No. 14-1106

United States Court of Appeals for the First Circuit

DOUGLAS J. LUCKERMAN

Plaintiff-Appellee

v.

NARRAGANSETT INDIAN TRIBE

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

HON. WILLIAM E. SMITH, C.J.

BRIEF OF PLAINTIFF-APPELLEE

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JURISDICTIONAL STATEMENT

A. The Jurisdiction of the District Court

Upon removal (ECF No. 1), the district court acquired jurisdiction under 28 U.S.C. § 1331 as a consequence of the Tribe's disputed contention that its own court had jurisdiction over Mr. Luckerman's claims. See National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 852 (1985) ("The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331."); Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 28 (1st Cir. 2000) ("In other words, federal courts have authority to determine, as a matter arising under federal law, the limits of a tribal court's jurisdiction.") (internal quotation marks omitted).

Once the district court acquired subject-matter jurisdiction, it could adjudicate the Tribe's defense of sovereign immunity. Ninigret, 207 F.3d at 28-29 ("We . . . hold instead that, as long as federal subject-matter jurisdiction exists, a defense predicated on tribal sovereign immunity is susceptible to direct adjudication in the federal courts, without reference to the tribal exhaustion doctrine.").

B. The Jurisdiction of This Court

It is settled in this circuit and elsewhere that an appeal lies under 28 U.S.C. § 1291's collateral order doctrine from the denial of a motion to dismiss based on foreign sovereign immunity. See Universal Trading & Inv. Co., Inc. v. Bureau for Representing Ukrainian Interests in Int'l and Foreign Courts, 727 F.3d 10, 15 (1st Cir. 2013) (citing approvingly to Ungar v. Palestine Liberation Org., 402 F.3d 274, 293 (1st Cir. 2005)); Price v. Socialist People's Libyan Arab Jamahiriya, 389 F.3d 192, 196 (D.C. Cir. 2004); S & Davis Int'l, Inc. v. Republic of Yemen, 218 F.3d 1292, 1295 (11th Cir. 2000).

A similar rule applies to interlocutory orders denying (a) Eleventh Amendment immunity, Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 147 (1993); Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1, 13 (1st Cir. 2007), (b) legislative immunity, Argomayor v. Colberg, 738 F.2d 55, 57-58 (1st Cir. 1984), and (c) the qualified immunity of public officials. Gericke v. Begin, 753 F.3d 1, 3 (1st Cir. 2014); Hernandez-Cuevas v. Taylor, 723 F.3d 91, 97 (1st Cir. 2013); Soto-Torres v. Fraticelli, 654 F.3d 153, 157 (1st Cir. 2011).

While this Court does not appear to have addressed the question, several circuits have held that tribal defendants may pursue interlocutory appeals from the

denial of motions to dismiss based on tribal sovereign immunity. Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d 1173, 1177 (10th Cir. 2010) (tribal entities entitled to appeal the denial of their Rule 12(b)(1) motions); Wisconsin v. Ho-Chunk Nation, 512 F.3d 921, 928 (7th Cir. 2008) ("A district court's determination that a tribe's sovereign immunity has been waived by the tribe or abrogated by Congress falls within the ambit of the collateral order doctrine as applied by this Court . . . ."); Burlington Northern & Santa Fe Ry Co. v. Vaughn, 509 F.3d 1085, 1090-91 (9th Cir. 2007) ("We join the Tenth and Eleventh Circuits in holding that denial of a claim of tribal sovereign immunity is immediately appealable under the collateral order doctrine."); Prescott v. Little Six, Inc., 387 F.3d 753, 755 (8th Cir. 2004) ("[W]e have jurisdiction under the collateral order doctrine, which permits an interlocutory appeal from a district court's denial of sovereign immunity."); Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla., 63 F.3d 1030, 1050 (11th Cir. 1995) (officers of tribal entities entitled to interlocutory appeal from an order denying them the benefits of tribal immunity).

This Court applies a four-part test to determine whether an interlocutory appeal satisfies the collateral order doctrine. Godin v. Schencks, 629 F.3d 79, 83-84 (1st Cir. 2010); Awuah v. Coverall North America, Inc., 585 F.3d 479, 480 (1st Cir. 2009). "For the collateral order doctrine to apply, the interlocutory order must present: (1) a conclusive decision, (2) distinct from the merits of the action, (3) on

an important issue, (4) which would effectively be unreviewable on appeal from a final judgment." Godin, 629 F.3d at 84.

The Tribe's appeal satisfies these requirements. As for conclusiveness, the district court's orders resolved the claim of immunity in that court. Those rulings are unlikely to be revisited by the district court in the absence of direction to do so from this Court. The distinctiveness requirement is equally well satisfied. The claim of immunity is clearly separate from and independent of Mr. Luckerman's claims for unpaid legal fees. Next, whether the Tribe has effectively waived its sovereign immunity is an issue of sufficient importance to warrant interlocutory review. This is so because of the important role played by sovereign immunity in fostering tribal independence. Finally, the issue is effectively unreviewable on appeal from a final judgment because the Tribe will have borne the burdens of litigation prior to entry of that judgment.

For purposes of appellate jurisdiction, the district court's denial of the Tribe's motion for reconsideration would appear to stand on the same footing as the denial of the Tribe's motion to dismiss. In other words, the order denying reconsideration qualifies as an appealable collateral order because it reaffirms an order which is itself qualified for interlocutory review. See Asociación de Subscripción, 484 F.3d at 13 (orders denying motions for judgment on the

pleadings and for reconsideration on Eleventh Amendment and qualified immunity grounds are appealable as collateral orders).

The Tribe's appeal from the denial of its motion for reconsideration would appear to be timely. The Tribe's notice of appeal was filed on January 17, 2014 (ECF No. 24), within the 30-day period available for taking the appeal. FED. R. APP. P. 4(a)(1)(A) and 4(a)(4)(A)(iv).

STATEMENT OF THE ISSUES

A. Whether the district court abused its discretion when it declined to invalidate the Tribe's waivers of sovereign immunity based on the Tribe's alleged waiver protocol.

B. Whether the district court abused its discretion when it declined to invalidate the Tribe's waivers of sovereign immunity based on the provisions of Article V of the Tribe's Constitution and By-Laws.

C. Whether the district court abused its discretion when it rejected the Tribe's contention that NITHPO's head, John Brown, did not have authority to waive the Tribe's sovereign immunity. [1]

D. Whether the district court abused its discretion by not affording the Tribe an opportunity for discovery first sought by the Tribe in its motion for reconsideration. J.A. 124.

[1] NITHPO is an acronym for Narragansett Indian Tribal Historic Preservation Office. Among other things, NITHPO is authorized to pursue the Tribe's interests in gaming and other forms of economic development. Narragansett Indian Tribal Resolution, TC 09092004-01, 9/9/04, J.A. 81-82.

STATEMENT OF THE CASE

This is the Tribe's appeal from the district court's order denying the Tribe's motion for reconsideration. Tribe's Add. 15-21. The Tribe's simultaneous appeal from the district court's order denying the Tribe's motion to dismiss was itself dismissed by this Court on August 29, 2014 for lack of appellate jurisdiction. Order of Court, 8/29/14. Accordingly, that appeal is not before the Court.

A. Pertinent Facts

This case arises out of an attorney-client relationship of several years' duration between Mr. Luckerman and the Tribe. Compl. ¶¶ 6-22, J.A. 8-10. During the engagement, Mr. Luckerman handled a wide variety of legal matters relating to tribal sovereignty, economic development, and historic preservation. Id.; Luckerman Aff., June 12, 2013, ¶¶ 4-22 (ECF No. 10-2), J.A. 74-76.

Two engagement agreements governed the parties' relationship—the first is dated March 6, 2003 (J.A. 14-15), the second February 3, 2007 (J.A. 17-18). Each agreement contains an explicit waiver of the Tribe's sovereign immunity. The 2003 letter contains this language:

> The Tribe agrees to waive any defense of sovereign immunity solely for claims or actions arising from this Agreement that are brought in state or federal courts.

