DOCKET NO.: HHB-CV-15-6028096-S

GREAT PLAINS LENDING LLC, ET AL., Plaintiffs	:	SUPERIOR COURT
	:	JUDICIAL DISTRICT OF NEW BRITAIN
	:	AT NEW BRITAIN
v.	:	
STATE OF CONNECTICUT, DEPARTMENT OF BANKING, ET AL., Defendants.	:	SEPTEMBER 30, 2015

PLAINTIFFS' REPLY IN SUPPORT OF BRIEF

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I. INTRODUCTION

This appeal raises a single issue: Does the doctrine of sovereign immunity bar the Department of Banking ("Department") from exercising jurisdiction over the plaintiffs? The Commissioner defended his ability to issue orders directed at the Plaintiffs on the theory that the doctrine of sovereign immunity did not bar administrative orders (only court actions). AR 157.

Rather than defend this appeal solely on the grounds cited by the Commissioner, however, the Department's brief interjects entirely new legal theories, raised for the first time now, on appeal. *See* 9/9/15 Defendants' Brief ("Defs. Br."). This is forbidden; the job of the court in an administrative appeal is to determine the validity of the reasons given for the agency's action. The court cannot supply a new reasoned basis for the agency action that the agency itself did not give. *See infra.* Moreover, even if this Court could consider these new arguments, the theories lack merit and mischaracterize federal Indian law. The Defendants' arguments should be rejected and the Decision vacated.

II. ARGUMENT

A. The Court's Review is Limited to the Commissioner's Stated Rationale

In the underlying administrative proceedings, the Commissioner denied Plaintiffs' Motion to Dismiss on the rationale that the contested case was not a "suit" for the purposes of tribal sovereign immunity, but merely a "demand for compliance." AR 157. In their Brief, Defendants admit that this was the sole basis of the Commissioner's Decision,[1] but nonetheless, advance several new legal theories as to why the Decision should be upheld. This tactic violates a settled rule of Connecticut administrative law—that courts may uphold agency decisions only

[1] *See* Defs. Br. at 14 (arguing in the alternative "if this Court disagrees with the Department's reasoning").

on the rationale given in the decision itself.[2] *Fanotto v. Inland Wetlands Comm'n*, 108 Conn. App. 235, 240 (2008).

The Court, in *Bouchard v. State Employees Retirement Comm'n*, 2015 WL 4570409, at *4 (Conn. Super. Ct. June 18, 2015), recently explained that review of all agency decisions under § 4-183 generally tracks the federal standard. Consistent with U.S. Supreme Court precedent, Connecticut courts "may not accept appellate counsel's *post hoc* rationalizations for agency action [and such action can only be upheld] on the basis articulated by the agency itself." *Id.*, (quoting *Motor Vehicle Manufs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983)).

Defendants attempt to replace this standard with one that would allow it to introduce any number of *post hoc* rationalizations for the Commissioner's Decision. Relying on *Conn. Coalition Against Millstone v. Conn. Siting Council*, 286 Conn. 57 (2008) and *Mehdi v. CHRO*, 144 Conn. App. 861 (2013), Defendants argue that because the issue of sovereign immunity relates to an agency's subject matter jurisdiction, this Court can exercise "plenary" review.[3]

Contrary to Defendants' assertions, plenary review means only that an agency's legal analysis will *not* receive deference. *See Conn. Siting Council*, 286 Conn. at 62, 69 (noting that the siting council analyzed the issue of federal preemption, but giving no deference to the council's preemption analysis). In contrast, the prohibition on *post hoc* rationalizations is grounded in the policy that a "reviewing court should not attempt itself to make up for . . .

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[2] Indeed, pursuant to § 4-183, "[t]he court's essential function in such an appeal is to review the administrative proceedings . . . that review is limited to the record. . . ." *Johnston v. Salinas*, 56 Conn. App. 772, 776 (2000). *See also McDonald v. Rowe*, 43 Conn. App. 39, 46 (1996) ("The trial court is confined to the record of the administrative hearing").

[3] It should be noted that Defendants' use of case authority on this issue is misleading. Defendants rely on *dicta* in a footnote in *Mehdi*, and, in doing so, strategically employ brackets in an effort to misrepresent the quotation's meaning. The footnote actually states: " [i]t is axiomatic that *[w]e* may affirm a proper result of the *trial court* for a different reason." 144 Conn. App. at 864 n.7 (emphasis added). This statement, as the cases cited in *Mehdi* make clear, deals with the traditional power of the Appellate Court to affirm the decision of the Superior Court on alternate grounds. *See* Prac. Bk. § 63-4(a)(1). *Mehdi* provides no basis for this Court to depart from the established standard under § 4-183, which limits the scope of review to the rationale of the agency decision itself.

deficiencies [in the agency's analysis]." *State Farm*, 463 U.S. at 43; *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (refusing to "supply a reasoned basis for the agency's action that the agency itself has not given"). Connecticut law is clear that Defendants cannot advance new legal theories at this stage of the proceedings as a means to affirm the Commissioner's Decision.

B. Defendants Are Unable to Refute that the Defense of Sovereign Immunity Validly Exists for Purposes of Administrative Actions

Defendants maintain that "contested cases" are not "suits" for the purposes of tribal sovereign immunity.[4] In doing so, Defendants conflate two distinct concepts: (1) whether Plaintiffs' lending activity is subject to state law; and (2) whether the Department can impose administrative orders and civil penalties on Plaintiffs, over their defense of sovereign immunity, in an attempt to stop it. This appeal relates only to the latter on which Defendants' analysis is fundamentally flawed.

As the Supreme Court held in *Federal Maritime Commission v. South Carolina Ports Authority* (*FMC*), given the substantial similarity between administrative adjudications and civil litigation, sovereign immunity can be invoked in "administrative tribunals." 535 U.S. 743, 761 (2002).[5] In an attempt to distinguish *Kanj v. Viejas Band of Kumeyaay Indians*, 2007 WL 1266963 (D.O.L. Apr. 27, 2007), Defendants only underscore its relevance. Defendants myopically focus on the outcome, ignoring the reasoning of the decision. The tribunal found that the tribe lacked immunity, but only because Congress abrogated immunity through the Clean Water Act. This outcome is consistent with what the U.S. Supreme Court has called "an enduring principle of Indian law," that "it is fundamentally Congress's job, not [the courts'], to

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[4] Curiously, Defendants fail to comment on the fact that the Department itself previously acknowledged the availability of sovereign immunity as a defense in agency proceedings. *See In re Cashcall, Inc.*, AR 42; Pls. Br. 32-33.

[5] Plaintiffs' Brief described these similarities in detail, along with the Connecticut courts' own recognition of the "similarity between administrative agencies and courts." Pls. Br. at 25–26; *see Dep't of Pub. Safety v. Freedom of Info. Comm'n*, 103 Conn. App. 571, 587 (2007).

determine whether or how to limit tribal immunity." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2037 (2014).

Even assuming *arguendo* that a contested case was non-judicial"—though given the substantial similarities to civil litigation, it surely cannot be—the proceedings would still be barred by tribal sovereign immunity. Both federal and state courts have recognized "tribal immunity from state administrative processes" even when those processes were "non-judicial." *Blue Lake Rancheria v. Morgenstern*, 2011 WL 6100845, at *8 (E.D. Cal. Dec. 6, 2011); *see also Middletown Rancheria of Pomo Indians v. Workers' Comp. Appeals Bd.*, 60 Cal. App. 4th 1340, 1347–48 (1998). In *Blue Lake*, the court held that a tribe was immune from California's non-judicial methods to collect unemployment insurance taxes allegedly owed. 2011 WL 6100845, at *8. The court noted that the State "fail[ed] to cite any authority supporting the theory that tribal sovereign immunity from state jurisdiction applies only to court proceedings and not to state administrative processes." *Id.* The court further held "there is no meaningful distinction between a sovereign being involuntarily subjected to state court proceedings . . . and a sovereign being involuntarily subjected to a state administrative process . . . ." *Id.*

Blue Lake's reasoning fully applies here. No matter how one characterizes a contested case—whether focusing on the similarities to civil litigation or the involuntary subjection to the state administrative process—the legal doctrine and defense of sovereign immunity does not simply disappear due to the administrative nature of the proceedings. Absent an unequivocal waiver, any unconsented adverse proceeding is barred by tribal sovereign immunity. The Commissioner's failure to recognize this fundamental fact warrants vacatur of his Decision.

C. Even If Defendants' *Post Hoc* legal Theories Could Be Considered by this Court They Are Substantively Flawed and Cannot Serve to Affirm the Decision

Defendants raise three *post hoc* legal theories for upholding the Commissioner's Decision: (1) Great Plains and Clear Creek are not arms of the Tribe, and therefore cannot invoke the defense of sovereign immunity; (2) the Department may prosecute Chairman Shotton under the doctrine of *Ex parte Young* for injunctive relief and under a "remedy-sought" theory for civil fines; and (3) "special justifications" warrant a disregard of sovereign immunity. Even assuming *arguendo* that these arguments could be considered (*but see supra*), they are each fundamentally mistaken and must be rejected.

1. Defendants Misapply Settled Legal Doctrine and Rely on Unfounded Evidence to Support their New Denial of Plaintiffs' Tribal Status

Plaintiffs offered substantial evidence at the administrative level demonstrating that Great Plains and Clear Creek were established by and operate as instrumentalities of the Tribe. At no time during the underlying proceedings was this evidence ever refuted or even challenged by the Department.[6] Defendants now, for the first time, attempt to introduce new factual allegations that are unfounded, irrelevant, and outside of the administrative record. Such efforts cannot and should not be permitted.

a. Defendants' First-Ever Challenge to the Plaintiff Entities' Sovereign Status is Procedurally Improper

Defendants never once disputed Great Plains' and Clear Creek's sovereign status during the underlying administrative proceedings. In fact, Defendants effectively conceded the issue.[7]

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[6] Defendants cite to *Gristede's Foods v. Unkechauge Nation*, 660 F. Supp. 2d 442 (E.D.N.Y. 2009), for the proposition that an entity claiming arm-of-the-tribe status bears the burden of proof. Even if this were true, Plaintiffs met this burden long ago as the Department did not contest Plaintiffs Tribal status ***at any point*** during the underlying administrative proceedings. In any event, *Gristede's Foods* is not binding on this Court, and *Cash Advance & Preferred Cash Loans v. State* is more on point for purposes of this action (holding tthat the *State* bears this burden to prove that an entity is not entitled to tribal sovereign immunity). 242 P.3d 1099, 1113 (2010).

[7] For example, the Department has characterized the lending activity as being conducted by *the Tribe* itself. AR 128 (referring to "*the Tribe's* offering and lending activities"). The Department also conceded that the Tribe's

Nonetheless, on appeal, Defendants have changed course, using unfounded allegations outside of the administrative record. For instance, Defendants point to an unauthenticated provision of purported tribal law to attempt to argue that the Tribe's businesses do not "serve the tribal government's purposes." Defs. Br. at 21 (citing to the Internet). Similarly, Defendants cite to a Bloomberg news article alleging that "little of the revenue" goes to the Tribe. *Id.* at 24. This is not admissible evidence, nor did the Defendants ever try to move it into evidence.

As set forth above, in actions brought under § 4-183, the Court's essential function is to review the agency's actions, and "that review is limited to the record." *Salinas*, 56 Conn. App. at 776, *overruled on other grounds by Lisee v. CHRO*, 258 Conn. 529 (2001). Thus, even if the Defendants' allegations had merit, this Court could not consider them as support for the Commissioner's Decision.[8]

More significantly, even if these irrelevant and unpersuasive sources were considered by this Court, they do not change the fundamental fact that no negative depiction of the online lending industry can have the effect of waiving the Tribe's immunity (or, in turn, the immunity of its entities or elected officials) from unconsented adverse action.[9] Because Defendants do not (and cannot) demonstrate the existence of such a waiver (or congressional abrogation), the Decision cannot stand.

Chairman and Vice-Chairman serve as officers of Great Plains, and that Great Plains is organized under tribal law. AR 4.

[8] Indeed, not only are the allegations outside the administrative record, they are patently contradicted by evidence in the record. The record is clear that the Tribe authorized Great Plains and Clear Creek to engage in lending activity and that all profits from that activity are allocated to the Tribe as the sole owner. *E.g.*, AR 115; AR 117; AR 122. None of this evidence was contradicted or otherwise challenged by the Department in the administrative proceeding.

[9] For similar reasons, the Court should disregard the single law review article cited in Defendants' Brief to support purported unfounded allegations regarding the tribal online lending industry, which are unrelated to the Plaintiffs and have no relevance to this appeal.

b. Defendants Misapply the Arm-of-the-Tribe Doctrine

The Court should reject Defendants' proposed arm-of-the-tribe test taken from *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 25 N.E. 3d 928 (N.Y. 2014) for several significant and compelling reasons. First, *Sue/Perior* contradicts Connecticut precedent. In *Seneca Niagara Falls Gaming Corp. v. Klewin Bldg. Co.*, 2005 WL 3510348 (Conn. Super. Ct. Nov. 30, 2005), the Court held that the Seneca Gaming Corporation—an entity with a structure identical to the business at issue in *Sue/Perior*—was an arm of the tribe. In holding to the contrary, *Sue/Perior* admitted that its analysis was inconsistent with the *Seneca Niagara* decision. *See* 25 N.E.3d at 936. Second, *Sue/Perior* is at odds with United States Supreme Court precedent holding that commercial status does not detract from a tribal entity's sovereign immunity protection. *E.g.*, *Kiowa Tribe of Okla. v. Mfg. Techs.*, 523 U.S. 751, 760 (1998). *Sue/Perior* ignores this principle and puts undue emphasis on whether corporate status exists. Third, contrary to the Defendants' assertions, the mere fact that *Sue/Perior*—expressly based on decades old New York case law (*see* 25 N.E.3d at 929)—was decided subsequent to *Bay Mills* has no significance whatsoever.[10]

In any event, the Court need not decide which arm-of-the-tribe test to adopt, as the Decision did not rely on Plaintiffs' status and it would be improper for the Court to take up that issue now. If the Court elects to do so, however, it should adopt the prevailing tests cited in Plaintiffs' Brief (*see* Pls. Br. at 19), which are consistent with *Seneca Niagara*.

