3d at 143; *see Bassett*, 221 F.Supp.2d at 280-281.

Aside from the fact that this case presents a clear application of the well-established sovereign immunity from suit, as discussed above, the plaintiffs in this case have already availed themselves of a valid judicial process, and now turn to this Court seeking a different result. The plaintiffs essentially ask this Court to overturn the decision of the Tribal Gaming Commission, which found that the plaintiffs violated the Standards of Operation and Management ("SOM") governing the conduct of gaming at Foxwoods Resort Casino by increasing their wagers after play had commenced. *See* Am. Compl, ¶ 30 (asking the court to award damages based on "converted front money"[10] and the their "winnings"); *Notice of Decision, Mashantucket Pequot Tribal Nation, Gaming Commission*, Appeal Hearing AD 12-09, pp. 11-15 (August 6, 2012) (attached to plaintiff's Amended Complaint as Exhibit B). While this Court lacks both personal and subject matter jurisdiction based on the arguments made herein, this Court also lacks authority under federal law to sit as an appellate venue over a tribal gaming commission. The Indian Gaming Regulatory Act, 25 U.S.C. § 2701- 2721 ("IGRA"), is a comprehensive statute governing Indian Gaming and has been found to preempt the field. *See, e.g., Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 543-45 (8th Cir. 1996). Under this comprehensive

[10] In another example of the plaintiffs' lack of adherence to the rules of the Court, including having a good faith basis for allegations, the plaintiffs allege a conversion of this "front money", while contradicting this with their own exhibits that demonstrate this so-called "front money" was returned to the plaintiffs as part of the escrow agreement. *See* Am. Compl, Ex. D. Escrow Agreement ¶ 6; Am. Compl., Ex. A, Decision of Director of Investigations, p. 1 (noting those monies returned as part of agreement between parties); Am. Compl. Ex. C, Tribal Gaming Commission Decision, p.1 (stating that Tribal Gaming Enterprise returned the customer deposit accounts).

statute, Indian tribes (often through tribal gaming commissions) are the primary regulators of gaming on Reservations. *See, e.g.,* 25 U.S.C. §§ 2701(5) (finding Indian tribes have exclusive right to regulate gaming activity on Indian lands) & 2702(2) (declaring a policy of IGRA to provide a statutory basis for the regulation of gaming by an Indian tribe); *Gaming Corp.*, 88 F.3d at 543-547 (discussing the legislative intent of IGRA, tribes regulatory role, and the fact that Class III gaming governed by tribal-state compacts).

In the case of the Mashantucket Pequot Tribal Nation, rather than a tribal-state compact, the Secretary of the Interior imposed federal gaming procedures, which provide that the Tribe's gaming commission is the primary regulator of gaming on the Reservation. *See* Mashantucket Pequot Final Gaming Procedures, 56 Fed. Reg. 24996 (May 31, 1991), Section 2(z) (defining the Tribal gaming agency as the Mashantucket Pequot Tribal Gaming Commission); Section 13 ("The Tribal Gaming Agency shall have primary responsibility for oversight of the tribal gaming operations and shall, for that purpose, employ non-uniformed inspectors . . . . Inspectors assigned by the Tribal gaming agency shall also receive consumer complaints within the gaming facilities and shall assist in seeking voluntary resolution of such complaints."); Title 3 M.P.T.L. ch. 1, Section 7 (a) (establishment of Tribal Gaming Commission as the Tribal Gaming Agency) and 7(b)(1)-(15) (powers and duties of the Tribal Gaming Commission including receiving complaints, adopting and enforcing Standards of Operation and Management, and conducting hearings).

Under this comprehensive federal scheme governing gaming in Indian country, the Mashantucket Pequot Tribal Gaming Commission was and is the appropriate adjudicative body to determine whether there was a violation of the SOMs, established under federal law, to insure the integrity of gaming on the Mashantucket Pequot Reservation. As the plaintiffs' own exhibits

to their Amended Complaint demonstrate, the Tribal Gaming Commission rendered its detailed and thoughtful decision, after three days of a de novo hearing, receipt of testimony and documentary and video evidence, with all parties represented by counsel. *See* Am. Compl., Ex. B (Tribal Gaming Commission's decision). While the plaintiffs can obviously disagree with the Decision or dislike the reality that IGRA and the Gaming Procedures contemplate and provide for the Tribal Gaming Commission to be the final adjudicator of such matters, that disagreement does not change the law or support this Court's jurisdiction to hear the matter again or sit, in essence, as an appellate review of the Tribal Gaming Commission's decision.

III. Conclusion

For the foregoing reasons, the Tribal Defendants respectfully request that their Motion to Dismiss be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2015, I caused a copy of foregoing to be filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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