J.A. 14. Similarly, the 2007 letter addresses the matter in these terms:

> The NITHPO agrees to a limited waiver of Tribal sovereign immunity in Tribal, federal and state courts, solely for claims arising under this Agreement.

J.A. 17.

Throughout the engagement, Mr. Luckerman billed the Tribe for his services and expenses in accordance with the terms of the engagement agreements, and the Tribe made payments in response to those billings both during the engagement and for years after its termination. Compl. ¶¶ 16-17, J.A. 9. The Tribe never expressed dissatisfaction with the legal services it received from Mr. Luckerman. Compl. ¶¶ 20-21, J.A. 10. Prior to the filing of Mr. Luckerman's complaint in March 2013, the Tribe never suggested that any provision of either engagement agreement was in any way illegal, unfair or improper. Compl. ¶ 22, J.A. 10.

At the filing of the complaint, the Tribe was in breach of the engagement agreements for failure to pay charges incurred under them. Compl. ¶ 19, J.A. 10.

B. Procedural History

This case was initially filed in the Superior Court of Rhode Island. The Tribe removed the case to the district court and, without answering, the Tribe filed a motion to dismiss based in substantial part on its contention that the Tribe had not waived its sovereign immunity. ECF No. 1; ECF No. 8. After briefing and argument, the motion was denied by the district court in an Opinion and Order entered on August 30, 2013 ("August Order"). Tribe's Add. 1-14.

C. The Motion for Reconsideration

One month later, on September 30, 2013, the Tribe filed a motion for reconsideration under Rule 59(e) in which it made four arguments to support its view that the district court should revisit the August Order. ECF No. 18; J.A. 120-121.

1. The Alleged Protocol

First, the Tribe contended, the waivers contained in the 2003 and 2007 engagement letters must be seen as "ineffective" because they "did not pass through any step of the Tribe's waiver approval protocol[,] . . . were not the subject of a Tribal Council vote and resolution[,] . . . and were not officially endorsed by [the] Chief Sachem." Mem. in Supp. of Mot. for Recons. ("Recons. Mem.") 2-3, J.A. 121-122.

This protocol argument received only passing mention in the Tribe's motion to dismiss. Indeed, it garnered a single sentence in the Tribe's principal supporting memorandum (Dismissal Mem. 5, J.A. 24), and a reminder about that sentence in the Tribe's reply memorandum. Reply Mem. in Supp. of Mot. to Dismiss 3, J.A. 102. With the Reply Memorandum, the Tribe filed the affidavit of the Chief Sachem dated August 6, 2013. J.A. 108-109. In the affidavit, the Chief referred to

the purported protocol (J.A. 108-109, ¶¶ 8-10), but he referenced no provision of tribal law enacting it.

2. The Tribal Constitution

Next, and in an effort to lend support to the suggestion that the Tribe had enacted a legal requirement relating to waivers of sovereign immunity, the Tribe referred for the first time to two sentences of the Tribe's Constitution. Recons. Mem. 3, J.A. 122. Here again, however, the argument is undeveloped; nothing is offered to indicate, for example, why this constitutional provision should be regarded as sufficient to invalidate the immunity waivers set forth in the engagement letters. Neither does the Tribe explain or otherwise elaborate on the point in its reply memorandum. Instead, the constitutional provision is simply repeated. Reply Mem. in Supp. of Mot. for Recons. 3, J.A. 152.

As indicated, this constitutional argument was raised for the first time on reconsideration. It was not presented to the district court as a reason for granting the Tribe' motion to dismiss: not in the Tribe's two supporting memoranda, not during oral argument.

3. John Brown's Authority

The third ground advanced by the Tribe as a reason for reconsideration relates to the 2007 agreement. The Tribe argued that John Brown, who signed the

2007 agreement for the Tribe, did not have authority to waive the Tribe's sovereign immunity. Recons. Mem. 4, J.A. 123. Without reference to any supporting facts or documentation, the Tribe simply asserts that "granting a waiver of sovereign immunity of the Tribe, *qua* Tribe, is squarely outside the scope of [Mr. Brown's] authority, which renders it ineffective." Id.

This argument too was not advanced by the Tribe in its motion to dismiss. Instead, the Tribe focused on its contention that NITHPO was a not a party to the case and, as a separate entity, it could not waive the Tribe's sovereign immunity. Dismissal Mem. 2 ("The NITHPO is not a party in this action and lacks the authority to waive the Tribe's sovereign rights."), J.A. 21; Reply Mem. 6-7, J.A. 105-106.

4. The Request for Discovery

The final ground put forth by the Tribe to support its motion for reconsideration is its contention that discovery is necessary to clarify "whether the Tribe actually received and read the 2003 letter" and to determine "whether the [engagement] letters completely and accurately memorialized the negotiations between the parties regarding Mr. Luckerman's legal services." Recons. Mem. 5, J.A. 124.

The Tribe did not seek discovery in this case prior to filing its motion for reconsideration. On the contrary, the Tribe explicitly rejected the idea when Mr. Luckerman raised it. Tr. of Hr'g on Mot. to Dismiss, 8/7/13, 26, J.A. 192.

SUMMARY OF ARGUMENT

The Tribe grounded its motion for reconsideration on the theory that the district court committed a manifest error of law when it denied the Tribe's motion to dismiss for lack of subject matter jurisdiction. Tribe's Br. 15. The district court understood the motion for reconsideration in the same way. Op. and Order, 1/7/14, at 5, Tribe's Add. 19.

As has been noted, the Tribe advanced four arguments in an effort to make its case for manifest error. First, it suggested that the district court failed to account properly for the Tribe's alleged waiver protocol. J.A. 121-123. Next, it contended that the district court failed to appreciate the import of Article V of the Tribe's Constitution. J.A. 122, 150. Third, it argued that the head of the Tribe's preservation office lacked the authority to give the Tribe's waiver of sovereign immunity. J.A. 123. Finally, the Tribe urged that the district court "should allow limited discovery prior to ruling on the Tribe's Motion to Dismiss." J.A. 124.

The Tribe's appeal from denial of its motion for reconsideration is based on one argument that is stated in a completely perfunctory way in its motion to dismiss, and three arguments that are not mentioned at all in that motion. Specifically, in its memorandum in support of its motion to dismiss, the Tribe dedicates a single sentence to its alleged procedure for approving waivers of sovereign immunity ("Moreover, in the case of the Narragansett Tribe[,] they

require an explicit resolution of the Tribal government by a vote of the Tribal Council and the signature of the Chief Sachem.") (J.A. 24), and it simply repeats that sentence in its reply memorandum (J.A. 102). In neither place, however, does the Tribe offer developed argumentation to support the contention. At the same time, the Tribe's arguments relating to its Constitution, John Brown's authority, and its purported need for discovery are each completely absent from the Tribe's motion to dismiss, supporting memoranda, and oral argument. This Circuit's precedent is clear in holding that such arguments may not form the basis for a motion to reconsider, just as they may not support an appellate effort to reverse the denial of such a motion.

As for the Tribe's alleged protocol, including the provisions of Article V of the Tribe's Constitution, the district court reasonably found it insufficient to provide notice that a particular procedure must be followed to secure a waiver of the Tribe's immunity. Tribe's Add. 20. In so concluding, the district court properly contrasted the Tribe's alleged procedure with the constitution- and ordinance-based procedures of other tribes:

> The three cases relied on by the Tribe all share a key characteristic that is missing here—each of the Indian tribes in those cases had constitutional provisions or ordinances that dictated how sovereign immunity was to be waived. . . . Here, the Tribe's Constitution and By-Laws are silent on how the Tribe must waive sovereign immunity, and thus Luckerman reasonably relied on the agreement he entered into with the Tribe.

Op. and Order, 1/7/14, at 5, Tribe's Add. 19.