D. Defendants' New Theories of Liability against Chairman Shotton Cannot Serve To Affirm the Civil Penalties Imposed Upon Him

Defendants also advance the new argument that tribal sovereign immunity does not bar relief (injunctive or monetary) against Chairman Shotton, regardless of whether Great Plains and

[10] Indeed, *Sue/Perior* observed that *Bay Mills* "do[es] not illuminate questions concerning whether . . . an entity is an 'arm' of the tribe." 25 N.E.3d at 934.

Clear Creek are arms of the Tribe. The argument is flawed because, although rare exceptions to tribal sovereign immunity arguably exist, Defendants' claims do not fit within them.

1. The *Dicta* in *Bay Mills* Cannot Serve to Uphold the Injunctive Action Against Chairman Shotton

Defendants repeatedly cite to *dicta* and dissenting language in *Bay Mills*, to support the proposition that tribal officials can be sued for violations of state law under the theory of *Ex Parte Young*.[11] Defendants attempt to extend this theory of liability against Chairman Shotton by citing *Alabama v. PCI Gaming*, 2015 WL 5157426 (11th Cir. Sept. 3, 2015) to support the position that "tribal officials may be subject to suit in *federal* court for violations of state law. . . ." Defs. Br. at 25 (emphasis added). Not only does *PCI Gaming* lack any precedential value in this Court, the claims against Chairman Shotton do not fit within the remedy described therein.

In finding that a group of tribal officials did not waive immunity by removing the case to federal court, *PCI Gaming* expressly held that the "premise of Alabama's argument—that the Individual Defendants were not immune from the state law claims in *state* court—does not hold up." 2015 WL 5157426, at *9 (emphasis added). The court reasoned that "tribal immunity is a matter of federal law and is not subject to diminution by the States." *Id.* (quoting *Bay Mills*, 134 S. Ct. at 2031). Because the claims against Chairman Shotton were brought in a state forum, not a federal one, even if *Ex parte Young* could be expanded to create a cause of action for violation of state law, it could not apply here.

2. Monetary Damages Imposed Against Chairman Shotton Cannot Stand

Defendants next claim that Chairman Shotton is liable for civil fines because those penalties are "imposed on him individually." Defs. Br. at 26. Their argument relies mainly on a

[11] In *Ex parte Young*, the Supreme Court held that the Eleventh Amendment did not bar lawsuits against state officials in federal court for prospective injunctive relief to enjoin ongoing violations of ***federal law***. 209 U.S. 123, 155–56 (1908).

"remedy-sought" theory discussed in a Superior Court decision currently on appeal, *Lewis v. Clarke*, 2014 WL 5354956 (Conn. Super. Ct. Sept. 10, 2014). *Lewis*, however, is inapposite.

In *Chayoon v. Sherlock*, the Connecticut Appellate Court squarely held that sovereign immunity "extends to all tribal employees acting within their representative capacity and within the scope of their official authority." 89 Conn. App. 821, 826–27 (2005). A tribal employee will be deemed to have acted in his representative capacity and within the scope of his official authority as long as the behavior was authorized by the tribe. *Id.* at 828. Moreover, as the. District Court held in *Bassett v. Mashantucket Pequot Museum & Research Center*, 221 F. Supp. 271, 280–81 (D. Conn. 2002), merely alleging that a tribal officer violated state law is an insufficient basis for a claim that he acted beyond the scope of his lawful authority.

It is inconsequential if the Department describes the fines as being against Chairman Shotton "individually" because *the Tribe* is the real party in interest. Indeed, all of the allegations against Shotton pertain to actions that he took in his role as Secretary/Treasurer of Great Plains and Clear Creek. Any relief ordered against the Secretary/Treasurer of Great Plains and Clear Creek would expend itself by extension, against the Tribe. Hence, the fines imposed against Chairman Shotton are barred by tribal sovereign immunity and must be vacated.

E. No "Special Justification" Exists For Disregarding Tribal Sovereign Immunity

The Connecticut Supreme Court has repeatedly held that when issues of sovereign immunity are at stake, there is no room for balancing of the equities. *See, e.g., Prigge v. Ragaglia*, 265 Conn. 338, 348-49 (2003) (plaintiffs' claims that state agency refused to place foster children with plaintiffs based on plaintiffs' religion were barred by sovereign immunity). It is not only Eleventh Amendment immunity that is nondiscretionary; the Connecticut Supreme Court has also held that "[n]either reason nor fairness" allows the court to disregard *tribal* sovereign immunity. *Beecher v. Mohegan Tribe of Indians*, 282 Conn. 130, 140 (2007).

Nothing is more central to federal Indian law than the principle that tribal sovereignty, and the attendant doctrine of sovereign immunity, exist at the sufferance of Congress, *not* the states. *Bay Mills*, 134 S. Ct. at 2030. Thus, unless and until Congress takes action to abrogate sovereign immunity in the manner in which Defendants advocate, or unless the Tribe takes action to waive its immunity or the immunity of its wholly owned entities and elected officials, any action taken against the Plaintiffs – state, federal or administrative – simply cannot stand.

F. Requiring Plaintiffs to Sacrifice the Defense of Sovereign Immunity to Preserve the Right to Participate in a Hearing is Plainly a Due Process Violation

Defendants claim that Plaintiffs forfeited their right to a hearing because they did not avail themselves of this opportunity when one was afforded, and thus no due process violation occurred. The reason that Plaintiffs did not request a hearing, however, is because they sought to challenge the administrative process on jurisdictional grounds and any participation in the merits of the action could be deemed a waiver of Plaintiffs' sovereign immunity. Defendants' theory of due process would require Plaintiffs to forfeit the defense of sovereign immunity or else face a default ruling against them in the event the immunity defense fails. It puts sovereign parties in an unconstitutional Catch-22, and is grounds for reversal.[12]

III. CONCLUSION

For the reasons set forth herein and in Plaintiffs' Brief, Defendants' arguments should be rejected and the Commissioner's Decision should be vacated.

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[12] Defendants argue, for the first time and without citing to any legal authority, that Plaintiffs have waived their immunity by pursuing the instant appeal. Defs. Br. at 4. It is not surprising that Defendants' cannot cite to authority to support their position as no such authority exists. Plaintiffs brought this appeal to defend themselves against actions taken by the Department. Because the issue of sovereign immunity relates to the Department's actions beyond its jurisdiction, it is plainly an appropriate subject for administrative relief. *See Payne v. Fairfield Hills Hosp.*, 215 Conn. 675, 679 (1990).

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CERTIFICATION

This is to certify that a copy of the foregoing was mailed and e-mailed, postage prepaid, to the following counsel of record this 30th day of September, 2015.

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UNREPORTED CASES

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of New Britain.

Roger BOUCHARD et al.
v.
STATE EMPLOYEES RETIREMENT COMMISSION.

No. CV126015373S. | June 18, 2015.

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OWENS, J.T.R.

I

FACTS

***1** In count one of their April 27, 2012 complaint, the plaintiffs, Roger Bouchard, James Fox, and James Malone, appeal, pursuant to General Statutes § 4–183, from a decision of the defendant, State Employees Retirement Commission (the Commission), denying the plaintiffs' request to have their retirement benefits recalculated in accordance with the decision in *Longley v. State Employees Retirement Commission (Longley),* 284 Conn. 149, 931 A.2d 890 (2007). Count two of the complaint is a mandatory class action brought on behalf of the similarly situated retirees to obtain a declaratory ruling that all of their pension benefits must be recalculated and the difference paid to each member of the class.

As background, pursuant to General Statutes § 5–162(a),[1] the state calculates employees' retirement pensions under State Employee Retirement Act (SERA), including the plaintiffs, in part by using the "base salary." "Base salary," in turn, is defined by General Statutes § 5–162(b)[2] as the average annual regular salary received by a member for his three highest-paid years of state service. General Statutes (Rev. to 2005) § 5–213(a)[3],[4] provides, in part, that certain long term employees are eligible for lump-sum longevity payments. Most importantly, General Statutes (Rev. to 2005) § 5–213(b)[5] requires that an additional longevity payment be made on a prorated basis on the proportion of the six-month period served prior to the date of retirement.

In 2007, the Supreme Court in *Longley* affirmed the Appellate Court decision in *Longley v. State Employees Retirement Commission,* 92 Conn.App. 712, 887 A.2d 904 (2005), regarding longevity payments. Specifically, the Supreme Court held that § 5–213 prorated longevity payments must be added to the salary in the final year for the purpose of calculating the base salary, and, thus, for calculating retirement benefits.

In the present case, on October 18, 2007, the defendant responded to this decision with a ruling that *Longley* only applied prospectively. Subsequently, the defendant changed its position and issued a modified ruling on April 16, 2009, which stated that the Retirement Division must calculate and award increased benefits for all individuals who retired on or after October 2, 2001, or who retired prior to that date, but whose pension was not yet finalized by said date. Pursuant to the modified ruling, the plaintiffs are not eligible for an increase in benefits because they retired before October 2, 2001,[6] and because they had a final decision on their pension prior to that date.[7]

The plaintiffs, retired employees of the state, are seeking to have their retirement benefits recalculated in accordance with the decision in *Longley.*The procedural background of the present action is as follows. On December 12, 2007, Bouchard submitted his claim for benefits under *Longley.*On December 31, 2007, Bouchard's claim was rejected, pursuant to the October 18, 2007 ruling that *Longley* only applied prospectively.

***2** On April 17, 2008, a federal class action was filed against the defendant, seeking redress under *Longley.*On June 10, 2009, the federal action was dismissed for failure to exhaust state procedures.

On August 24, 2009, the plaintiffs filed a declaratory ruling with the defendant, which was treated by the defendant

as a claim. On September 9, 2009, the defendant issued a final agency decision on the claim. On November 4, 2009, the plaintiffs appealed to the defendant. In late April 2010, the defendant denied the plaintiffs' request to have their retirement benefits recalculated. On October 21, 2011, after the defendant denied their request for reconsideration, the plaintiffs filed a second petition for declaratory ruling. On March 15, 2012, the defendant issued a declaratory ruling, which denied the plaintiffs' request that the defendant declare that *Longley* requires the defendant to recalculate petitioner's pension to include their final, prorated longevity payment in the final year of employment for the purpose of calculating annual salary regardless of retirement date. Finally, on April 27, 2012, the plaintiffs filed the present action. The present appeal was filed by the plaintiffs within the forty-five day period provided in General Statutes § 4–183(c). [8]

On October 30, 2014, the plaintiffs filed the present motion, seeking judgment on the merits as to count one, the administrative appeal, and summary judgment as to count two, the declaratory judgment action. On the same day, the plaintiffs also filed a memorandum, an affidavit, and other documents in support. On February 13, 2015, the defendant filed an appeal brief as to count one, and a cross motion for summary judgment as to count two, the declaratory judgment action. On March 30, 2015, the plaintiffs filed a reply brief supporting the administrative appeal and motion for summary judgment. On May 7, 2015, the defendant filed a reply brief. Oral argument was heard on these matters on May 12, 2015.

After oral argument, on May 13, 2015, the defendant filed a supplemental brief. On May 13, 2015, the plaintiffs filed a reply to the supplemental brief. Finally, on May 14, 2015, the defendant filed a reply to the plaintiffs' opposition to the supplemental brief.

II

DISCUSSION

A

COUNT ONE: ADMINISTRATIVE APPEAL

The Superior Court has jurisdiction over an administrative appeal, pursuant to General Statutes § 4–183. The review of an administrative agency's final decision is limited in scope by the language in General Statutes § 4–183(j), which states: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) *arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.* If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. For purposes of this section, a remand is a final judgment."(Emphasis added.)

***3** Our Supreme Court has further described and clarified the scope of review. "[J]udicial review of the commissioner's action is governed by the [Uniform Administrative Procedure Act, General Statutes § 4–166 et seq. (UAPA)] ... and the scope of that review is very restricted ... [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable ... Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact ... Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion."(Internal quotation marks omitted.) *Frank v. Dept. of Children & Families,* 312 Conn. 393, 403–04, 94 A.3d 588 (2014)."The substantial evidence rule governs judicial review of administrative fact-finding under the UAPA. [See] General Statutes § 4–183(j)(5) and (6). An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred ... The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency ... It is fundamental that a plaintiff has the burden of proving that the commissioner, on the facts before him, acted contrary to law and in abuse of his discretion ... The law is also well established that if the decision of the

commissioner is reasonably supported by the evidence it must be sustained."(Internal quotation marks omitted.) *Id.*, at 404.

Furthermore, "[e]ven for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion ... [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts ... [Similarly], this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes ... Cases that present pure questions of law, however, invoke a broader standard of review than is ... involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion ... Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny ... the agency is not entitled to special deference ... We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute ... has not previously been subjected to judicial scrutiny [or to] ... a governmental agency's time-tested interpretation ..." (Internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* 310 Conn. 276, 281–82, 77 A.3d 121 (2013).

***4** Our appellate courts have held, in the context of zoning and land use appeals, that "[w]hen a commission states its reasons in support of its decision on the record, the court goes no further, but if the commission has not articulated its reasons, the court must search the entire record to find a basis for the [commission's] decision."(Internal quotation marks omitted.) *Azzarito v. Planning & Zoning Commission,* 79 Conn.App. 614, 618, 830 A.2d 827, cert. denied, 266 Conn. 924, 835 A.2d 471 (2003)."The action of the commission should be sustained if even *one of the stated reasons* is sufficient to support it."(Emphasis added.) *Burnham v. Planning & Zoning Commission,* 189 Conn. 261, 265, 455 A.2d 339 (1983).

This established rule, as applied in the context of zoning and land use appeals, is also consistent with the general standard for the review of administrative decisions on the federal level. "[The reviewing court] may not supply a reasoned basis for the agency's action that the agency itself has not given. [The reviewing court] will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."(Internal quotation marks omitted.) *Motor Vehicle Manufacturers Assn. of the United States, Inc. v. State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29, 42–43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Additionally, "courts may not accept appellate counsel's post hoc rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."*Id.*, at 50.

1

Agency's Declaratory Ruling

In the September 9, 2009 declaratory ruling by the defendant,[9] the plaintiffs asked that their pension benefits be recalculated in accordance with the Supreme Court decision in *Longley.*The plaintiffs challenged the defendant's April 16, 2009 modified ruling, which stated that the Retirement Division must calculate and award increased benefits for all individuals who retired on or after October 2, 2001, or who retired prior to that date, but whose pension was not yet finalized by said date. Specifically, the plaintiffs' petition for declaration asserted the following grounds: (1) the commission's decision to use six years as its limitation period for such recalculation was arbitrary and capricious; (2) the commission is acting in an arbitrary and capricious manner by selecting any cut off date for recalculation; (3) the commission actively concealed the use of the prorated longevity amount in its benefit calculations.

The defendant held, in part, that its decision with regard to the imposition of a six-year statute of limitations on recalculation of retirement benefits was not arbitrary and capricious. The defendant ruled that "[t]he Commission chose a six-year limitations period as the Commission believed that it was the most suitable statute of limitations on the basis of the nature of the cause of action and of the right(s) sued upon."The defendant held that the most applicable statute of limitations period is the six-year period for breach of contract, much like the one the Employee Retirement Income Security Act of 1974 (ERISA) statutes place on claims for benefits under the employee benefits plans.

***5** Furthermore, in the declaratory ruling, the defendant argued that it has a fiduciary duty to protect the assets of

the fund, and that the prudent man standard requires it to evaluate the cost to the plan, in addition to its obligations to members. The defendant held that the Commission, in its role as fiduciary, reasonably concluded that an unlimited award of retroactive relief for all retirees would have an onerous financial impact on the Retirement Fund. The defendant concluded that the "decision to recalculate retirement benefits for those retirees who had either been retired or 'finalized' within a six-year period prior to the *Longley* decision was based upon the most analogous and applicable statute of limitations as well as financial considerations concerning the estimated cost of retroactivity and its impact on the state retirement fund."

On March 19, 2012, the defendant issued another declaratory ruling. Although the defendant repeated many of the same arguments that were made during the September 9, 2009 ruling, the defendant also included arguments that were not previously discussed. Most importantly, the defendant held that its decision to limit payment to "pending" claims was reasonable in light of the fact that *Longley* was a new interpretation of the law, and, thus, could only be applied prospectively. More specifically, the defendant ruled that *Longley* represented a new interpretation of law that can be applied retroactively, if at all, only to pending cases.

2

Summary of Parties' Arguments

In their memorandum, the plaintiffs argue that the defendant's administrative rulings, including the arguments regarding the statute of limitations period, prospective application of *Longley,* and financial hardship, were arbitrary and capricious. Firstly, as to the imposition of a six-year statute of limitations on the recalculation of retirement benefits, the plaintiffs argue, in part, that the statute of limitations looks forward from the date a claim accrues, and not backwards. In other words, the plaintiffs argue that if the retirees' action accrued when *Longley* was decided, in 2007, then the six-year statute of limitations period would expire in 2013, and not in 2001. The plaintiffs contend that the defendant had to defend its decision on the ground it made it.

The plaintiffs also argue that no statute of limitations period applies to the present case, and that the defendant cannot retroactively apply the six-year statute of limitations period in § 5–155a–2(a) of the Regulations of Connecticut State Agencies. The plaintiffs contend that the defendant cannot retroactively apply a statute of limitations that was enacted on April 27, 2012, well after the plaintiffs filed their administrative claims, and on the same day as the present appeal was commenced. Specifically, the plaintiffs contend that the statute of limitations cannot bar actions already pending.

In the alternative, the plaintiffs argue that any applicable statute of limitations does not bar their action due to tolling. The plaintiffs contend that their action only accrued when they exhausted their administrative remedies, on March 19, 2012. Additionally, the plaintiffs argue that making retirement payments was a continuous violation that tolled the statute of limitations.

***6** Secondly, the plaintiffs argue that the defendant has abandoned the claim that *Longley* applies only prospectively when they ruled, on April 16, 2009, that they would provide retroactive payments to anyone who retired no earlier than six years before *Longley.*In the alternative, the plaintiffs argue that even if the claims were not abandoned, the *Longley* decision is presumed to have retroactive effect, and this presumption cannot be overcome under the present circumstances.

Thirdly, as to the defendant's claim of financial hardship, the plaintiffs argue that the defendant has grossly exaggerated the potential financial impact of the suit, should the plaintiffs prevail. Specifically, while the original estimates of the cost ranged from $50 million to $160 million, the defendant now estimates that the cost would be only about $16 million.

The defendant counters that it does not have to defend its decision on the ground it made it because the court may consider alternative grounds for affirming the defendant's decision as long as the record supports the affirmance. Furthermore, the defendant contends that each of the arguments relevant to the administrative appeal, including those related to the statute of limitations period, were previously "raised in some fashion below."

3

Applicable Law and Analysis

As to the administrative appeal, the issue before the court is whether the defendant's decision to recalculate retirement

benefits for those retirees who had either been retired or 'finalized' within a six-year period prior to the *Longley* decision was arbitrary and capricious. In the present case, the defendant has stated the reasons in support of its decision on the record, and the defendant's actions should be sustained if even one of the stated reasons is sufficient to support it. As argued by the plaintiffs, the defendant has to defend its decision on the grounds it made it.

Firstly, in the underlying administrative decision, the defendant ruled that "[t]he Commission chose a six-year limitations period as the Commission believed that it was the most suitable statute of limitations on the basis of the nature of the cause of action and of the right(s) sued upon."The defendant held that the most applicable statute of limitations period is the six-year period for breach of contract, much like the one the ERISA statutes place on claims for benefits under the employee benefits plans.

As to the imposition of a six-year statute of limitations on the recalculation of retirement benefits, the plaintiffs correctly point out that a statute of limitations looks forward from the date a claim accrues, and not *backwards.*As defined by Webster's dictionary, a "statute of limitations" is a "statute assigning a certain time *after* which rights cannot be enforced by legal action or offenses cannot be punished."(Emphasis added.) Merriam–Webster's Collegiate Dictionary (10th Ed.1998). Black's Law Dictionary similarly defines a "statute of limitations" as: "A law that bars claims *after* a specified period; specif., a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." (Emphasis added.) Black's Law Dictionary (9th Ed.2009).

***7** In the underlying administrative decision, the defendant applied the six-year limitations period for contract claims, pursuant to General Statutes § 52–576. Subsection (a) of General Statutes § 52–576 states, in relevant part: "No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years *after* the right of action accrues."(Emphasis added.) General Statutes § 52–576(a).

Thus, the six-year statute of limitations would necessarily end six years *after* the right of action accrues. In other words, as applicable to the present facts, if the statute of limitations begins to run in 2007, when *Longley* was decided, then the six-year statute of limitations period would expire in 2013, and not in 2001. As argued by the plaintiffs, the defendant "might have claimed that its six-year look back [from the date of the *Longley* decision] was, in its view, a way to draw a line between those who get and those who do not, but it has nothing to do with being a statute of limitations."As such, the defendant's decision to calculate and award increased benefits for all individuals who retired on or after October 2, 2001, based upon the application of an analogous statute of limitations period, was arbitrary and capricious.

Secondly, in its March 15, 2012 ruling, the defendant ruled that its decision to limit retroactive relief to pending cases was correct as *Longley* was a new interpretation of the law and should be applied prospectively. In order to determine whether a new interpretation of law, such as *Longley,* applies retroactively, the court must determine two separate but related questions."First, [the court] must determine whether the original award was a pending matter for the purpose of recalculation of benefits."*Marone v. Waterbury,* 244 Conn. 1, 7, 707 A.2d 725 (1998)."Although it is true that judgments that are not by their terms limited to prospective application are presumed to apply retroactively ... this general rule applies to cases that are pending and not to cases that have resulted in final judgments."(Citation omitted.) *Id.,* at 10–11. "Whether a judgment is final depends upon the governing statute. [T]he line that separates lower court judgments that are pending on appeal (or may still be appealed), from lower court judgments that are final, is determined by statute ... Having achieved finality ... a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy ... Principles of finality are equally applicable to administrative decisions ... that are appealable to the Superior Court."(Citation omitted; internal quotation marks omitted.) *Id.,* at 12.

Even if the court decides that the original award was a pending matter, and not a final judgment, the court must next decide whether the presumption in favor of retroactivity has been overcome by applying the criteria set forth in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). The Connecticut Supreme Court has adopted its own version of the *Chevron* test: "A common law decision will be applied nonretroactively only if: (1) it establishes a new principle of law, either by overruling past precedent on which litigants have relied ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed ... (2) given its prior history, purpose and effect, retrospective application of the rule would retard its operation; and (3) retroactive application would produce substantial inequitable results,

injustice or hardship."(Citation omitted; internal quotation marks omitted.) *Ostrowski v. Avery,* 243 Conn. 355, 377 n. 18, 703 A.2d 117 (1997).

***8** As to retroactive application, the first question before the court in the present case is whether the plaintiffs' retirement benefit awards were a pending matter or a final judgment at the time that *Longley* was issued. In *Marone v. Waterbury, supra,* 244 Conn. at 1, in order to determine whether there was a final judgment, the court looked to the governing statutes in that case, and held: "General Statutes §§ 31–301a and 31–301b govern the finality of workers' compensation awards, which become final when and if the parties fail to appeal within the statutory time period. In the present case, the plaintiff began receiving benefits pursuant to the 1983 award once the appeal period lapsed without either party having appealed the commission's determination. Because neither the plaintiff nor the defendant appealed the original award, it became final and was, accordingly, no longer pending when *Szudora* [*v. Fairfield,* 214 Conn. 552, 573 A.2d 1 (1990)] was decided."(Footnotes omitted.) *Marone v. Waterbury, supra,* at 13.

In the present case, General Statutes § 5–160 et seq. governs the calculation of retirement benefits for state employees. None of the relevant statutes set time limitations for a petition with the defendant. Moreover, as explained in *Malerba v. Connecticut State Employees Retirement Commission,* Superior Court, judicial district of New Britain, Docket No. CV–06–4011383–S (July 15, 2008, Schuman, J.) (45 Conn. L. Rptr. 853, 854), "[t]he statute governing declaratory rulings with state agencies contains no universal limitations period for filing petitions. General Statutes § 4–176. Instead, each state agency has its own limitations period for filing claims or challenges."At the time that *Longley* was decided, there was no applicable statute of limitations for the filing of a petition with the defendant.

Thus, the appeal period for the calculation of retirement benefits did not lapse at the time of the *Longely* decision, and there was no final decision. As such, the matter was pending at the time of the decision, and the next question for the court is whether the presumption in favor of retroactivity has been overcome by applying the *Chevron* test.

The court in *Malerba v. Connecticut State Employees Retirement Commission, supra,* 45 Conn. L. Rptr. at 853, faced the same question of whether *Longley* applies retroactively. The court concluded that *Longley* applies retroactively in part because the second prong of the *Chevron* test, that retrospective application of the rule would retard its operation, is not satisfied. Specifically, the court held that "[a]s for the second factor, retroactive application of *Longley* would not retard its operation, but rather would further it by providing employees retirement benefits to which *Longley* held they are statutorily entitled."*Id.,* at 854.

The analysis in *Malerba* is persuasive, and *Longley* applies retroactively to the present plaintiffs' cases. As such, because *Longley* applies retroactively, the defendant did not have the discretion to choose an arbitrary cut off date for the recalculation of retirement benefits.

***9** Thirdly, the defendant also ruled in the underlying agency rulings that its decision to limit retroactive relief to claims pending as of October 2, 2001 was not arbitrary and capricious because it would alleviate the heavy financial impact that full retroactive application would entail. The defendant stated in its 2009 ruling that "the cumulative impact on the total SERS membership with $17.6 billion in actuarial liability would be considerable."In the March 15, 2012 ruling, the defendant stated that "retroactive application of *Longley's* holding to all SERS retirees would cost the retirement fund from $48,872,505 to $157,732,207 ..."

The retroactive application of the *Longley* decision has been discussed in the preceding paragraphs, and, as discussed in *Malerba,* financial impact is part of the analysis. Despite any financial costs that may burden the defendant, the defendant cannot choose an arbitrary cutoff date simply due to financial concerns when binding Supreme Court authority demands otherwise. Further, as noted by the plaintiffs, the precise extent of the financial impact is questionable.

Finally, the defendant now submits two alternative statute of limitations arguments: (1) the analogous three-year statute of limitations period for torts, under General Statutes § 52–577, bars the plaintiffs' action because they did not bring their underlying claims within three years from the date that they received their final calculations for retirement benefits; (2) the six-year statute of limitations period of § 5–155a–2(a) of the Regulations of Connecticut State Agencies bars the action. These grounds, however, were not raised by the defendant during the underlying administrative process, and the court will not consider appellate counsel's post hoc rationalizations for the agency's action. See *Motor Vehicle Manufacturers Assn. of the United States, Inc. v. State Farm Mutual Automobile Ins. Co., supra,* 463 U.S. at 50.

The defendant argues that these argument were "raised in some fashion below." The defendant is mistaken. Except for the vague and inaccurate reference to "statute of limitations," these alternative statute of limitations grounds are different and distinguishable from the arguments the defendant made during the administrative process. First, as previously discussed, the defendant's decision to calculate and award increased benefits for all individuals who retired on or after October 2, 2001, was an arbitrary cut off date for the distribution of awards that has no connection to a statute of limitations period. [10] Second, the statute of limitations under § 5–155a–2(a) of the Regulations of Connecticut State Agencies was not, and could not, have been addressed in the underlying decisions because the Regulation was enacted on April 27, 2012, after the entire administrative process had ended. [11] As such, the court will not consider these alternative arguments.

Thus, for the foregoing reasons, the court sustains the plaintiffs' appeal, and orders the defendant to apply *Longely* to the plaintiffs' retirement income calculation from the time of retirement.

4

Postjudgment Interest

***10** General Statutes § 37–3a states, in part: "(a) Except as provided in sections 37–3b, 37–3c and 52–192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions or arbitration proceedings under chapter 909, including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable ... The awarding of interest in such cases is discretionary."