As for the contention that the head of the Tribe's preservation office did not have the requisite authority to waive the Tribe's immunity, this argument was not raised by the Tribe in its motion to dismiss.[2] As such, it could not have been a ground for reconsideration of the August Order. Iverson v. City of Boston, 452 F.3d 94, 104 (1st Cir. 2006) (no abuse of discretion in district court's failure to address on reconsideration a theory not properly developed in plaintiff's complaint or opposition to a motion to dismiss); Aybar v. Crispin-Reyes, 118 F.3d 10, 16 (1st Cir. 1997) (motion for reconsideration is not a place for presentation of new arguments that could have been presented prior to entry of the underlying judgment). Moreover, the record facts are more than sufficient to establish that Mr. Brown had the requisite authority. His office had been given broad responsibility to "pursu[e], establish[] and accomplish[] Indian Gaming under the Indian Gaming Regulatory Act" and "to enact and legislate any necessary rules, and regulations incidental to the task, and to carry out and facilitate any business, necessary to the task[.]" J.A. 81-82. Indeed, Mr. Brown's authority was such that, in carrying out his duties, he needed only to "report to the Chief Sachem with any updates of [his]

[2] Neither was the argument explicitly addressed by the district court in its order denying the motion for reconsideration.

actions and findings[,]" not to clear his actions in advance with the Chief or anyone else. Id. at 82. Moreover, the engagement letter signed by Mr. Brown affirmed the breadth of his office's responsibility in matters involving "Tribal sovereignty, culture and traditions and well as for economic development and other issues . . . ." J.A. 17.

The last of the grounds advanced by the Tribe in its reconsideration motion is also without merit.[3] The Tribe's contention is that the district court should have permitted discovery before ruling on the motion to dismiss. Here too, however, the Tribe made no request for discovery in connection with its motion to dismiss, and such a request is not properly made for the first time in a motion for reconsideration. See Iverson, 452 F.3d at 104.

There is a second complication for the Tribe on this point. The Tribe not only failed to make a request for discovery in its motion to dismiss, it opposed the conditional request for discovery that Mr. Luckerman made. The Tribe argued that no discovery should be permitted because Mr. Luckerman should be able to defend against the motion to dismiss based on the record developed at the time of argument. Tr. of Hr'g on Mot. to Dismiss, 8/7/13, 26, J.A. 192.

[3] The district court did not explicitly address this argument when it denied the motion for reconsideration.

Apart from its lateness and inconsistency, the request for discovery was properly denied because it presented no meaningful justification for the discovery sought. The facts the Tribe proposed to pursue—"whether the Tribe actually received and read the 2003 letter" and "whether the letters completely and accurately memorialized the negotiations between the parties"—were well within the experience of the Tribe's own witnesses. If the Tribe had pertinent facts to offer, it could have done so without discovery. As for whether the Tribe actually received the 2003 letter, the Tribe adroitly has refused to answer that question squarely throughout the case. As a consequence, it is difficult to regard the Tribe's sudden interest in the subject as genuine. Moreover, until the motion for reconsideration, the Tribe never suggested any uncertainty about whether it received the letter. As for whether the letters adequately memorialize the agreements between the parties, the Tribe provided no information to the district court suggesting where such evidence might lead or how it might make a difference in the outcome of the motion to dismiss.

In this appeal, the Tribe fails to demonstrate that there was manifest error in the district court's August Order. As a consequence, the district court could not have abused its discretion when it denied the Tribe's motion for reconsideration.

STANDARD OF REVIEW

"[R]econsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (3d ed. 2013). Relief is appropriate when "the original judgment evidenced a manifest error of law, if there is newly discovered evidence, or in certain other narrow situations." Global Naps, Inc. v. Verizon New England, Inc., 489 F.3d 13, 25 (1st Cir. 2007); see also Palmer v. Champion Mortgage, 465 F.3d 24, 29-30 (1st Cir. 2006). Amendment of a judgment to rectify an obvious error of law has been determined by this Court to be an appropriate use of Rule 59(e). Ira Green, Inc. v. Military Sales & Serv. Co., 775 F.3d 12, 28 (2014) (defamation judgment in plaintiff's favor correctly reversed by the district court in light of the jury's verdict finding no related damages). Similarly, an error of law was manifest where a portion of a district court's award of attorneys' fees lacked a statutory basis. Merit Constr. Alliance v. City of Quincy, 759 F.3d 122, 132-134 (1st Cir. 2014) (plaintiffs not qualified to recover fees under ERISA's fee-shifting provision).

A motion for reconsideration "certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." Aybar, 118 F.3d at 16 (quoting Moro v. Shell Oil Co., 91 F.3d 872, 876 (7th Cir. 1996)); see also Iverson, 452 F.3d at 104.

Neither is a motion for reconsideration "a mechanism to regurgitate 'old arguments previously considered and rejected.'" Biltcliffe v. CitiMortgage, Inc., 772 F.3d 925, 930 (1st Cir. 2014) (quoting Nat'l Metal Finishing Co., Inc. v. BarclaysAmerican/Commercial, Inc., 899 F.2d 119, 123 (1st Cir. 1990)).

This Court reviews the denial of a motion to reconsider for abuse of discretion, Calderon-Serra v. Wilmington Trust Co., 715 F.3d 14, 20 (1st Cir. 2013); Mulero-Abreu v. Puerto Rico Police Dep't, 675 F.3d 88, 94-95 (1st Cir. 2012), and it will not overturn the denial "unless a miscarriage of justice is in prospect or the record otherwise reveals a manifest abuse of discretion." Rivera v. Riley, 209 F.3d 24, 27 (1st Cir. 2000). A district court "exceeds its discretion when it fails to consider a significant factor in its decisional calculus, if it relies on an improper factor in computing that calculus, or if it considers all of the appropriate factors but makes a serious mistake in weighing such factors." Lebrón v. Commonwealth of Puerto Rico, 770 F.3d 25, 32 (1st Cir. 2014) (quoting Colón-Cabrera v. Esso Standard Oil Co. (Puerto Rico), Inc., 723 F.3d 82, 88 (1st Cir. 2013)); see also Matamoros v. Starbucks Corp., 699 F.3d 129, 138 (1st Cir. 2012) ("An abuse occurs when a court, in making a discretionary decision, relies upon an improper factor, neglects a factor entitled to substantial weight, or considers the correct mix of factors but makes a clear error of judgment in weighing them.").

"An abuse of discretion also occurs if the court adopts an incorrect legal rule." Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 295 (1st Cir. 2000).

The Tribe refers to Third Circuit precedent to suggest that this Court should apply plenary review to the district court's denial of the Tribe's motion for reconsideration. Wiest v. Lynch, 710 F.3d 121, 128 (3d Cir. 2013); Tribe's Br. 15. Assuming for these purposes that there is no material difference between the standards of review applicable to motions for reconsideration in the two circuits, the Third Circuit precedent is nevertheless of no assistance to the Tribe here. Wiest involved the application of an incorrect legal standard resulting in the dismissal of the plaintiff's claim. Specifically, the court held that the plaintiff's whistleblower claim under Section 806 of the Sarbanes-Oxley Act was improperly dismissed under Rule 12(b)(6) because the district court evaluated the complaint based on the wrong legal standard. 710 F.3d 137-138; see also Long v. Atlantic City Police Dept., 670 F.3d 436, 447 (3d Cir. 2012) (plenary and abuse-of-discretion review are essentially the same where the outcome turns on whether the district court's dismissal resulted from application of an incorrect legal rule). In First Circuit terms, the district court in Wiest adopted "an incorrect legal rule." Waste Mgmt. Holdings, Inc., 208 F.3d at 295.

No incorrect legal rule affected the district court's denial of the Tribe's motion to dismiss. Indeed, this is a case in which the controlling legal rules were

never in dispute. There was agreement that, as an initial matter, the Tribe enjoyed sovereign immunity from suit, that it could waive that immunity, and that any waiver had to be clear and unequivocal to be effective. When it denied the motion for reconsideration, indeed when it denied the Tribe's underlying motion to dismiss, the district court never labored under a misapprehension of the controlling law. Accordingly, even if the Wiest rule can be taken as an expression of First Circuit law, it is of no assistance to the Tribe.

ARGUMENT

A. The Arguments Made in the Motion for Reconsideration Were Waived When Not Properly Raised in the Motion to Dismiss.

As has been indicated, the four grounds upon which the Tribe based its motion for reconsideration were either raised perfunctorily or not at all in the Tribe's motion to dismiss. See supra pp. 8-16. As a consequence, those arguments could not have provided a basis for reconsideration.

"A Rule 59(e) motion normally may not be used as a vehicle to raise arguments that could have been (but were not) raised prior to judgment." Perez v. Lorraine Enters., Inc., 769 F.3d 23, 28 (1st Cir. 2014) (raising a due process challenge for the first time on reconsideration); Global Naps, Inc. v. Verizon New England, Inc., 489 F.3d at 25 (raising objections to service charges that had been alluded to, but not detailed, prior to judgment); Tell v. Trustees of Dartmouth College, 145 F.3d 417, 419-420 (1st Cir. 1998) (raising a new theory for addressing the case's indispensable-party problem). In response to the plaintiffs' new theory in Tell, this Court held that failure to raise the argument earlier effected a waiver of plaintiffs' ability to assert the theory as a basis for reconsideration:

> This alternative argument should have been proffered to the district court in response to the Board of Trustees' motion to dismiss for a lack of an indispensable party. Failure to do so waived the argument, and the district court was not obliged to consider it on reconsideration.

Id. at 420 (citation omitted).

Each of the Tribe's arguments on reconsideration readily could have been made at the time of the Tribe's motion to dismiss, and the Tribe does not suggest otherwise. Rule 59(e) is not intended to provide a second opportunity to make arguments that could have been made earlier:

> It is not the purpose of allowing motions for reconsideration to enable a party to complete presenting his case after the court has ruled against him. Were such a procedure to be countenanced, some lawsuits really might never end, rather than just seeming endless.

Frietsch v. Refco, Inc., 56 F.3d 825, 828 (7th Cir. 1995) (Posner, C.J.).

Indeed, "[a] district court is entitled to disregard arguments made in a Rule 59(e) motion that 'could, and should, have been made before judgment issued.'" Morán Vega v. Cruz Burgos, 537 F.3d 14, 18 n.2 (1st Cir. 2008) (quoting FDIC v. World Univ. Inc., 978 F.2d 10, 16 (1st Cir. 1992)); Iverson, 452 F.3d at 104. In Iverson, for example, after the district court awarded summary judgment to the defendant on plaintiffs' claims under the Americans with Disabilities Act ("Act"), plaintiffs filed a motion for reconsideration in which they set forth a new theory for recovery under the Act, one that had not been set forth in their complaint or developed in their papers opposing the City's motion to dismiss.[4] In its decision denying the motion for reconsideration, the district court declined to address the

[4] The City's Rule 12 motion had been converted to a motion for summary judgment. Iverson, 452 F.3d at 97.

new argument. Id. On appeal, this Court ruled that the district court properly disregarded the new argument:

> The plaintiffs' objection to the lower court's denial of their motion for reconsideration need not detain us. As said . . . the plaintiffs failed properly to develop the [new] theory in either their complaint or their opposition to the City's dispositive motion. It follows, a fortiori, that there was no abuse of discretion in the district court' refusal to address that theory on a motion for reconsideration . . . . The presentation of a previously unpled and undeveloped argument in a motion for reconsideration neither cures the original omission nor preserves the argument as a matter of right for appellate review.

Id. Such arguments warrant no greater attention on appeal:

> We have held, with echolalic regularity, that theories not squarely and timely raised in the trial court cannot be pursued for the first time on appeal. This prophylactic rule requires litigants to spell out their legal theories face-up and squarely in the trial court; if a claim is merely insinuated rather than actually articulated, that claim ordinarily is deemed unpreserved for purposes of appellate review.

Id. at 102 (citations and internal quotation marks omitted).

Judicial economy is not the only interest served by the rule prohibiting a party from advancing new arguments in a motion for reconsideration. The rule serves an interest in basic fairness as well. If the Tribe had raised these arguments in connection with its motion to dismiss, Mr. Luckerman would have had an opportunity not only to brief and argue these points, but also to rebut them by presenting pertinent factual material. The Tribe's argument about the constitutional basis for its alleged protocol, for example, would have provided Mr. Luckerman

with an opportunity to say whether, in his experience, Article V of the Tribe's Constitution had been applied as the Tribe suggests. Further, had the Tribe made its argument about the authority of Mr. Brown to bind the Tribe, Mr. Luckerman would have been able to set forth the facts that led him to think that Mr. Brown possessed the authority necessary to waive the Tribe's immunity. When the Tribe raised its arguments for the first time in its motion for reconsideration, Mr. Luckerman's opportunity to respond appropriately had been lost. At that stage, in the absence of newly discovered evidence, the district court and the parties were confined by the record developed in connection with the motion to dismiss.

For these reasons, the district court could not have abused its discretion when it denied the Tribe's motion for reconsideration.

B. The Waivers of Sovereign Immunity Given by the Chief Sachem and the Head of NITHPO Were Not Contrary to Tribal Law.

The Tribe relies on a series of cases in which courts declined to enforce explicit waivers of tribal sovereign immunity because the waivers were inconsistent with tribal law. Tribe's Br. 27-32. Those cases are not controlling here, however, because, in each of them, the inconsistent tribal law was clearly set forth in the tribe's constitution or ordinances. In this case, no such tribal law prevented the Chief or the head of NITHPO from waiving the Tribe's sovereign immunity as they did.

The Tribe begins its argument with the following, out-of-context quotation from the Supreme Court's opinion in United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 513 (1940):

> [I]mmunity cannot be waived by officials. If the contrary were true, it would subject the government to suit in any court in the discretion of the responsible officer.

Tribe's Br. 27-28. While the Tribe offers this as support for the broad proposition that tribal officials may never waive sovereign immunity without the explicit approval of the tribal council, neither USF&G nor any other case supports that proposition. The question in USF&G was whether government officials acting on behalf of the Choctaw and Chickasaw Nations had waived the tribes' sovereign immunity in certain receivership proceedings simply by failing to object to the receivership court's jurisdiction over cross-claims against the tribes. 309 U.S. at 513. The Supreme Court ruled that no waiver had occurred, indeed that none could have occurred as a consequence of failure to object to the assertion of a cross-claim. Id.

Thus, rather than providing support for the Tribe's assertions here, USF&G is an endorsement of the accepted principle—one not challenged in this case—that waivers of tribal sovereign immunity must be clear and unequivocal. In that sense, USF&G is in the mainstream of cases requiring explicit language to effect waivers

of sovereign immunity. It adds nothing to the force of the Tribe's position in this case.

Neither do the Tribe's other cases support the proposition it advances. Memphis Biofuels, LLC v. Chicksaw Nation Indus., Inc., 585 F.3d 917, 919 (6th Cir. 2009), discussed at pages 28-29 of the Tribe's brief, was a case in which a tribal corporation ("CNI") repudiated an agreement to supply diesel fuel and soybean oil to Memphis Biofuels. The controlling agreement between Memphis and CNI contained an explicit waiver of CNI's sovereign immunity and a "representation and warranty" that the waiver was "valid, enforceable and effective." Id. at 918. After CNI declined to arbitrate its dispute with Memphis, and sought a declaration of its sovereign immunity in a tribal court, Memphis brought a separate federal court action seeking, among other things, a declaration of the waiver's validity. Id. at 919. The district court dismissed Memphis's complaint for lack of subject matter jurisdiction, finding that it had neither diversity nor federal-question jurisdiction. Id. On appeal, the Sixth Circuit affirmed on the ground that CNI's express waiver of its sovereign immunity was invalid because of the clear requirement in CNI's charter that its board of directors approve any waiver of sovereign immunity. Id. at 921-922 ("CNI's charter requires board approval to waive sovereign immunity."). Since the board had not given that approval, the waiver could not be enforced. Id. at 922.