"Whether to award prejudgment and postjudgment interest for the detention of money under General Statutes § 37–3a is a decision left to the discretion of the trial court, and requires the trial court to consider whether an award of interest is fair and equitable under the circumstances."*Salce v. Wolczek,* 314 Conn. 675, 696, 104 A.3d 694 (2014)."[T]he trial court's discretion under § 37–3b includes the discretion to choose a fair rate of interest not to exceed 10 percent per annum."*DiLieto v. County Obstetrics & Gynecology Group, P.C.,* 310 Conn. 38, 60, 74 A.3d 1212 (2013)."[A]n award of interest under § 37–3a does not require proof of wrongfulness in addition to proof of the underlying legal claim ... Thus, interest may be awarded in the discretion of the trial court even when the liable party's failure to pay the judgment was not blameworthy, unreasonable or in bad faith ... This interpretation of § 37–3a is consistent with the primary purpose of [that provision], which is not to punish persons who have detained money owed to others in bad faith but, rather, to compensate parties that have been deprived of the use of their money."(Citations omitted; internal quotation marks omitted.) *Id.,* at 53 n. 13. "[T]he fact that a defendant has a legal right to withhold payment under the judgment during the pendency of an appeal is irrelevant to the question of whether the plaintiff is entitled to interest under § 37–3a."*Id.,* at 49.

Due to its discretionary nature, "the trial court should consider any and all factors that are relevant to its determination [of whether to award postjudgment interest]."*Id.,* at 59. "[A] paramount factor for the trial court to consider in deciding whether to award post-judgment interest is the purpose of such interest, namely, to compensate the prevailing party for the loss of the use of the money owed from the date of the judgment until the date that the judgment is paid. In exercising its discretion under § 37–3b, the trial court should identify any other factors or considerations that may militate for or against an award of postjudgment interest."*Id.,* at 59. "The assertion of a good faith defense is one factor that the court may consider, but it does not bar an award of interest."*Salce v. Wolczek, supra,* 314 Conn. at 697.

The court in *Riley v. Travelers Home and Marine Ins. Co.,* Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X04–CV–11–6025680–S (September 26, 2014, Sheridan, J.), "surveyed representative decisions of Superior Court judges in the first six months of 2014 and found that, with rare exceptions, most judges found that interest in the range of 3 to 6 percent per annum appropriately compensates a plaintiff for deprivation of the use of his or her money."As noted by the court in *Riley,*"[t]he object of a survey of other Superior Court decisions is not to suggest that an appropriate interest rate is the average of all the interest rates employed by other judges. Rather it helps by giving an approximation of the upper and lower limits of the range within which-absent extraordinary circumstances-the court should exercise its discretion."

***11** In the present case, when taking all of the relevant factors into account, the court awards postjudgment interest

in part because the purpose of such interest is to compensate the prevailing party for the loss of the use of the money owed from the date of the judgment until the date that the judgment is paid, and not to punish those that withheld money in bad faith. There are, however, mitigating factors as to the amount of the award. Specifically, the court finds that there is no evidence that the defendant withheld benefits and moneys from the plaintiffs in bad faith. Thus, taking into account this mitigating factor, and in view of the interest rate awards in similar Superior Court decisions, the court orders that a 5 percent interest rate is most appropriate.

The court holds that the plaintiffs should be compensated for the deprivation of the use of funds, and orders the award of postjudgment interest at the rate of 5 percent per annum from the date of the final judgment until the date the judgment is fully paid.

B

COUNT TWO: MOTION FOR SUMMARY JUDGMENT ON CLASS ACTION

"An action for declaratory judgment is a special proceeding ..."*Wilson v. Kelley,* 224 Conn. 110, 121, 617 A.2d 433 (1992)."The purpose of a declaratory judgment action is to secure an adjudication of rights where there is a substantial question in dispute or a substantial uncertainty of legal relations between the parties."(Internal quotation marks omitted.) *St. Paul Fire and Marine Ins. Co. v. Shernow,* 22 Conn.App. 377, 380–81, 577 A.2d 1093 (1990), aff'd, 222 Conn. 823, 610 A.2d 1281 (1992)."The court may address the merits of a declaratory judgment action upon a motion for summary judgment.*United States Automobile Assn. v. Marburg,* 46 Conn.App. 99, 102 n. 3, 698 A.2d 919 (1997)."*Allstate Ins. Co. v. Dubois,* Superior Court, judicial district of New Britain, Docket No. CV–12–6013815–S (August 20, 2012, Swienton, J.).

"Summary judgment shall be rendered forthwith if the pleadings, affidavits and other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law ... In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party."(Citation omitted; internal quotation marks omitted.) *Vendrella v. Astriab Family Ltd. Partnership,* 311 Conn. 301, 313, 87 A.3d 546 (2014)." 'Issue of fact' encompasses not only evidentiary facts in issue but also questions as to how the trier would characterize such evidentiary facts and what inferences and conclusions it would draw from them."*United Oil Co. v. Urban Development Commission,* 158 Conn. 364, 379, 260 A.2d 596 (1969).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact ... As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent ... When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue ... Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue."(Internal quotation marks omitted .) *Romprey v. Safeco Ins. Co. of America,* 310 Conn. 304, 319–20, 77 A.3d 726 (2013)."It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact ... are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17–45]." (Internal quotation marks omitted.) *Ramirez v. Health Net of the Northeast, Inc.,* 285 Conn. 1, 11, 938 A.2d 576 (2008).

***12** "Summary judgment may be granted where the claim is barred by the statute of limitations ... Summary judgment is appropriate on statute of limitations grounds when the material facts concerning the statute of limitations [are] not in dispute ..." (Citation omitted; internal quotation marks omitted.) *Romprey v. Safeco Ins. Co. of America, supra,* 310 Conn. at 313. "[I]n the context of a motion for summary judgment based on a statute of limitations special defense, a defendant typically meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period ... When the plaintiff asserts that the

limitations period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute."*Id.,* at 321.

The plaintiffs move for summary judgment as to count two on the same grounds that they raised as to count one. In fact, the plaintiffs have failed to differentiate the two claims in their memorandum. The plaintiffs essentially argue that there is no genuine issue of material fact that the defendant must recalculate their pension benefits in accordance with the Supreme Court decision in *Longley.*

As to count two, the defendant moves on its cross motion for summary judgment on the following grounds: (1) sovereign immunity precludes the putative class members' claims; (2) declaratory judgment action is inappropriate where an administrative appeal addressing the same underlying issues is pending; (3) count two is time barred by the statute of limitations set forth in General Statutes § 52–577; (4) count two is time barred by the regulatory period limitations set forth in § 5–155a–2 (a) of the Regulations of Connecticut State Agencies; and (5) count two is time barred by the commission's resolution applicable to *Longley* type claims.

As to the first ground, the defendant argues that the class action claims are essentially money damages claims that are precluded by sovereign immunity. The defendant further argues that the three exceptions to sovereign immunity do not apply.

As to the third ground, the defendant argues that, in the absence of an express statute of limitations period, an analogous statute of limitations should be applied. The defendant contends that the three-year statute of limitations period for torts, under General Statutes § 52–577, should be applied because the present action seeks to recover damages for breach of a statutory duty.

In the alternative, as to the fourth ground, the defendant argues that the six-year statute of limitations period of § 5–155a–2(a) of the Regulations of Connecticut State Agencies applies. In particular, the defendant contends that the statute of limitations period is presumed to apply retroactively, and that the statute of limitations in effect at the time an action is filed governs the timeliness of the claim.

***13** Finally, as to the fifth ground, the defendant argues that *Longley* should not be given retroactive effect, and instead applies prospectively. The defendant essentially contends that its decision to apply *Longley* retroactively for six years was a voluntary action on its part. As such, the defendant argues that the time period contained within its resolution bars the current claims.

1

Sovereign immunity does not preclude the class members' claims

The defendant argues that the declaratory relief in count two is essentially a claim for monetary damages cloaked in declaratory relief language, and that the claim is barred by statutory immunity.

"Claims involving the doctrines of common-law sovereign immunity and statutory immunity, pursuant to § 4–165, implicate the court's subject matter jurisdiction."(Internal quotation marks omitted.) *Kelly v. Albertsen,* 114 Conn.App. 600, 605, 970 A.2d 787 (2009). Accordingly, "a motion to dismiss is the appropriate procedural vehicle to raise a claim that sovereign immunity [or statutory immunity] bars the action."(Internal quotation marks omitted.) *Manifold v. Ragaglia,* 94 Conn.App. 103, 116, 891 A.2d 106 (2006), aff'd, 102 Conn.App. 315, 926 A.2d 38 (2007).

"The doctrine of sovereign immunity protects state officials and employees from lawsuits resulting from the performance of their duty ."*Hultman v. Blumenthal,* 67 Conn.App. 613, 620, 787 A.2d 666, cert. denied, 259 Conn. 929, 793 A.2d 253 (2002)."Our Supreme Court has recognized that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state."(Internal quotation marks omitted.) *Kenney v. Weaving,* 123 Conn.App. 211, 215, 1 A.3d 1083 (2010)."The law is firmly established that the state cannot be sued except with its own consent ... Whether a particular action is one against the state is not determined solely by referring to the parties of record. The fact that the state is not named as a defendant does not conclusively establish that the action is not within the principle which prohibits actions against the sovereign without its consent."(Citations omitted.) *Somers v. Hill,* 143 Conn. 476, 479, 123 A .2d 468 (1956).

"[T]he sovereign immunity enjoyed by the state is not absolute. There are [three] exceptions: (1) when

the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity ... (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights ..., and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority."(Citations omitted; internal quotation marks omitted.) *Columbia Air Services, Inc. v. Dept. of Transportation,* 293 Conn. 342, 349, 977 A.2d 636 (2009).[12] "In the absence of a proper factual basis in the complaint to support the applicability of these exceptions, the granting of a motion to dismiss on sovereign immunity grounds is proper."(Internal quotation marks omitted.) *Id.,* at 350.

***14** "A plaintiff who seeks to bring an action for monetary damages against the state must first obtain authorization from the claims commissioner ...General Statutes § 4–160(a) provides as follows: When the claims commissioner deems it just and equitable, the claims commissioner may authorize suit against the state on any claims which, in the opinion of the claims commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable. When sovereign immunity has not been waived, the claims commissioner is authorized by statute to hear monetary claims against the state and determine whether the claimant has a cognizable claim ... This legislation expressly bars suit upon claims cognizable by the claims commissioner except as he may authorize, an indication of the legislative determination to preserve sovereign immunity as a defense to monetary claims against the state not sanctioned by the [claims] commissioner or other statutory provisions ..." (Citations omitted; internal quotation marks omitted.) *Id.,* at 351–52.

In the present case, the issue is whether the first exception to statutory immunity applies, where there is an applicable statutory waiver of the state's sovereign immunity. The present case involves the payment of retirement benefits, and General Statutes § 4–142 states: "There shall be a Claims Commissioner who shall hear and determine all claims against the state *except:* (1) *Claims for the periodic payment of disability, pension, retirement or other employment benefits;* (2) claims upon which suit otherwise is authorized by law including suits to recover similar relief arising from the same set of facts; (3) claims for which an administrative hearing procedure otherwise is established by law; (4) requests by political subdivisions of the state for the payment of grants in lieu of taxes; and (5) claims for the refund of taxes."(Emphasis added.) "The claims commissioner has authority to hear all claims against the state except those expressly enumerated in § 4–142."*Chotkowski v. State,* 240 Conn. 246, 264, 690 A.2d 368 (1997).

"The judges of the Superior Court disagree as to whether § 4–142 constitutes a waiver of sovereign immunity as to claims that fall outside the jurisdiction of the Claims Commissioner."*York v. State,* Superior Court, judicial district of Hartford, Docket No. CV–08–4037176–S n. 4 (June 25, 2014, Huddleston, J.). For example, in *Wagner v. State,* Superior Court, judicial district of Hartford, Docket No. CV–09–5026341–S (November 17, 2010, Pellegrino, J.T.R.), the court reasoned: "Because jurisdiction has not been vested in some other court and [t]he fact that no other court has exclusive jurisdiction in any matter is sufficient to give the Superior Court jurisdiction over that matter ... by logical necessity ... the only possible interpretation of the [statutory] language ... is that the Superior Court has jurisdiction over claims falling within § 4–142(1). The necessary implication of § 4–142(1) is that the state has waived sovereign immunity for claims of the types listed in that section."(Citations omitted; internal quotation marks omitted.) *Id.*

***15** On the other hand, the court in *Doe v. State,* Superior Court, judicial district of New Haven, Docket No. 410586 (October 26, 1998, Levin, J.) (23 Conn. L. Rptr. 352, 355), held that it was without jurisdiction to hear the plaintiff's claims because "[n]othing in the language, legislative history or common law background of Public Acts No. 96–85 suggests that it was intended to diminish sovereign immunity or enlarge the state's waiver of the doctrine and thereby expand the jurisdiction of the court."Similarly, the court in *Doe v. Dept. of Children and Families,* Superior Court, judicial district of Hartford, Docket No. CV–04–0831392–S (November 30, 2004, Hennessey, J.) (38 Conn. L. Rptr. 361, 363), held:

"Sovereign immunity, however, has not expressly or impliedly been waived regarding a claim of negligence against the state. Though § 4–142(2) may indeed bar the claims commissioner from hearing the plaintiff's negligence claim, it does not necessarily follow that the Superior Court must therefore have jurisdiction. It is submitted that the intersection of these two statutes on these facts may indeed give rise to a situation where a claim of negligence against the state is completely precluded."

The reasoning in *Wagner* is more persuasive. As such, because the present action involves the alleged miscalculation of retirement benefits, the state has waived its statutory immunity as to count two, pursuant to § 4–142. [13]

2

Count two is time barred by the statute of limitations in General Statutes § 52–577

"It is true that no class action may proceed on behalf of class members whose claims are barred by the applicable statute of limitations."*Campbell v. New Milford Board of Education,* 36 Conn.Sup. 357, 363, 423 A.2d 900 (1980)."The purpose of a declaratory judgment action, as authorized by General Statutes § 52–29 and Practice Book § [17–55], is to secure an adjudication of rights where there is a substantial question in dispute or a substantial uncertainty of legal relations between the parties ... [I]n analyzing whether a declaratory judgment action is barred by a particular statutory period of limitations, a court must examine the underlying claim or right on which the declaratory action is based ... It necessarily follows that if a statute of limitations would have barred a claim asserted in an action for relief other than a declaratory judgment, then the same limitation period will bar the same claim asserted in a declaratory judgment action."(Citations omitted; footnotes omitted; internal quotation marks omitted.) *Wilson v. Kelley,* 224 Conn. 110, 115–16, 617 A.2d 433 (1992).

In the present case, General Statutes § 5–160 et seq. governs the calculation of retirement benefits for state employees. More specifically, the plaintiffs have cited to General Statutes §§ 5–162, 5–213, and 5–192. These statutes do not have a directly applicable statute of limitations period. Nevertheless, the defendant contends, citing to *Bellemare v. Wachovia Mortgage Corp.,* 284 Conn. 193, 931 A.2d 916 (2007), that the court must apply an analogous statute of limitations period, such as General Statutes § 52–577.

***16** "Public policy generally supports the limitation of a cause of action in order to grant some degree of certainty to litigants ... The purpose of [a] statute of limitation ... is ... to (1) prevent the unexpected enforcement of stale and fraudulent claims by allowing persons after the lapse of a reasonable time, to plan their affairs with a reasonable degree of certainty, free from the disruptive burden of protracted and unknown potential liability, and (2) to aid in the search for truth that may be impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise ...*Therefore, when a statute includes no express statute of limitations, we should not simply assume that there is no limitation period. Instead, we borrow the most suitable statute of limitations on the basis of the nature of the cause of action or of the right sued upon.*" (Citations omitted; emphasis added; internal quotation marks omitted.) *Bellemare v. Wachovia Mortgage Corp., supra,* 284 Conn. at 199.

In the present case, it is difficult to determine the appropriate statute of limitations to apply to a cause of action involving the plaintiffs' request that the defendant recalculate pensions to comply with the statutory requirements of §§ 5–162, 5–213, and 5–192.

In the underlying administrative ruling, the defendant argued that a six-year statute of limitations period applies. The defendant compared the present action to a suit to recover benefits under Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. In *Cole v. Aetna Life & Casualty,* United States District Court, Docket No. 3:97CV2272 (DJS) (D.Conn. March 28, 2002), the court held that "[t]he Connecticut statute of limitations for contract actions, which is the most analogous to ERISA, is six years," pursuant to General Statutes § 52–576(a). [14]

The defendant now argues, however, that the statute of limitations in General Statutes § 52–577 should apply instead. The defendant contends that the present cause of action is more akin to a breach of statutory duty than to a breach of contract action, and that the three-year statute of limitations in § 52–577 should apply to breach of statutory duty. In *Bellemare v. Wachovia Mortgage Corp., supra,* 284 Conn. at 193, the issue before the Supreme Court was "whether the trial court properly applied the three year statute of limitations set forth in General Statutes § 52–577 to the plaintiff's claim for damages arising from the defendant's failure to provide a release of mortgage to the plaintiff pursuant to General Statutes § 49–8."(Footnote omitted.) *Id.,* at 195. The Supreme Court affirmed the Superior Court's use of the three-year limitations period, and held: "[A]lthough the existence of a mortgage suggests that the plaintiff's claim sounds in contract, the duty that allegedly was breached was created by statute ... Furthermore, *other courts have held that, when a plaintiff seeks to recover damages for the breach of a statutory duty, such an action sounds in tort.*" (Citation omitted; emphasis

added.) *Id.,* at 200. The court concluded that "the duty to release the mortgage that the plaintiff complained of ... did not arise from the mortgage contract but, rather, from [General Statutes] § 49–8, which also prescribes damages for a breach of that statutory duty. Therefore, such a breach is tortious in nature and not contractual."*Id.,* at 201.

***17** The court finds that the present claim is more similar to a breach of statutory duty action, than to a breach of contract action. As such, pursuant to *Bellemare v. Wachovia Mortgage Corp., supra,* 284 Conn. at 193, the three-year statute of limitations under § 52–577 applies. [15]

Section 52–577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."'The three year limitation period of § 52–577... begins with the date of the act or omission complained of, not the date when the plaintiff first discovers an injury ... The relevant date of the act or omission complained of, as that phrase is used in § 52–577, is the date when the negligent conduct of the defendant occurs and not the date when the plaintiffs first sustain damage ... Ignorance of his rights on the part of the person against whom the statute has begun to run, will not suspend its operation."(Citations omitted; internal quotation marks omitted.) *Piteo v. Gottier,* 112 Conn.App. 441, 445–46, 963 A.2d 83 (2009). Thus, "[w]hen conducting an analysis under § 52–577, the only facts material to the trial court's decision on a motion for summary judgment are the date of the wrongful conduct alleged in the complaint and the date the action was filed."(Internal quotation marks omitted.) *Rickel v. Komaromi,* 144 Conn.App. 775, 782, 73 A.3d 851 (2013).

In the present case, the statute of limitations under § 52–577 begins to run at the time of the wrongful conduct alleged in the complaint. In the context of the failure to correctly calculate retirement and pension benefits, as required by General Statutes § 5–160 et seq., the action arose at the time the plaintiffs received their finalized pension calculation. [16]

As to the class action (count two), the class is defined as "former state employees who retired and began collecting pensions under the [State Employees Retirement Act] SERA plan prior to October 2, 2001 ..." As such, the statute of limitation for the most recent retiree in the defined class expired no later than October 2, 2004. Yet, the plaintiffs did not bring the declaratory judgment class action until April 27, 2012. Thus, there is no genuine issue of material fact that count two is barred by the three-year limitations period in § 52–577. [17] , [18]

3

Statute of Limitations Not Tolled by Continuing Course of Conduct Doctrine

The plaintiffs argue that the statute of limitations is tolled due to continuing violation. Specifically, the plaintiffs contend that in *State v. Commission on Human Rights & Opportunities,* 211 Conn. 464, 559 A.2d 1120 (1989), the Supreme Court held that making retirement payment was a continuing course of conduct that tolled the statute of limitations.

The Appellate Court has noted "that the doctrine of equitable tolling generally has been used in the Connecticut appellate courts in the context of administrative employment discrimination complaints. See, e.g., *State v. Commission on Human Rights & Opportunities,* [*supra,* 211 Conn. at 475] ('principle of the equitable tolling of limitations periods based on an employer's continuing acts of discrimination is well established in the federal courts'); *Williams v. Commission on Human Rights & Opportunities,* 67 Conn.App. 316, 329, 786 A.2d 1283 (2001) ('[u]sually, in employment discrimination cases, time limits will not be tolled absent some behavior of the employer designed to delay the filing of the complaint or fraud')." (Internal quotation marks omitted.) *Gager v. Sanger,* 95 Conn.App. 632, 637 n. 4, 897 A.2d 704, cert. denied, 280 Conn. 905, 907 A.2d 90 (2006).

***18** In *Williams v. Commission on Human Rights & Opportunities, supra,* 67 Conn.App. at 32, the court stated: "The reason the Connecticut legislature determined that the deadline for filing employment discrimination complaints should be 180 days was to make our statute of limitations consistent with federal law concerning employment discrimination ... The purpose behind the short deadline, as opposed to deadlines in other causes of action, in federal law is because Congress intended to encourage prompt processing of employment discrimination complaints."(Citation omitted.) *Id.* Furthermore, the *Williams* court noted that "Connecticut courts look to federal law for guidance in interpreting state antidiscrimination laws ... The general rule is that [c]ourts have taken a uniformly narrow view of equitable exceptions of Title VII limitations

periods."(Citation omitted; internal quotation marks omitted.) *Id.*, at 329.

The present case does not involve discrimination, and does not involve the application of federal law. In addition, the relevant statute of limitations period is three years, which is far longer than the unusually short 180–day period for filing employment discrimination complaints. As such, there is an open question as to whether the continuing course of conduct doctrine should apply outside of the employment discrimination context, including claims, such as count two, that involve a declaratory judgment action rather than the filing of an administrative complaint.

The plaintiffs cite to *Watts v. Chittenden,* 301 Conn. 575, 22 A.3d 1214 (2011), for the general proposition that there is a continuing course of conduct violation because there is an ongoing breach of duty. The plaintiffs also cite to *DeMunnik v. Danbury,* Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X10–CV–07–4018804–S (June 1, 2009, Scholl, J.) (48 Conn. L. Rptr. 10), which has applied the doctrine to the continuous violation of pension rights, outside of the discrimination context. The defendant, on the other hand, has cited to cases that support the argument that the periodic payment of retirement benefits is not a continuing liability nor a continuing violation of a duty. See *Hartford v. Commission on Human Rights & Opportunities,* Superior Court, judicial district of New Britain, Docket No. CV–03–0520745–S (February 19, 2004, Shapiro, J.) ("[C]ases in which the focal point of the plaintiff's complaint is a singular event or a broad program or system that affects pay, as opposed to the pay level itself, are different ... In contrast, [i]n a salary case, however, each weeks paycheck is compensation for work presently performed and completed by an employee."[Citation omitted; internal quotation marks omitted.]); *Smith v. State,* 250 Neb. 291, 296, 549 N.W.2d 149 (1996) ("A pension law which provides for the payment of benefits based upon the monthly earnings of an employee, to be paid monthly upon the death, disability or retirement of the employee, does not create a continuing liability. The liability for the payment of the pension accrues when the events stated in the law occur which entitle the employee to a pension ... The fact that such liability is to be discharged under the provisions of the statute by monthly payments for the remainder of the life of the employee entitled thereto does not make the liability a continuing one in the sense that a new liability is created from day to day or month to month."[Citation omitted; internal quotation marks omitted.]).

***19** In addition to the cases cited by the parties, in the comparable context of ERISA cases, most courts have rejected the theory that each payment based upon an alleged miscalculation constitutes a fresh breach by the defendants of their duty to administer the pension plan in accordance with ERISA. In *Novella v. Westchester County,* 661 F.3d 128, 143 (2d Cir.2011), the court conducted a survey of other federal decisions, and explained that some courts have applied the theory that "each payment based upon an alleged miscalculation constitutes a fresh breach by the [defendants] of their duty to administer the pension plan in accordance ... with ERISA, gives rise to [a] separate cause of action, and starts the running of a new limitations period ... for each cause of action ... Many courts have, however, expressly rejected this method. See, e.g., *Miller v. [Fortis Benefits Ins. Co.,* 475 F.3d 516 (3d Cir.2007)] (collecting Third Circuit cases declining to apply a continuing-violation approach to claim accrual); *Edes v. Verizon Commc'ns, Inc.,* 417 F.3d 133, 139–40 (1st Cir.2005) (rejecting a continuing-violation theory where the wrongful conduct was the defendant's single misclassification of plaintiffs as off-payroll employees); *Pisciotta v. Teledyne Indus.,* 91 F.3d 1326, 1332 (9th Cir.1996) (Although the [plaintiffs] now contend that each and every time that they were entitled to a reimbursement payment it constituted a new and separate breach of ERISA ... the applicable four-year statute of limitations begins to run when a plaintiff knows or has reason to know of the injury that is the basis of the action); *Phillips v. Alaska Hotel & Rest. Emps. Pension Fund,* 944 F.2d 509, 520–21 (9th Cir.1991) (declining to apply a continuing-violation approach), cert. denied, 504 U.S. 911, 112 S.Ct. 1942, 118 L.Ed.2d 548 (1992)." (Citation omitted; internal quotation marks omitted.) *Novella v. Westchester County, supra,* 661 F.3d at 145–46.

In *Novella,* a participant in pension plan brought a class action, alleging that defendants' application of two different benefit rates to calculate amount of pensioners' disability pension benefits violated ERISA. The Second Circuit court held: "We do not adopt the continuing-violation theory. We think that method is appropriate in ERISA cases, as elsewhere, only where separate violations of the same type, or character, are repeated over time ... Usually, [t]hese cases are marked by repeated decision-making, of the same character, by the fiduciaries ... But it is not as clear a fit in cases where, as here, the plaintiff['s] claims are based on a single decision that results in lasting negative effects ...*Schultz v. Texaco, Inc.,* 127 F.Sup.2d 443, 447 (S.D.N.Y.2001) ([T]he mere fact that the effects of a single, wrongful act continue to

be felt over a period of time does not render that single, wrongful act a single continuing violation); *Miele v.[Pension Plan of New York State Teamsters Conference Pension & Retirement Fund,* 72 F.Sup.2d 88, 102 n. 14 (E.D.N.Y.1999)] (rejecting application of the continuing-violation theory of accrual because a pension fund has no obligation to continually reassess claim denials or benefit underpayments on a monthly basis)." (Citations omitted; internal quotation marks omitted.) *Novella v. Westchester County, supra,* 661 F.3d at 146.

***20** Based on the foregoing discussion, the court finds that the equitable tolling that has been applied in the context of excusing tardiness in filing administrative employment discrimination complaints is not applicable to the declaratory action in count two, which does not involve discrimination, and includes a far longer statute of limitations period. Furthermore, the majority of analogous cases support the proposition that the periodic payment of retirement benefits is not a continuing liability nor a continuing violation of a duty, and these cases are persuasive authority. Hence, the court finds that the plaintiffs have not met their burden to show that there is a genuine issue of material fact that the continuing course of conduct doctrine tolls the statute of limitations for count two.

4

Defendant's Alternative Grounds for Summary Judgment

The defendant raised the following additional grounds for summary judgment: (1) declaratory judgment action is inappropriate where an administrative appeal addressing the same underlying issues is pending; (2) count two is timed barred by the regulatory period limitations set forth in § 5–155a–2(a) of the Regulations of Connecticut State Agencies; and (3) count two is time barred by the commission's resolution applicable to *Longley* type claims. The court will not address these alternative grounds because summary judgment is granted for the defendant on the ground that count two is barred by the three-year limitations period in § 52–577.

III

CONCLUSION

For the foregoing reasons, the court sustains the plaintiffs' administrative appeal (count one), and orders the defendant to apply *Longely* to the named plaintiffs' retirement income calculation from the time of retirement. Furthermore, the court orders the award of postjudgment interest at the rate of 5 percent per annum from the date of the final judgment until the date the judgment is fully paid.

In addition, the cross motion for summary judgment is granted for the defendant as to count two, because the claim is barred by the three-year limitations period in § 52–577. As such, the plaintiffs' motion for summary judgment is denied as to count two.

Judgment shall enter accordingly.

OWENS, J.T.R.

All Citations

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Footnotes

1 General Statutes § 5–162(a) states, in part: "[t]he retirement income for which a member is eligible shall be determined from his retirement date, years of state service and base salary ..."

2 General Statutes § 5–162(b) states, in part: " 'Base salary' means the average annual regular salary, as defined in subsection (h) of section 5–154, received by a member for his three highest-paid years of state service, disregarding any general temporary reduction or any reduction or nonpayment for illness or other temporary absence ..."