MM&A Productions, LLC v. Yavapai-Apache Nation, 316 P.3d 1248 (Ariz. Ct. App. 2014), cert. denied, 135 S.Ct. 872 (2014), discussed at pages 28-29 of the Tribe's brief, is to the same effect. In that case, the Yavapai-Apache Nation asserted its sovereign immunity in an effort to block enforcement of an entertainment and production agreement with MM&A. MM&A relied on the Nation's contractual waivers of sovereign immunity, Id. at 1250, but the Nation referred to its Constitution which required any waiver of sovereign immunity to be given by the Nation's Tribal Council or by the Constitution itself:

> The Yavapai-Apache Tribe hereby declares that, in exercising self-determination and its sovereign powers to the fullest extent, the Tribe is immune from suit except to the extent that the Tribal Council expressly waives sovereign immunity, or as provided by this constitution.

Id.

Finally, the Tribe refers to World Touch Gaming, Inc. v. Massena Mgmt., LLC, 117 F. Supp. 2d 271 (N.D.N.Y. 2000). Tribe's Br. 30-31. In that case, World Touch Gaming ("WTG"), a gambling equipment supplier, entered into lease/purchase agreements with the Akwesasne Mohawk Casino, a wholly owned subsidiary of the St. Regis Mohawk Tribe. Id. at 273. The agreements, which were signed on behalf of the Casino by the senior vice president of its management firm, contained language waiving the Casino's sovereign immunity and acknowledging that the waiver would allow WTG to pursue such legal and equitable remedies as it

might find necessary to enforce the terms of the agreements. Id. The Casino failed to meet its obligations under the agreements, and WTG brought suit. The defendants moved to dismiss based on tribal sovereign immunity. The court granted the motion as to the tribal defendants on the strength of the "unequivocal language of the [St. Regis Mohawk] Tribe's Constitution and Civil Judicial Code" providing that "only the Tribal Council can waive the Tribe's sovereign immunity, and such waiver must be express." Id. at 275.

At the time of its engagement agreements with Mr. Luckerman, the Tribe simply did not have a legal framework in place comparable to those described in these cases. No fair reading of Article V of the Tribe's Constitution can be said to establish a procedure for waiving the Tribe's sovereign immunity, and the Tribe has pointed to no provision of its ordinances or general laws setting forth a waiver procedure. The Chief's late-in-the-day affidavit asserting the existence of a practice regarding waivers is not the equivalent of established tribal law; it could not have served as notice of law to Mr. Luckerman; and it cannot be reconciled with the Chief's silence in the face of the immunity waiver contained in the 2003 agreement, or with Mr. Brown's express acceptance of the immunity waiver set forth in the 2007 agreement.

In connection with its alleged protocol, the Tribe made a series of assertions that have no support in the record. The Tribe asserted, for example, that "Mr.

Luckerman was not ignorant of the Tribe's official waiver protocol." J.A. 122. In fact, there is no evidence in the record that Mr. Luckerman was in any way familiar with it prior to the Tribe's motion for reconsideration. Neither is there any evidence in the record that Mr. Luckerman had worked on a matter during the relevant period that would have provided an opportunity to become familiar with the Tribe's supposed waiver protocol.

The Tribe further asserts that "Mr. Luckerman was well aware that the decision to grant waiver is not taken lightly and requires formal approval." Id. It is reasonable to assume that Mr. Luckerman would have expected the Tribe to take such decisions seriously, but this is quite different from having knowledge of the existence or terms of a particular procedure not set forth in tribal law. Moreover, there is nothing in this record to suggest that Mr. Luckerman would have had any awareness that the approvals of the Chief Sachem and the chief executive officer of the tribal office "authorized and empowered to enact and legislate any necessary rules, and regulations incidental to the task" of "investigating, pursuing, establishing, and accomplishing Indian Gaming, as defined under the Indian Gaming Regulatory Act[,]" would be insufficient to effect waivers of the Tribe's immunity. Tribal Council Resolution TC-09092004-01, J.A. 81-82.

Finally along this line, the Tribe asserts that "Luckerman does not refute his knowledge or understanding of this protocol in any of his pleadings." J.A. 122.

Here, however, the Tribe fails to mention that there was no record fact to refute. The relevant record from the Tribe's perspective consists of two affidavits submitted by the Chief Sachem.[5] There is no assertion in either of them that Mr. Luckerman had knowledge of the supposed protocol. J.A. 94-95; J.A. 154-155. Indeed, in the second of his affidavits, the Chief asserted that he did "not recall any conversation with Mr. Luckerman regarding the terms of the letter dated March 6, 2003." J.A. 155.

Accordingly, there was no manifest error of law in the district court's rejection of the Tribe's arguments in this area, and no abuse of discretion in its refusal to reconsider the matter.

C. NITHPO's Waiver of Tribal Immunity Was Effective Without the Express Approval of the Tribal Council.

At the time of its motion to dismiss, the Tribe made a single argument with regard to the 2007 agreement: It contended that NITHPO was a separate legal entity from the Tribe and, as such, it could not waive the Tribe's sovereign immunity. J.A. 25 ("As a separate entity, with no authority to waive the Tribe's immunity, any waiver by NITHPO is wholly inapplicable to the Tribe's

[5] In all, the record contains three affidavits signed by the Chief. The affidavit filed on August 6, 2013 (J.A. 108-109), however, is duplicative of one filed on July 9, 2013 (J.A. 94-95). The later affidavit appears to have been filed to satisfy the district court's rule requiring original (non-electronic) signatures on such documents. D.R.I. LR Gen 303(d)(3)(B).

immunity.") The district court rejected the separate-entity argument pointing out that courts—including this one—presented with the question in analogous cases had rejected it. Tribe's Add. 5-6.

The Tribe offered a new argument in its motion for reconsideration: It contended that the 2007 agreement had not been approved under the Tribe's "rigid protocol for waiving its tribal sovereign immunity[,]" J.A. 121-122, and John Brown, the NITHPO chief executive who signed the 2007 engagement agreement, was without authority to waive the Tribe's immunity. J.A. 123. Both new arguments seemed to concede the correctness of the district court's ruling as to the separate-entity argument by leaving it uncontested in the motion for reconsideration. Thus, the Tribe offered nothing to suggest that there was manifest error in the district court's rejection of the separate-entity argument. The district court could not have abused its discretion by not reconsidering a ruling that it was not asked to reconsider.

In this appeal, the Tribe proceeds in much the same way. While it alludes to several of its previous arguments relating to the 2007 agreement, Tribe's Br. 37-39, it does not develop an argument to explain how the district court committed a manifest error of law when it determined that NITHPO was not a separate legal entity from the Tribe and, accordingly, that its sovereign immunity was not separate from that of the Tribe. Tribe's Add. 5-6. Indeed, except for a passing

reference to Ninigret (Tribe's Br. 39), the Tribe completely ignores the cases relied on by the district court to support its conclusion regarding NITHPO's waiver authority. Tribe's Add. 5-6.

In that passing reference to Ninigret, the Tribe states that the case "held effective waiver of immunity by a Narragansett Tribal entity must be authorized by Resolution of the Tribal Council, as the Tribe's legislative body." Tribe's Br. 39. Ninigret contains no such holding. It is true that the existence of a tribal ordinance authorizing the Housing Authority to waive the Tribe's immunity was one of the factors that led the court to conclude that a waiver of sovereign immunity had occurred in the case. Ninigret, 207 F.3d at 29-31. Nonetheless, the Ninigret court did not hold that such an ordinance is a prerequisite to waiver by a tribal entity or office, or that it constitutes the exclusive means for achieving waiver. Id. Moreover, the Ninigret court was quite clear that it was the contractual, forum-selection clause that carried the day as to the effectiveness of the Authority's waiver of the Tribe's sovereign immunity. Id. at 31.

The Tribe makes no mention of the second case relied upon by the district court for its conclusion that NITHPO could waive the Tribe's sovereign immunity. The district court referred to Confederated Tribes of the Colville Reservation Tribal Credit v. White (In re White), 139 F.3d 1268 (9th Cir. 1998). Tribe's Add. 6. In that case, Colville Tribal Credit ("Colville"), an agency of the Confederated

Tribes of the Colville Reservation, in an effort to collect an obligation of the debtor in a Chapter 11 proceeding, actively participated in that proceeding by filing an objection to confirmation of the debtor's initial reorganization plan, and casting ballots rejecting both the initial and amended reorganization plans of the debtor. Confederated Tribes, 139 F.3d at 1270. Later, after the debtor converted the case to one under Chapter 7 and was granted a discharge, Colville filed an adversary proceeding contesting the discharge. Id. Colville moved for summary judgment asserting tribal immunity as a barrier to the discharge. Id. The bankruptcy court, however, rejected the defense on the ground that Colville had submitted to the jurisdiction of the bankruptcy court and thereby waived its sovereign immunity. Id.

Both the district court and the Ninth Circuit affirmed. Id. In the court of appeals, Colville argued that the waiver was without authority "because an agent of the Tribes cannot waive sovereign immunity by filing a proof of claim in a Chapter 11 reorganization, at least not without an express and clear waiver supporting that action by the governing body of the Tribes." Id. at 1271. The court rejected the argument, finding nothing in the record to suggest that tribal approval was a necessity in the circumstances, and noting that the tribes had acknowledged Colville's role as an agency of the tribes both in the adversary proceeding and on appeal. Id.

The Tribe also ignores the third case relied upon by the district court to support its conclusion that NITHPO has the capacity to waive the Tribe's immunity. The district court referred to the Seventh Circuit's opinion in Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir. 1993). Tribe's Add. 6. In that case, a wholly-owned tribal entity, Sioux Manufacturing Corporation ("SMC"), was set up by the Devil's Lake Sioux Tribe to bring manufacturing to the tribe's reservation in Fort Totten, North Dakota. SMC and the tribe then entered into negotiations with Medical Supplies & Technology, Inc. ("MST"), an Illinois corporation, to manufacture and market latex medical products on the reservation. In that connection, SMC and MST signed a letter of intent outlining the deal, one provision of which provided that SMC and the tribe would waive "all sovereign immunity in regards to all contractual disputes." Id. at 807. Before final agreements were signed, the contemplated transactions came undone and litigation ensued. Id. SMC took the position that the waiver of sovereign immunity set forth in the letter of intent was ineffective because it had not been signed by the tribe itself. Id. at 812. The court of appeals found the argument "unpersuasive":

> Even if we did not consider the foregoing a clear waiver of any sovereign immunity SMC may enjoy, we find the Letter of Intent itself forecloses argument on this point. As we mentioned at the outset, the Letter of Intent contains a provision specifically dealing with sovereign immunity. Under that section, SMC and the Tribe agreed to "waive all sovereign immunity in regards to all contractual disputes." Assuming the Letter is a valid contract, we agree with the

> court below and conclude the Tribe and SMC have waived sovereign immunity.

Id.

In the present case, the district court reasonably concluded that a tribal office like NITHPO—in an explicit contract, with no clear tribal law preventing it—may waive a tribe's sovereign immunity. The Tribe made no effort to show that there was manifest error in that ruling. Accordingly, the district court could not have abused its discretion when it denied the Tribe's motion for reconsideration.

D. The Record Well Supports a Finding that John Brown Had Apparent Authority to Waive the Tribe's Sovereign Immunity.

As has been noted, it was not until it filed its motion for reconsideration that the Tribe first argued that John Brown lacked the authority to give the waiver of immunity set forth in the 2007 engagement agreement. J.A. 123. Thus, the issue was not before the district court at the time of decision on the motion to dismiss, and neither the district court nor Mr. Luckerman had an opportunity to address the matter. The district court, we submit, could not have committed a manifest error of law with respect to an issue neither raised nor addressed in the case until after the August Order.

When in its motion for reconsideration the Tribe did advance an argument about John Brown's authority (J.A. 123), it relied on three cases which, as the district court noted, the Tribe "failed to cite in its motion to dismiss." Tribe's Add.

19. Nevertheless, in each of the cases, waivers of sovereign immunity were invalidated because they were obtained in violation of the explicit requirements of tribal constitutions or ordinances, not simply because a tribal official was determined to have acted without express or apparent authority. In Sanderlin v. Seminole Tribe of Florida, 243 F.3d 1282 (11th Cir. 2001), the first of the Tribe's cases on this point, a claim that the tribe's chief had impliedly waived his tribe's immunity by accepting funds under the federal Rehabilitation Act was rejected in substantial part because a tribal ordinance dealt "specifically with the Tribe's sovereign immunity and how a waiver may be effected by trial leaders." Id. at 1287. Similarly, in World Touch Gaming, 117 F. Supp. 2d at 275, it was "the unequivocal language of the Tribe's Constitution and Civil Judicial Code[,]" giving the tribal council exclusive authority to waive the tribe's immunity, that served to defeat World Touch's claims of waiver based on express and apparent authority. Id. at 274-276. Finally, in Danka Funding Co., LLC v. Sky City Casino, 329 N.J. Super. 357 (N.J. Super. Ct. Law Div. 1999), the consent to jurisdiction and suit given by the comptroller of a tribal enterprise was found to be ineffective to waive the tribe's immunity where it was given without first satisfying the tribe's laws explicitly setting forth the procedures to be followed to obtain the tribe's waiver of immunity. Id. at 365-366.

Unlike the circumstances in Sanderlin, World Touch Gaming, and Danka Funding, no tribal law specified a particular procedure for securing waivers of the Tribe's immunity. At the same time, Mr. Luckerman—never having received an indication to the contrary—was reasonable in his belief that the Tribe's Chief and the head of its preservation office had the authority to give the limited waivers of the Tribe's immunity that they unreservedly gave in the engagement letters.[6] If either official doubted his authority to provide an effective waiver, it would have been a simple matter to so advise Mr. Luckerman.

One case that the Tribe does not cite or discuss is Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe, 107 P.3d 402 (Colo. Ct. App. 2004). There, the Ute Tribe's chief financial officer signed a contract with Rush Creek by which the latter agreed to provide the tribe with computer software and services. Id. at 404. After the tribe failed to make the contractually required payments, Rush Creek sued. Id. The tribe, for its part, asserted sovereign immunity and moved to dismiss for lack of subject matter jurisdiction. Id. The trial court denied the motion.

The contract contained a clause that, on appeal, the tribe conceded to be an explicit waiver of sovereign immunity. Id. at 406. At the same time, however, the tribe contended that, although the CFO had authority to enter into contracts on the

[6] As the Complaint indicates, Mr. Luckerman had been working with the Tribe for several months before the first of the engagement letters was put in place. J.A. 8.

Tribe's behalf, that authority did not extend to contracts waiving the Tribe's sovereign immunity. Id. Rush Creek countered that even if the CFO did not have express authority to waive the tribe's immunity, he nonetheless had apparent authority to do so, particularly because the tribe's constitution was silent as to the procedures for waiving sovereign immunity. Id. Finally, Rush Creek argued that it was justified in relying on the CFO's apparent authority to agree to the waiver. Id.

The Colorado Court of Appeals agreed with Rush Creek:

> When, as here, a person has authority to sign an agreement on behalf of a sovereign, it is assumed that the authority extends to a waiver of immunity contained in the agreement. *See* Restatement (Third) of the Law of Foreign Relations of the United States § 456 cmt. b (1987); *see also C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe,* 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001) (citing Restatement § 456 and noting that the law governing waivers of immunity by foreign sovereigns is helpful in deciding tribal sovereign immunity issues); S*mith v. Hopland Band of Pomo Indians,* 95 Cal.App.4th 1, 115 Cal.Rptr.2d 455 (2002) (citing Restatement provision). Nothing in this record negates that assumption; in fact, the silence of the Tribe's Constitution and personnel policy concerning sovereign immunity and waivers reinforces it.
>
> The words, actions, and other described conduct of the Tribe, reasonably interpreted, would and did cause Rush Creek to believe that the Tribe consented to have the contract and waiver signed on its behalf by the CFO. The CFO held himself out as the Tribe's agent and acted at least with apparent authority in assenting to the contract and the waiver therein. Rush Creek relied to its detriment upon the apparent authority of the CFO. Hence, we conclude as a matter of law that the CFO had apparent authority to sign the contract and waive the Tribe's sovereign immunity.

Id. at 408.