3 General Statutes § 5–213 has been amended in 2012. Nevertheless, the amended version of the statute does not apply to the plaintiffs' claims because statutes affecting substantive rights only apply prospectively. See *D'Eramo v. Smith,* 273 Conn. 610, 620–21, 872 A.2d 408 (2005) ("we have uniformly interpreted [General Statutes] § 55–3 as a rule of presumed legislative intent that statutes affecting substantive rights shall apply prospectively only" [internal quotation marks omitted]). It should be noted that neither party has argued that the latest version of the statute applies.

4 General Statutes (Rev. to 2005) § 5–213(a) states, in part: "[E]ach employee in the state service who has completed not less than ten years of state service and who is not included in any collective bargaining unit ... shall receive semiannual lump-sum longevity payments based on service completed as of the first day of April and the first day of October of each year ..."

5 General Statutes (Rev. to 2005) § 5–213(b) states, in part: "The semiannual longevity lump-sum payments shall be made on the last regular pay day in April and October of each year, except that a retired employee shall receive, in the month immediately following retirement, a prorated payment based on the proportion of the six-month period served prior to the effective date of his retirement."

6 Bouchard, Malone, and Fox retired in 1990, 1997 and 2000, respectively.

7 Bouchard received his final calculation on April 18, 1994. Malone received his final calculation on May 22, 1998. Finally, Fox received his final calculations on April 18, 2001.

8 General Statutes § 4–183(c) states: "(1) Within forty-five days after mailing of the final decision under section 4–180 or, if there is no mailing, within forty-five days after personal delivery of the final decision under said section, or (2) within forty-five days after the agency denies a petition for reconsideration of the final decision pursuant to subdivision (1) of subsection (a) of section 4–181a, or (3) within forty-five days after mailing of the final decision made after reconsideration pursuant to subdivisions (3) and (4) of subsection (a) of section 4–181a or, if there is no mailing, within forty-five days after personal delivery of the final decision made after reconsideration pursuant to said subdivisions, or (4) within forty-five days after the expiration of the ninety-day period required under subdivision (3) of subsection (a) of section 4–181a if the agency decides to reconsider the final decision and fails to render a decision made after reconsideration within such period, whichever is applicable and is later, a person appealing as provided in this section shall serve a copy of the appeal on the agency that rendered the final decision at its office or at the office of the Attorney General in Hartford and file the appeal with the clerk of the superior court for the judicial district of New Britain or for the judicial district wherein the person appealing resides or, if that person is not a resident of this state, with the clerk of the court for the judicial district of New Britain. Within that time, the person appealing shall also serve a copy of the appeal on each party listed in the final decision at the address shown in the decision, provided failure to make such service within forty-five days on parties other than the agency that rendered the final decision shall not deprive the court of jurisdiction over the appeal. Service of the appeal shall be made by United States mail, certified or registered, postage prepaid, return receipt requested, without the use of a state marshal or other officer, or by personal service by a proper officer or indifferent person making service in the same manner as complaints are served in ordinary civil actions. If service of the appeal is made by mail, service shall be effective upon deposit of the appeal in the mail."

9 The September 9, 2009 underlying declaratory ruling by the defendant was a final agency decision.

10 The defendant's argument regarding the application of analogous statute of limitations to count one is not persuasive, even if the court is to consider the defendant's argument on the merits. In *Malerba v. Connecticut State Employees Retirement Commission, supra,* 45 Conn. L. Rptr. at 853, the case similarly involved the recalculation of benefits under *Longley.*The plaintiffs were former state employees who retired between April 2003 and April 2006, and they filed petitions for a declaratory ruling concerning the applicability of the final, prorated longevity payment, as well as other retirement questions, with the defendant Connecticut state employees retirement commission. The commission rendered decisions rejecting the plaintiffs' claims.

In *Malerba,* the commission argued, in part, that the "plaintiffs took too long after their retirement to file the petitions to the commission for a declaratory ruling and that they are now time-barred."*Id.,* at 854. The Superior Court held: "There is no merit to this argument. The statute governing declaratory rulings with state agencies contains no universal limitations period for filing petitions. General Statutes § 4–176. Instead, each state agency has its own limitations period for filing claims or challenges, either as a matter of statute or regulation ... The commission, however, has no written time limitation for filing challenges to its decisions."(Citations omitted.) *Id.*

The Superior Court further stated: "Although the defendant now encourages the court to apply analogous statutes of limitation, the court declines to do so. The commission did not assert any limitations bar during the proceedings on the petitions. It appears from that fact that the commission's true position may be that, in order to fulfill its mission to state retirees, it will not reject claims solely due to delay. In any event, the commission has had ample opportunity to enact its own statute or regulation containing a limitations period. It has failed to do so ... Accordingly, the court rejects the argument that the plaintiffs' claims are time-barred."*Id.*

The holding in *Malerba* is persuasive, and is directly applicable to count one in the present case. The named plaintiffs in the present case are not time barred as to count one for failing to file their administrative petitions in a timely manner because, much like in *Malebra,* there is no applicable statute of limitations period. The defendant did not issue a

regulation with an applicable statute of limitations for the filing of petitions with the agency until April 27, 2012, the same date that the present action was commenced.

The defendant argues, however, that *Malerba* is contrary to binding authority which requires that a court apply an analogous statute of limitations. In support, the defendant cites to the following Connecticut cases: *Bellemare v. Wachovia Mortgage Corp.,* 284 Conn. 193, 199, 931 A.2d 916 (2007) ("[w]hen a statute includes no express statute of limitations, we should not simply assume that there is no limitation period. Instead, we borrow the most suitable statute of limitations on the basis of the nature of the cause of action or of the right sued upon"); *Doe v. State Dept. of Mental Health and Addiction Services,* Superior Court, judicial district of Litchfield, Docket No. CV–13–5007428–S (March 19, 2014, Pickard, J.) (same); *Satagaj v. Portland,* Superior Court, judicial district of Middlesex, Docket No. CV–06–5001169–S (February 20, 2009, Taylor, J.) (47 Conn. L. Rptr. 268) (same).

The cases that the defendant cites, however, arise in the context of an application of a statute of limitations for the filing of an action with the Superior Court, and not to the administrative petitions that the named plaintiffs are required to file in order to exhaust their administrative remedies. As suggested by the court in *Malerba,* administrative agencies may have their own reasons for declining to enact their own regulation with a limitations period for bringing a petition. The defendant's argument for applying an analogous statute of limitations to count one is misguided, and the holding in *Malerba* is persuasive.

As to the timeliness of count one, the only relevant statute of limitations is the forty-five day period governing administrative appeals, pursuant to General Statutes § 4–183. There is no dispute that the present action is not time barred by § 4–183.

11 In addition, the defendant conceded during oral argument that this was not a strong argument because the claim was already pending at the time that § 5–155a–2(a) was enacted. *Andrulat v. Brook Hollow Associates,* 176 Conn. 409, 412–13, 407 A.2d 1017 (1979) ("[a]lthough changes in the statute of limitations may not retroactively bar actions already pending ... they do govern actions brought subsequent to the effective date of the amended statute" [Citation omitted]).

12 The legislature may waive immunity from suit as to claims that do not involve monetary relief. See, e.g., *Martinez v. Dept. of Public Safety,* 263 Conn. 74, 85, 818 A.2d 758 (2003), superseded by statute on other grounds, General Statutes § 53–39a (recognizing waiver of immunity for actions that may be brought against the state for the purpose of quieting title to property, pursuant General Statutes § 12–369).

13 The plaintiffs also argue that sovereign immunity does not bar claims created by statute, and that the declaratory judgment action is authorized by General Statute § 52–29(a), which states, in part: "The Superior Court in any action or proceeding may declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed."Section 52–29, however, does not waive the state's sovereign immunity. See *Thorpe v. Galvin,* Superior Court, judicial district of New Haven, Docket No. CV–10–6007876–S (August 4, 2011, Zemetis, J.) ("[w]hile the plaintiff avers that the present lawsuit is brought pursuant to [General Statutes] §§ 52–29, 52–471 and Practice Book § 17–54, et seq.... none of those statutes waive the State's sovereign immunity").

14 General Statutes § 52–576(a) states, in part: "No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues ..."

15 In applying the § 52–577 statute of limitations to count two, this court does not reject the sound reasoning in *Malerba v. Connecticut State Employees Retirement Commission, supra,* 45 Conn. L. Rptr. at 853. In *Malebra,* the Superior Court held: "The statute governing declaratory rulings with state agencies contains no universal limitations period for filing petitions. General Statutes § 4–176. Instead, each state agency has its own limitations period for filing claims or challenges, either as a matter of statute or regulation ... The commission, however, has no written time limitation for filing challenges to its decisions."(Citations omitted.) *Id.,* at 854.

In addition, the court stated: "Although the defendant now encourages the court to apply analogous statutes of limitation, the court declines to do so. The commission did not assert any limitations bar during the proceedings on the petitions. It appears from that fact that the commission's true position may be that, in order to fulfill its mission to state retirees, it will not reject claims solely due to delay. In any event, the commission has had ample opportunity to enact its own statute or regulation containing a limitations period. It has failed to do so ... Accordingly, the court rejects the argument that the plaintiffs' claims are time-barred."*Id.*

The holding in *Malerba* is distinguishable as to count two because count two is a declaratory judgment class action, rather than an administrative appeal. As such, the fact that the defendant did not assert any limitations bar during the proceedings on the petitions is not relevant to the separate class action claim. Furthermore, although an agency may have good reasons to decline to enact its own statute or regulation containing a limitations period, this reasoning does not apply to a separate claim with the Superior Court, such as a declaratory judgment class action. Instead, the policy

considerations described in *Bellemare v. Wachovia Mortgage Corp., supra,* 284 Conn. at 199, require the enforcement of an analogous statute of limitations.

16 The date that the Supreme Court issued the *Longley* decision cannot be used as the date that the statute of limitations begins to run under § 52–577. Unlike General Statutes § 52–584, the date of discovery and the plaintiffs' knowledge of the relevant facts or law are not relevant to the statute of limitations analysis under § 52–577. Thus, the plaintiffs' various arguments that they were not aware and could not have been aware of the miscalculations until *Longley* was issued are without merit, in the context of § 52–577. The defendant's wrongful conduct is the only relevant fact, and the defendant failed to correctly calculate the plaintiffs' retirement benefits, as required by statute, on the date that the plaintiffs received their finalized pension calculation. It should be also noted that *Longley* was decided in 2007, and the present action was not commenced until 2012. As such, the plaintiffs' action would be barred even if the *Longley* decision is used as the date the statute of limitations began to run.

17 Even if the named plaintiffs' exhaustion of administrative remedies serves to toll the statute of limitations for the unnamed plaintiffs, the action is still barred under § 52–577 because the named plaintiffs began to exhaust their administrative remedies on August 24, 2009, when they filed their petition for declaratory ruling.

18 Even if the six-year statute of limitations period, pursuant to General Statutes § 52–576, applies to present case, the plaintiffs' action is still untimely. Under that statute, the limitations period for count two would expire no later than October 2, 2007.

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2007 WL 1266963 (DOL Adm.Rev.Bd)

Administrative Review Board

United States Department of Labor

IN THE MATTER OF: JAMAL KANJ, COMPLAINANT
v.
VIEJAS BAND OF KUMEYAAY INDIANS, RESPONDENT

ARB CASE NO. 06-074
ALJ CASE NO. 06-WPC-01
April 27, 2007

BEFORE THE ADMINISTRATIVE REVIEW BOARD:

***1 Appearances:**

For the Complainant:
Bryan Rho, Esq., *The McMillan Law Firm, APC,* LaMesa, California
For the Respondent:
George S. Howard, Esq., *Pillsbury Winthrop Shaw Pittman,* San Diego, California

ORDER OF REMAND

On August 5, 2005, the Complainant, Jamal Kanj, filed a complaint in which he alleged that the Respondents, Viejas Band of Kumeyaay Indians (Band or tribe), terminated his employment as Director of Public Works and Deputy Tribal Government Manager because he reported high levels of fecal coliform in Viejas Creek to the Respondent's Tribal Council. He averred that the termination from employment and other adverse employment actions violated the whistleblower protection provisions of the Federal Water Prevention Pollution Control Act (Clean Water Act, Act). [1]

The Band moved for summary decision, arguing that tribal sovereign immunity barred the suit. On December 19, 2005, a Labor Department Administrative Law Judge (ALJ) denied the motion, and on March 9, 2006, the ALJ granted the Band's motion to certify the issue of its sovereign immunity to the Administrative Review Board for interlocutory review. The Band then petitioned the Board for interlocutory review of the ALJ's order denying summary decision. [2]

On August 24, 2006, we granted the petition for interlocutory review on the question whether Congress abrogated the Band's sovereign immunity from suit by a private citizen pursuant to 33 U.S.C.A. § 1367 (West 2001).

JURISDICTION AND STANDARD OF REVIEW

"[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 416 (2001). "Although the [Supreme] Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation." *Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 759 (1998).

Sovereign immunity from suit may be invoked not only in Article III courts, but also before court-like "federal administrative tribunals." *Federal Mar. Comm'n v. South Carolina*, 535 U.S. 743, 761, 1875-76 (2002). Environmental whistleblower adjudications in the Labor Department's Office of Administrative Law Judges and the Administrative Review Board are sufficiently analogous to Article III trial proceedings that "a state is generally capable of invoking sovereign immunity in proceedings initiated by a private party under 29 C.F.R. § part 24 [the environmental whistleblower regulations]." *Rhode Island v. United States,* 304 F.3d 31, 46 (1st Cir. 2002) (*Migliori*). Nothing in existing sovereign immunity jurisprudence indicates that tribes cannot invoke sovereign immunity in administrative adjudications such as this. [3]

***2** The standard of review on summary decision is de novo, i.e., the same standard that the ALJ applies in initially evaluating a motion for summary judgment governs our review. *Honardoost v. PECO Energy Co.*, ARB No. 01-030, ALJ 00-ERA-36, slip op. at 4 (ARB Mar. 25, 2003). The standard for granting summary decision in whistleblower cases is the same as for summary judgment under the analogous Fed. R. Civ. P. 56(e). Summary decision is appropriate "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision" as a matter of law. 29 C.F.R. §§ 18.40, 18.41 (2006); *Mehen v. Delta Air Lines*, ARB No. 03-070, ALJ No. 03-AIR-04, slip op. at 2 (ARB Feb. 24, 2005). If the non-moving party fails to show an element essential to his case, there can be no "genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Rockefeller v. U.S. Dep't of Energy*, ARB No. 03-048, ALJ No. 2002-CAA-0005, slip op. at 4 (ARB Aug. 31, 2004), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

DISCUSSION

The Band seeks summary decision on grounds of tribal sovereign immunity. The ALJ denied the motion on the ground that Congress abrogated tribal sovereign immunity from suit based on the whistleblower provision of the Clean Water Act and on the ground that immunity from suit based on self-government in purely intramural matters did not arise. We affirm the ALJ on both counts.

1. Congress abrogated tribal immunity from Clean Water Act whistleblower complaints

In *Erickson v. EPA*, ARB Nos. 03-002, 03-003, 03-004, 03-064; ALJ Nos. 1999-CAA-2, 2001-CAA-8, 2001-CAA-13, 2002-CAA-3, 2002-CAA-18, slip op. at 10-12 (ARB May 31, 2006), we held that we were bound by the opinion of the Office of Legal Counsel (OLC) that Congress waived federal sovereign immunity from suit under the whistleblower provisions of the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 2003), and the Clean Air Act, 42 U.S.C.A. § 7622 (West 2003). OLC concluded that Congress expressly waived sovereign immunity from whistleblower suits by (1) permitting an aggrieved employee to file a complaint against "any person," and (2) defining the term "person" in the statutes' general definitions sections to include "each department, agency, and instrumentality of the United States." [4] 42 U.S.C.A. §§ 6971(b), 6903(15); 42 U.S.C.A. §§ 7622(b)(1), 7602(e) (OLC letter attached).

The Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA), argues in his amicus brief that OLC's reasoning compels the conclusion that Congress abrogated Indian tribal immunity from whistleblower suits under the Clean Water Act. Congress expressed that intention by (1) permitting an aggrieved employee to file a complaint against any "person," 33 U.S.C.A. § 1367(a), and (2) defining the term "person" in the statute's general definitions sections to include "municipalities," *id.* at § 1362(5), which in turn, includes "an Indian tribe or an authorized Indian tribal organization, *id.* at § 1362(4)." Amicus Br. at 6-10.

***3** We agree that the framework OLC applied to whistleblower claims against the federal government under the SWDA and the CAA must be applied to whistleblower claims against sovereign tribes under the Clean Water Act. Under this analysis, we conclude that Congress abrogated tribal immunity from whistleblower suits under the Clean Water Act.

The Band argues that an abrogation analysis that focuses only on the text of the whistleblower provision and the general definitions provision is too narrow. It fails to account for the fact that Congress used much more explicit language elsewhere in the Clean Water Act to address tribal sovereignty, viz., the Administrator is "authorized to treat an Indian tribe as a State" for enumerated purposes, which do not include the whistleblower provision. 33 U.S.C.A. § 1377(e) (West 2001). From this, the Band argues that "[a]n elementary principle of statutory construction is that a section of a statute dealing with a specific topic (in this case, the sovereign immunity of tribes) governs or takes precedence over an interpretation based on a general provision of the statute (such as the definitional provisions in § 1362(4) and (5) [])]." Band Br. at 7.

The difficulty with this argument is that both the Clean Air Act and the Solid Waste Disposal Act include provisions that waive federal sovereign immunity with language much more explicit than the whistleblower text. 42 U.S.C.A. § 7418(a) (West 2003) (CAA) ("Each department, agency, and instrumentality of the executive, legislative, and judicial branches, of the Federal Government . . . shall be subject to, and comply with, all Federal . . . requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity"). 42 U.S.C.A. § 6961(a) (West 2003) (SWDA) (same). These provisions would support the same argument the Band makes under the Clean Water Act - that the contrast between text concerning federal compliance responsibilities and text concerning whistleblower liability shows that Congress drafted differently when it wanted to eliminate sovereign immunity than when it did not. In other words, the textual differences bespeak a difference in intent. But OLC's analysis did not treat the more explicit waivers in the CAA and SWDA as evidence of what Congress did not intend in the whistleblower provisions. Nowhere in its argument does the Band suggest any reason why the OLC analysis would look upon the explicit abrogations in the Clean Water Act differently.

The Band asserts that we should disregard the OLC opinion. "While opinions by the OLC may provide guidance for executive branch agencies, the Board here is performing an adjudicative function, and is not bound by an opinion." Band Reply Br. at 3. However, the Band offers no authority for its argument and makes no response to the authorities cited by amicus in support of the proposition that OLC opinions bind the Secretary of Labor and, in turn, the Board. Amicus Br. at 9 n.6. Thus, we have no basis for deviating from our conclusion in *Erickson* that we are bound by the OLC opinion. *Erickson,* slip op. at 10-12. Accordingly, we reject the Band's assertion of sovereign immunity from suit under § 1367 of the Clean Water Act.

2. Tribal immunity based on purely intramural governance does not apply

***4** The Band also argued that it was immune from suit under subsection 1367 because Kanj's duties were inherently governmental, and the Ninth Circuit has held that federal statutes of general applicability that are silent about coverage of Indian tribes, will not apply to tribes if they concern "exclusive rights of self-governance in purely intramural matters." *See EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1078-80 (9th Cir. 2001) (following *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). Band Opening Br. at 11.

The ALJ rejected this argument because the Clean Water Act is not silent about coverage of Indian tribes. Congress specifically referred to Indian tribes twice. The whistleblower provision applies to "any person in violation of paragraph (1)" - the prohibition on discriminating against employees because they raise environmental safety concerns. *Id.* § 300j-9(i)(2)(A). The general definitions section of the Act defines the term "person" to include municipalities, which in turn includes "Indian tribes." 42 U.S.C.A. § 300f(12) and (11). And § 1377(e) authorizes EPA "to treat an Indian Tribe as a state" under certain circumstances. *See Kanj v. Viejas Band*, ALJ No. 2006-WPC-01 (ALJ Dec. 19, 2005) (order denying Respondent's motion for summary decision).

Additionally, as the ALJ pointed out, the parties are in disagreement on whether Kanj's duties are purely intramural. Thus, he concluded, "even if the statute were construed as one of general applicability, based on this dispute of fact summary judgment is inappropriate." *Id.* We concur.

CONCLUSION

Accordingly, we hold that the ALJ did not err in denying the Tribe's motion for summary decision based on tribal sovereign immunity and we **REMAND** this case for further proceedings consistent with this opinion.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge
DAVID G. DYE
Administrative Appeals Judge

Footnotes

1 33 U.S.C.A. § 1367 (West 2001).

2 The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under the WPCA to the Administrative Review Board. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). The Secretary's delegation of authority to the Board includes, "discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute." *Id.* at 64,273.

3 In *Migliori*, the First Circuit directly decided the question whether state sovereign immunity may be used to bar administrative adjudications like ours. As far as our research shows, no court has squarely confronted the question whether Indian sovereign immunity may be raised in our proceedings. *See e.g., Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1180 (10th Cir. 1999)(court need not decide whether the Council could assert its immunity in the administrative proceeding, since court finds that "the SDWA has explicitly abrogated tribal immunity in any case"). And the Supreme Court has said that "the immunity possessed by Indian tribes is not coextensive with that of the States," and "there are reasons to doubt the wisdom of perpetuating the doctrine" of tribal immunity. *Kiowa Tribe,* 523 U.S. at 755, 758. However, inasmuch as we conclude that Congress did abrogate tribal immunity from suit for violations of the Clean Water Act's whistleblower provision, we need not decide the effect of the *Migliore* decision on these proceedings.

4 The OLC also considered the Clean Water Act and concluded that Congress did not waive federal sovereign immunity from suit under the whistleblower provision of that statute, 33 U.S.C.A. § 1323 (West 2001). Although the statute permits whistleblower claims against any "person," 33 U.S.C.A. § 1367(a), the statute's definition of "person" does not include the United States, *id.* § 1362(5).

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Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

BLUE LAKE RANCHERIA, a federally recognized Indian Tribe; Blue Lake Rancheria Economic Development Corporation, a federally-chartered tribal corporation; and Mainstay Business Solutions, a federally authorized division of Blue Lake Rancheria Economic Development Corporation, Plaintiffs,
v.
Marty MORGENSTERN, individually and in his official capacity as Secretary of the California Labor and Workforce Development Agency; PAM Harris, individually and in her official capacity as Chief Deputy Director of the Employment Development Department of the State of California ("EDD"); Jack Budmark, individually and in his official capacity as a Deputy Director of the Tax Branch of the EDD; Talbott Smith, individually and in his official capacity as a Deputy Director of the Unemployment Branch of the EDD; Kathy Dunne, individually and in her official capacity as a Senior Tax Compliance Representative of EDD; Sarah Reece, individually and in her official capacity as an Authorized Representative of the EDD; the State of California; the Employment Development Department, a department of the State of California; and Does 1–50, inclusive, Defendants.

No. 2:11–CV–01124 JAM–JFM. | Dec. 6, 2011.

Attorneys and Law Firms

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Jennifer T. Henderson, Department of Justice, Jill Bowers, Attorney General of California, Steven J. Green, Office of the Attorney General, Sacramento, CA, for Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

JOHN A. MENDEZ, District Judge.

***1** This matter is before the Court on Defendants' Marty Morgenstern ("Morgenstern"), Pam Harris ("Harris"), Jack Budmark ("Budmark"), Talbott Smith ("Smith"), Kathy Dunne ("Dunne") and Sarah Reece ("Reece"), the State of California (the "State"), and the Employment Development Department ("EDD") (collectively "Defendants") Motion to Dismiss (Docs.# 26, # 36) Plaintiffs' Blue Lake Rancheria ("the Tribe"), Blue Lake Rancheria Economic Development Corporation ("EdCo"), and Mainstay Business Solutions ("Mainstay") (collectively "Plaintiffs") Complaint (Doc. # 1).

Defendants move to dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) for lack of jurisdiction and 12(b)(6) for failure to state a claim. Plaintiffs oppose the motion (Doc. # 46).[1] For the reasons set forth below, the motion to dismiss is DENIED.

I. FACTUAL ALLEGATIONS AND SUMMARY OF ARGUMENTS

Plaintiffs seek to enjoin Defendants from enforcement of State unemployment insurance taxes. Defendants are attempting to collect approximately $19,285,572.67 in state unemployment insurance contributions that Defendants assert are owed by Mainstay. Plaintiffs allege that if any money is owed, it is less than the amount Defendants seek to recover. Compl., ¶ 26. Plaintiffs argue that Defendants' collection activities violate tribal sovereign immunity and unlawfully encumber tribal land and tribal assets. Compl., ¶ 31. The Complaint alleges that Plaintiffs have not waived sovereign immunity, nor has Congress abrogated the Tribe's sovereign immunity. Compl., ¶¶ 32, 33. Accordingly, the Complaint seeks a declaration that Defendants' collection activities are violating Plaintiffs' tribal sovereign immunity and unlawfully encumbering tribal assets and land, both on and off the reservation. The Complaint also seeks an injunction enjoining Defendants from continuing to bring levies and liens on Tribal assets and property, and requiring Defendants to cancel any existing liens and return any funds seized in response to the existing liens.

Plaintiffs' suit concerns the collection of unemployment insurance contribution payments, pursuant to the Federal Unemployment Tax Act, 26 U.S.C. § 3301 et seq. ("FUTA"). FUTA is a joint federal-state program for unemployment insurance. FUTA was amended in 2001 to require states to allow Indian tribes to elect to be a reimbursing employer. A reimbursing employer reimburses the State for all benefits paid to former employees. (Cal. Unempl.Ins.Code 803(b).) Mainstay elected to be a reimbursing employer under FUTA, and held this designation from 2003 to 2010. Compl., ¶ 24. Mainstay ceased making full contribution payments as required, prompting Defendants to eventually begin the collection activities at issue in this suit.

II. PROCEDURAL BACKGROUND

Plaintiffs brought a motion for a preliminary injunction, which this Court heard on June 29, 2011 (see Transcript, Doc. # 31). The Court granted the motion on August 11, 2011 (Doc. # 40), following the submission of supplemental briefing by both parties. The preliminary injunction enjoined Defendants from further collection activities, ordered them to withdraw and release any liens and levies placed on Plaintiffs' assets and deposit with the Court the amount that had already been collected through the liens and levies. Defendants deposited the required sum with the Court, and have filed a notice of appeal (Doc. # 42) of the preliminary injunction order. Plaintiffs have voluntarily dismissed from the suit defendants the State of California and the Employment Development Department (Doc. # 45). Accordingly, "Defendants" for purposes of this order refers only to the individual defendants, not the dismissed State and EDD defendants.

***2** Defendants' Reply brief (Doc. # 47) also raised the new argument that only defendant Harris is a properly named defendant, because under California Unemployment Insurance Code § 301(c) only the Director of EDD is vested with responsibility for filing and releasing liens. However, as Plaintiffs' contend in the sur-Reply (Doc. # 52) ordered by this Court, Defendants offer no legal authority for their argument. Each individually named Defendant is alleged to have some connection with the collection actions at issue in this suit, Compl., ¶ 14, as required under *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) for suits against state officers. *See also Los Angeles County Bar Ass'n v. Eu,* 979 F.2d 697, 704 (9th Cir.1992). Accordingly, at this time the Court will not dismiss any of the individually named defendants from this suit.

III. OPINION

A. *Legal Standard*

1. *12 (b)(6) Motion to Dismiss*

A party may move to dismiss an action for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). In considering a motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), *overruled on other grounds by Davis v. Scherer,* 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984); *Cruz v. Beto,* 405 U.S. 319, 322, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972). Assertions that are mere "legal conclusions," however, are not entitled to the assumption of truth. *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009), (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). To survive a motion to dismiss, a plaintiff needs to plead "enough facts to state a claim to relief that is plausible on its face."*Twombly,* 550 U.S. at 570. Dismissal is appropriate where the plaintiff fails to state a claim supportable by a cognizable legal theory. *Balistreri v. Pacifica Police Department,* 901 F.2d 696, 699 (9th Cir.1990).