Neither does the Tribe refer to StoreVisions, Inc. v. Omaha Tribe of Nebraska, 281 Neb. 238, 795 N.W.2d 271, modified, 281 Neb. 978, 802 N.W.2d 420 (Neb. 2011). In that case, the tribe engaged a general contractor to perform work and supply materials in connection with the tribe's plans to expand its casino operations. 281 Neb. at 240, 795 N.W.2d at 275. Prior to the execution of the construction contracts, StoreVisions asked the tribe to execute a waiver of its sovereign immunity. Id. The tribe agreed and the waiver was signed by the chairman and vice chairman of the tribe's council at a meeting attended by five of the seven members of the council. Id. More than a year later, StoreVisions sued the tribe for breach of contract alleging claims under eleven of the construction agreements concluded by the parties. Id.

The tribe asserted sovereign immunity and moved to dismiss, but the trial court denied the motion on the ground that the tribe's chairman and vice chairman had apparent authority to act on the tribe's behalf and waive its sovereign immunity. 281 Neb. at 241, 795 N.W.2d at 275. Before the Nebraska Court of Appeals could issue a decision on the merits of the case, the Supreme Court of Nebraska transferred the matter to its own docket. 281 Neb. at 241, 795 N.W.2d at 275-276. That court found Rush Creek instructive and adopted its reasoning. 281 Neb. at 245-246, 795 N.W.2d at 278-279. While the court was influenced by

several aspects of the case, one was that the tribe had established no legal framework for waiving its immunity:

> [B]ecause the Tribe's constitution and bylaws are silent as to the method of waving sovereign immunity, it was reasonable for StoreVisions to rely upon the words and actions of the Tribe with respect to the waiver of immunity.

281 Neb. at 247, 795 N.W.2d at 279.

In the present case, the Tribe has never suggested that the Chief or Mr. Brown lacks the authority to bind the Tribe by contract. Indeed, except for the limitation as to waivers of sovereign immunity which he alleges arises out of the purported protocol, the Chief identifies no other limitation on his or Mr. Brown's authority to contract on behalf of the Tribe. J.A. 108-109, 154-155. Neither does the record reflect a single corroborative example of this alleged limitation in a contract setting other than the present one.

By the time of the 2007 engagement letter, the Tribe had endowed NITHPO and Mr. Brown with wide-ranging authority over the most fundamental of tribal affairs. In 2003, for example, in connection with the economic development promised by the terms of the Indian Gaming Regulatory Act ("IGRA"), the Tribe

> authorized the Tribal Historic Preservation Office to investigate and pursue the restoration of said Federal Tribal rights and entitlement afforded to [the Tribe] under [IGRA]. . . .

J.A. 81. In 2004, apparently not fully satisfied with the breadth of authority previously delegated to NITHPO and Mr. Brown, the Tribe expanded that authority to include the ability to "establish[]" and "accomplish[]" Indian gaming:

> NOW THEREFORE BE IT RESOLVED, the Narragansett Indian Tribal Government hereby re-affirm, authorize and assign the task of investigating, pursuing, establishing and accomplishing Indian Gaming, as defined under the Indian Gaming Regulatory Act, to the Narragansett Indian Tribal Historic Preservation Office . . . .

Id. At the same time, the Tribe sought to leave no doubt about the authority of NITHPO and Mr. Brown to accomplish their assigned objectives by emphasizing that the delegated authority included the ability to enact and legislate any necessary rules and regulations, and to carry out any business necessary to its objectives:

> BE IT FURTHER RESOLVED, that the Narragansett Tribal Historic Preservation Office is authorized and empowered to enact and legislate any necessary rules, and regulations incidental to the task, and to carry out and facilitate any business, necessary to the task . . . .

Id. at 82.

When Mr. Luckerman and Mr. Brown signed the 2007 engagement letter, they both acknowledged that NITHPO's areas of authority and responsibility were wide-ranging and fundamental, and that one of those areas was "the preservation of Tribal sovereignty":

> This letter confirms that you have engaged the Law Office of Douglas J. Luckerman to represent the Narragansett Indian Tribal Historic Preservation Office (NITHPO) in connection with issues that relate to the preservation of Tribal sovereignty, culture and traditions as well as

> for economic development and other issues you may choose in the future.

J.A. 17. Five paragraphs later in the same letter, Mr. Brown agreed "to a limited waiver of Tribal sovereign immunity in Tribal, federal and state courts, solely for claims arising under [the 2007 engagement agreement]." Id.

Mr. Luckerman was reasonable to think that Mr. Brown was acting within his authority, and the district court did not abuse its discretion when it denied the Tribe's motion for reconsideration as to the authority question.

E. The District Court Properly Denied the Motion for Reconsideration Without First Permitting the Discovery Requested by the Tribe.

In its motion for reconsideration, the Tribe argued for the first time that the record was unclear as to two facts: "whether the Tribe actually received and read the 2003 letter" and "whether the [2003 and 2007] letters completely and accurately memorialized the negotiations between the parties regarding Mr. Luckerman's legal services." J.A. 124. In the Tribe's view, the appropriate remedy for this alleged defect in the record was to "allow limited discovery prior to ruling on the Tribe's Motion to Dismiss."[7] Id. (emphasis added).

The Tribe's request for discovery at the reconsideration stage of the case was a reversal-of-course for the Tribe. During oral argument on the Tribe's motion

[7] The Tribe's motion to dismiss had been decided a month earlier, on August 30, 2015.

to dismiss on August 7, 2013, Mr. Luckerman made a conditional request for discovery. Relying on this Court's opinion in Valentin v. Hospital Bella Vista, 254 F.3d 358, 364-365 (1st Cir. 2001), Mr. Luckerman asked the district court to permit the parties to develop jurisdictional facts through discovery if the court was inclined to grant the Tribe's motion to dismiss. J.A. 180-181, 182, 190-191. Unconditionally, the Tribe opposed any such discovery:

> Mr. Killoy: Just first point is if we adopt what I understand Mr. Muri's position to be and that is to develop a record by discovery in this case, I think we overlook the rule of the law here and that is that tribal immunities aren't implied, they've got to be explicit; and if you can't show that in the record today, then the case should be dismissed on those grounds.

Tr. of Hr'g on Mot. to Dismiss 26, J.A. 192.

Accordingly, not only did the Tribe fail to make a request for discovery prior to filing its motion for reconsideration, it squarely opposed a request by Mr. Luckerman that could have revealed the facts that the Tribe now seeks to discover. This Court has held that a strategy of this kind "sounds the death knell" for an appellate argument that the district court's procedure was defective. Valentin, 254 F.3d at 364-365. In Valentin, a diversity case where the location of plaintiff's domicile was at issue, the district court had scheduled an evidentiary hearing to assist in sorting out the factual questions raised by defendants' motion to dismiss for lack of subject matter jurisdiction. Id. at 362. Five days before the hearing, the

plaintiff filed a motion asking the district court to "suspend" the hearing "and determine the existence *vel non* of jurisdiction on the parties' written submissions." Id. Apparently in response to plaintiff's motion, the district court decided the jurisdictional issue on the papers in favor of defendants. Id. When, on appeal, the plaintiff found fault with the district court's decision to forego an evidentiary hearing, this Court had this observation:

> Under the circumstances, we think that the plaintiff is estopped from asserting before us that the district court blundered in failing to convene an evidentiary hearing. After all, a party who requests a court to take a specific course of action ordinarily cannot be heard to complain when the court obliges.

Id. at 364-365 (citations omitted).

Even if the Tribe's arguments are treated as timely and consistent with its behavior in the district court, the suggestion that there is error in the district court's decision to proceed without discovery is without merit. As for whether the Tribe "actually received and read the 2003 letter[,]" the Tribe and its employees were in a position to provide clarification without discovery. Nevertheless, the Tribe failed to do so and, to the contrary, went to considerable lengths to avoid doing so. For his part, the Chief would only say that he "never executed or countersigned the letter dated March 6, 2003" and that "neither the Tribe nor [he] have agreed to a waiver" of the Tribe's sovereign immunity as specified in the letter." J.A. 108.

The Tribe's adept footwork was not lost on the district court. During oral argument on the Tribe's motion to dismiss, the court pressed counsel for the Tribe for a forthright answer to whether the Chief received and read the 2003 letter. J.A. 170-173. No such answer emerged from the exchange. When the Tribe sought discovery in its motion for reconsideration, the district court had this observation:

> The Tribe argues that it is unclear from the record whether it received these two letters from Luckerman. Def. Mot. for Reconsideration 5, (ECF No. 18.). Tellingly, however, the Tribe never disputes that it actually received the letter.

Op. and Order, 4 n. 3; Tribe's Add. 18.

The Tribe also argued that it should have had discovery on whether the 2003 and 2007 letters "completely and accurately memorialized the negotiations between the parties regarding Mr. Luckerman's legal services." J.A. 124. Prior to the motion for reconsideration, the Tribe nowhere suggested that the engagement letters were incomplete or inaccurate in any way. Indeed, the Tribe's approach prior to the motion for reconsideration was to portray itself as ignorant of the 2003 letter and unrelated to the 2007 letter. Given the Tribe's posture, the district court would have had little reason to think that discovery on these issues would be useful. In any event, nothing prevented the Tribe from presenting, in affidavit form, its own account of facts bearing on these questions. The Tribe failed to do so.

When the district court declined to reopen the case for discovery, it acted well within its discretion.

F. The District Court Did Not Rely Improperly on the Conduct of the Tribe and Its Officials.

The Tribe argues that the district court "erred in relying on subsequent acts by the Tribe and equity principals [sic] to hold that the Tribe waived its immunity." Tribe's Br. 33. This argument misconstrues the district court's reasoning and decision.

In this appeal, as in the district court, the Tribe obscures the difference between contract formation and contract interpretation. The district court did indeed take into account aspects of the Tribe's behavior—its receipt of the engagement letters (obvious in the case of the 2007 letter); its failure to raise any question or concern about the waivers of sovereign immunity clearly set forth in the letters; its acceptance of, and partial payment for, Mr. Luckerman's services over several years—to conclude that the Tribe gave its assent to the terms of the letters, i.e., to conclude that contracts were formed. The Williston treatise describes the inquiry in these terms:

> [T]he nature of agreement requires a manifestation of mutual assent, and the concept of manifestation generally requires an objective indicium of mutual assent. This objective evidence may include words or any other conduct, including, in an appropriate case, silence.

1 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 1:3, p. 27 (4th ed. W. Grp. 2004). The Restatement (Second) of Contracts confirms the role of conduct in ascertaining whether the parties have come to agreement:

> Words are not the only medium of expression. Conduct may often convey as clearly as words a promise or an assent to a proposed promise.

RESTATEMENT (SECOND) OF CONTRACTS § 19 cmt. a (1981).

The well-established and undisputed requirement that waivers of sovereign immunity be based on clear and unequivocal language, and not be inferred from conduct, is a quite different matter. For that determination, the district court focused exclusively, as it was required to do, on the language of the waivers set forth in the engagement letters. Tribe's Add. 2-3. In both letters, the language is clear and unequivocal, and the Tribe never suggested otherwise. In reaching its conclusions about the meaning and clarity of the waivers, the district court did not rely on the conduct of the parties, or on inferences drawn from that conduct.

In Altheimer & Gray, 983 F.2d at 812, see supra p. 33, the Seventh Circuit seems to have acknowledged the point made here about the difference between contract formation and contract interpretation. In that case, the circuit court held that the charter of SMC (a tribal corporation) was not the only route to a finding that the tribe had waived its sovereign immunity. Id. In addition, SMC had entered into a letter of intent with MST (SMC's tentative manufacturing partner) which

contained an explicit waiver of sovereign immunity by SMC and the tribe. Id. The district court, however, apparently had not addressed whether the letter of intent was a binding contract. Id. Accordingly, the effectiveness of the contractual waiver—clear on its own terms—would depend on the validity of the letter of intent as a binding agreement of the parties: "Assuming the Letter is a valid contract, we agree with the court below and conclude the Tribe and SMC have waived sovereign immunity." Id.

The authorities cited by the Tribe in connection with this aspect of the case are inapposite. Tribe's Br. 32-33. Maynard v. Narragansett Indian Tribe, 798 F. Supp. 94 (D.R.I. 1992), aff'd 984 F.2d 14 (1st Cir. 1993), and Federico v. Capital Gaming Int'l, Inc., 888 F. Supp. 354 (D.R.I. 1995), are cases in which the district court was asked to conclude that the Tribe had waived its sovereign immunity—not based on contract language directed to the issue—but, in Maynard, on "the course of events leading to the creation of the reservation and federal tribal recognition[,]" 798 F. Supp. at 96, and, in Federico, on "retaining . . . an active lobbyist, to assist the tribe in achieving qualifying status, pursuant to the Gaming Act . . . ." 888 F. Supp. at 356. Thus, both cases were efforts to find waiver in the meaning of conduct, not in the meaning of contract language. The holdings in both cases are consistent with the well-established rule that a waiver of tribal sovereign immunity may not be inferred from tribal conduct.

The Tribe returns to World Touch Gaming, 117 F. Supp. 2d 271, to support its argument that the district court incorrectly relied on "subsequent acts" to establish a waiver of sovereign immunity. Tribe's Br. 33. As has been indicated (see supra p. 29, 35), World Touch Gaming is a case in which a contractual waiver of tribal sovereign immunity given by a tribe's management firm was found to be insufficient to supersede the unequivocal constitutional and statutory requirements of tribal law. Id. at 275. WTG seems to have argued in the alternative that, even if the contractual waiver was ineffective, the tribal defendants were estopped from asserting sovereign immunity because of their "subsequent acts, or acquiescence in carrying out the contract. . . ." Id. at 276. The district court rejected the argument as one that "must fail" in light of the longstanding prohibition against implied waivers of sovereign powers established in cases like Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982) ("No claim is asserted in this litigation, nor could one be, that petitioners' leases contain the clear and unmistakable surrender of taxing power required for its extinction."), and Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978) ("In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit."). World Touch Gaming, Merrion, and Santa Clara Pueblo are cases in which plaintiffs sought to diminish sovereign authority based on inference or implication. No such effort is made here. Mr.

Luckerman relies, as did the district court, on the clear and unequivocal language of the engagement letters.

Finally, the Tribe provides an extended quotation from the Eleventh Circuit's opinion in Florida v. Seminole Tribe of Florida, 181 F.3d 1237, 1243 (11th Cir. 1999), presumably to reinforce its contention that Mr. Luckerman improperly relies on conduct to establish the Tribe's waiver of sovereign immunity. Tribe's Br. 33. Seminole Tribe adds nothing to the Tribe's contention. In that case, Florida sued to enjoin the tribe from engaging in what the State regarded as Class III gaming operations without first entering into a compact with the State to regulate the activity, as required by the Indian Gaming Regulatory Act ("IGRA") and state law. Id. at 1239. The district court granted the tribe's motion to dismiss, in part because the tribe had not expressly waived its sovereign immunity. On appeal, the State argued that Congress had abrogated the tribe's sovereign immunity with the enactment of IGRA, and the tribe had waived its immunity by electing to engage in gaming under IGRA. Id. at 1241. The Eleventh Circuit rejected both arguments. As to the contention that the tribe had waived its immunity, the court relied on the well-established rule that "waivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed." Id. at 1243.

In this case, the district court properly relied on the clear and explicit language of the engagement letters to conclude that the Tribe waived its sovereign immunity. The Tribe's contention that waiver was inferred improperly from conduct misconstrues the August Order and misunderstands the difference between contract formation and contract interpretation. There was no error in the August Order and the district court correctly declined to reconsider it.

CONCLUSION

The district court did not abuse its discretion when it denied the Tribe's motion for reconsideration. Accordingly, the district court's Opinion and Order entered on January 17, 2014, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the Brief contains 12,137 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the Brief has been has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

/s/ Anthony F. Muri
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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2015, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system. I further certify that a copy of the foregoing document will be served by U.S. mail upon these parties or counsel of record upon acceptance by the clerk.

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