Upon granting a motion to dismiss for failure to state a claim, the court has discretion to allow leave to amend the complaint pursuant to Federal Rule of Civil Procedure 15(a)."Dismissal with prejudice and without leave to amend is not appropriate unless it is clear ... that the complaint could not be saved by amendment."*Eminence Capital, L.L.C. v. Aspeon, Inc.,* 316 F.3d 1048, 1052 (9th Cir.2003).

2. *12(b)(1) Motion to Dismiss*

Dismissal is appropriate under Rule 12(b)(1) when the District Court lacks subject matter jurisdiction over the claim. Fed.R.Civ.P. 12(b)(1). A Rule 12(b)(1) motion may either attack the sufficiency of the pleadings to establish federal jurisdiction, or allege an actual lack of jurisdiction which exists despite the formal sufficiency of the complaint. Because challenges to standing implicate a federal court's subject matter jurisdiction under Article III of the United States Constitution, they are properly raised in a motion to dismiss under Rule 12(b)(1).

***3** *Meaunrit v. ConAgra Foods Inc.*, 2010 WL 2867393, *3 (N.D.Cal. July 20, 2010) (internal citations omitted). When a defendant brings a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff has the burden of establishing subject matter jurisdiction. *See Rattlesnake Coalition v. United States Envtl. Protection Agency*, 509 F.3d 1095, 1102, FN 1 (9th Cir.2007).

There are two permissible jurisdictional attacks under Rule 12(b) (1): a facial attack, where the court's inquiry is limited to the allegations in the complaint; or a factual attack, which permits the court to look beyond the complaint at affidavits or other evidence. *Savage v. Glendale Union High School*, 343 F.3d 1036, 1039 n. 2 (9th Cir.2003)."In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction, whereas in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction."*Li v. Chertoff*, 482 F.Supp.2d 1172, 1175 (S.D.Cal.2007) (internal citations omitted). If the moving party asserts a facial challenge, the court must assume that the factual allegations asserted in the complaint are true and construe those allegations in the light most favorable to the plaintiff. *Id.* at 1175, citing *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir.2003). If the moving party asserts a factual attack, the court may resolve the factual disputes, looking beyond the Complaint to matters of public record, without presuming the truthfulness of the plaintiff's allegations. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.2000).

Here, Defendants ask the Court to take judicial notice of several affidavits and request an evidentiary hearing as to any disputed facts concerning the Court's jurisdiction, implying a factual attack.[2] The affidavits (Doc. # 25, exhibits 1–5), are affidavits on the docket that were previously submitted in opposition to Plaintiffs' motion for a preliminary injunction. The affidavits address factual disputes surrounding whether or not any of the tax assessments were in error, whether Plaintiffs may have the money to repay delinquent assessments, and what procedures were followed to review Plaintiffs' account. Documents attached to two of the affidavits that were submitted show the form Plaintiffs filled out to become a reimbursing employer, the information that was sent to Indian tribes in California regarding the option to be a reimbursing employer, and internal information about the reimbursing employer option to which Defendants were privy. These documents are not relevant to the question of the Court's jurisdiction, as they do not address the jurisdictional challenges brought by Defendants concerning Eleventh Amendment immunity, *Ex Parte Young*, or the Tax Injunction Act. Accordingly, because the extrinsic evidence submitted by Defendants is not relevant to the jurisdictional challenge, the Court will view Defendants' challenge as a facial attack, limiting review to the allegations of the Complaint and taking the allegations of the Complaint as true.

3. *Judicial Notice*

***4** Defendants incorporate by reference their brief in opposition to the motion for preliminary injunction (Doc. # 25), and ask the Court to take judicial notice of several affidavits that were submitted in conjunction with the opposition to the motion to dismiss. (See FN 1 of Defendants' Motion to Dismiss). Defendants request judicial notice of previously submitted declarations of Stanley M. Adge, Robert T. Brewer, Loretta Paullin–Delaney, Michelle Sutton–Riggs and Martin Swindell (Doc. # 25, exhibits 1–5).

Generally, the court may not consider material beyond the pleadings in ruling on a motion to dismiss for failure to state a claim. There are two exceptions: when material is attached to the complaint or relied on by the complaint, or when the court takes judicial notice of matters of public record, provided the facts are not subject to reasonable dispute. *Sherman v. Stryker Corp.*, 2009 WL 2241664 at *2 (C.D.Cal. Mar.30, 2009) (internal citations omitted). Courts may consider extrinsic evidence when "plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document ...."*Knievel v. ESPN*, 393 F.3d 1069, 1076 (9th Cir.2005). Further, as discussed above, the court may consider extrinsic evidence when deciding factual challenges to jurisdiction under Rule 12(b)(1).

Plaintiffs attached to the Complaint EdCo's Federal Charter of Incorporation (Doc. # 1, ex. # 1), and notices of levies and liens from EDD (Doc. # 1, ex. # 2). The Court will consider these documents, as they are attached to the Complaint. Plaintiffs also note that should the Court consider matters outside the pleadings as requested by Defendants, this will convert the Rule 12(b)(6) motion into Rule 56 motion for summary judgment. *See Keams v. Tempe Technical Institute, Inc.*, 110 F.3d 44, 46 (9th Cir.1997), and that if converted, all parties must be given a reasonable opportunity to present all material that is pertinent to the motions. *See*Fed.R.Civ.P. 12(d).

The Court will not convert the 12(b)(6) motion to dismiss into a motion for summary judgment by considering matters outside the pleadings. The affidavits do not form the basis of the Complaint, and are not matters of public record, thus the Court will not take judicial notice as requested by Defendants. *See Dao v. University of California, et al.*, 2004 WL 1824129, *4 (N.D.Cal. Aug.13, 2004) (noting that affidavits are not pleading exhibits unless they form the basis of the complaint, and the Ninth Circuit has found reversible error where a court took judicial notice of an affidavit outside of the pleadings without converting the motion to dismiss into a motion for summary judgment).

B. *Jurisdictional Challenges*

1. *Eleventh Amendment Immunity*

Defendants argue that the Court should dismiss the Complaint for lack of jurisdiction. The Eleventh Amendment grants states sovereign immunity from suit. See, e.g., *Agua Caliente Band of Cahuilla Indians v. Hardin,* 223 F.3d 1041, 1045 (9th Cir.2000)."Since the Supreme Court's decision in *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), Courts have recognized an exception to the Eleventh Amendment bar for suits for prospective declaratory and injunctive relief against state officers, sued in their official capacities, to enjoin an alleged ongoing violation of federal law."*Id.*

***5** In *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997), a tribe's claim to submerged lands located within the boundaries of the Coeur d'Alene Reservation was not found to be within the *Ex Parte Young* exception. *Agua Caliente,* 223 F.3d at 1046 (citing *Coeur d' Alene,* 521 U.S. at 282. The tribe in *Couer D'Alene* brought land title claims and sought declaratory and injunctive relief establishing its exclusive right to use and enjoy the submerged lands and prohibiting defendants from regulating the lands. The Supreme Court determined that *Ex Parte Young* did not apply because of the unique nature of the tribe's claims, which the Court determined were the functional equivalent of a quiet title action that would have divested the state of substantially all regulatory power over the land at issue. *Agua Caliente,* 223 F.3d at 1046, citing *Coeur d'Alene,* 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112.

However, in *Agua Caliente,* an Indian tribe challenged the state's application California's sales tax on purchases made by non-Indians at a hotel located on a reservation as a violation of federal law prohibiting state taxation of value generating activities on reservation land. The Ninth Circuit held that this case was distinguishable from *Couer d'Alene,* and that the *Ex Parte Young* doctrine applied. The *Agua Caliente* Court held that action was properly characterized as a suit for declaratory relief against state officers to enjoin an ongoing violation of federal law, rather than a suit against the state itself, thus it came under the *Ex Parte Young* exception to Eleventh Amendment immunity, even though the tribe had an available remedy under state law. The Court stated that "there existed an alternate forum in state court in which the Tribe *could* raise its claims neither divested the district court of jurisdiction nor removed the case from the Young exception for Eleventh Amendment purposes."*Agua Caliente,* 223 F.3d at 1049 (emphasis in original). The Court noted that the Supreme Court's decision in *Coeur d'Alene* supported this conclusion, as Justice Kennedy stated in the principal opinion that even if there is a prompt and effective remedy in a state forum, a second instance in which Young may serve an important interest is when the case calls for the interpretation of federal law. *Id.*

Defendants contend that Plaintiffs' claims are barred by sovereign immunity and the Eleventh Amendment, as the *Ex parte Young* fiction does not lift the sovereign immunity bar to Plaintiffs' claims for prospective relief against the individual Defendants. Plaintiffs argue that since they dismissed defendants the State of California and EDD, the sovereign immunity arguments are no longer relevant as to the State and EDD. With respect to the remaining Defendants, Plaintiffs contend that the *Ex Parte Young* exception to Eleventh Amendment immunity applies to this suit.

The Court finds Plaintiffs' argument persuasive that this suit for declaratory and injunctive relief falls within the *Ex Parte Young* exception to the Eleventh Amendment. Accordingly, the Court finds that Eleventh Amendment immunity is not a bar to Plaintiffs' Complaint.

2. *Tax Injunction Act*

***6** Defendants next contend that Plaintiffs' claims are barred by the Tax Injunction Act. Plaintiffs argue in opposition that the Tax Injunction Act does not apply to this suit, as it is a suit brought by an Indian tribe under 28 U.S.C. § 1362.

The Tax Injunction Act, 28 U.S.C. § 1341 states that "the district courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."However, the Tax Injunction Act's

jurisdictional bar does not apply to Indian tribes bringing suit under 28 U.S.C. § 1362.*Agua Caliente,* 223 F.3d at FN 5 (citing *Moe v. Confederated Tribes of the Colville Indian Reservation,* 425 U.S. 463, 472–474, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976)).*California v. Grace Brethren Church,* 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982), the case relied on by Defendants to argue that the Tax Injunction Act bars this Court's jurisdiction is inapplicable, as it was not a suit brought by an Indian tribe under 28 U.S.C. § 1362. Thus, this Court does not find that its jurisdiction over Plaintiffs' suit is barred by the Tax Injunction Act.

C. *Claims for Relief*

Plaintiffs bring two claims for relief: (1) a claim for declaratory relief, seeking a declaratory judgment that Defendants' collection actions violate Plaintiffs' tribal sovereign immunity; and (2) a claim for injunctive relief enjoining Defendants from continuing to serve notices of levy and liens on Plaintiffs' assets. Defendants argue that Plaintiffs' claims for declaratory and injunctive relief should be dismissed for failure to state a claim, under several theories.

1. *Abrogation and Waiver of Sovereign Immunity*

First, Defendants contend that Congress abrogated tribal sovereign immunity against the State's collection of taxes under the UI program. Alternatively, Defendants assert that by electing to participate in California's reimbursable program, Plaintiffs expressly waived tribal sovereign immunity to the State's collection of Plaintiffs' tax delinquency. Plaintiffs have alleged that Congress did not abrogate sovereign immunity, nor did the tribe waive immunity.

Federally recognized Indian tribes are immune from suit by any entity, including state governmental agencies, absent a clear waiver by the tribe or congressional abrogation. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Waiver cannot be implied or imputed, it must be unequivocally expressed. *Santa Clara Pueblo,* 436 U.S. at 58. Tribal sovereign immunity is a matter of federal law, and cannot be diminished by the States. *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.,* 523 U.S. 751, 756, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

"There is a difference between the right to demand compliance with state laws and the means available to enforce them."*Kiowa,* 523 U.S. at 755; see also *Okla. Tax Comm'n,* 498 U.S. at 514 (noting that while sovereign immunity bars the Sate from pursing the most efficient remedy, adequate alternatives, such as lobbying Congress for legislation, exist).

***7** Further, tribal sovereign immunity also extends to entities that are arms of the tribe. *Allen v. Gold Country Casino,* 464 F.3d 1044, 1046 (9th Cir.2006). When an Indian tribe establishes an entity to conduct business activities, that entity is immune if it functions as an arm of the tribe.*Id.* Further, "like foreign sovereign immunity, tribal immunity is a matter of federal law."*Kiowa,* at 523 U.S. 759.Though Defendants assert that Congress clearly abrogated tribal sovereign immunity when it amended FUTA to require states to permit Indian tribes to participate in state reimbursable programs, the Court is not persuaded by this argument. The 2001 FUTA Amendments at issue state that:

> The State law shall provide that a governmental entity, included an Indian tribe, or any other organization (or group of governmental entities or other organizations) which, but for the requirements of this paragraph, would be liable for contributions with respect to service to which paragraph (1) applies may elect, for such minimum period and at such time as may be provided by State law, to pay (in lieu of such contributions) into the State unemployment fund amounts equal to the amounts of compensation attributable under the State law to such service. The State law may provide safeguards to ensure that governmental entities or other organizations so electing will make the payments required under such elections.

26 U.S.C. § 3309(a)(2). The statute goes on to state that states may take "reasonable measures" to ensure that Indian tribes electing the reimbursable program pay their unemployment insurance tax, such as requiring a tribe to post a payment bond. 26 U.S.C. § 3309(d). However, the 2001 Amendments do not clearly state that tribal sovereign immunity is abrogated. Because abrogation of tribal sovereign immunity

must be express and may not be implied, the Court does not find that the 2001 FUTA Amendments expressly abrogate tribal immunity. Likewise, Plaintiffs have alleged that the tribe did not waive its immunity, and Defendants' argument that Plaintiffs' did so simply by electing to become a reimbursable employer is not persuasive.

2. *Immunity for Individual Indians*

Defendants argue that tribal sovereign immunity neither bars collection activities against individual Indian's serving as Plaintiff's agents or officers, nor prohibits the seizure of tribal assets located off the reservation. As noted by Plaintiffs, none of the plaintiffs are individual Indians, therefore arguments regarding the sovereign immunity of individual Indians are not relevant to the motion to dismiss.

3. *Seizure of Assets Outside the Reservation*

With respect to seizure of tribal assets off the reservation, Plaintiffs assert that sovereign immunity applies to tribal assets and property, regardless of whether it is located on or off of a reservation. The Complaint alleges that Defendants' collection actions unlawfully encumber tribal lands and other tribal assets, both on and off reservation. Compl., ¶ 31. While the state power over Indian affairs is considerably more expansive outside the reservation than within reservation boundaries, *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 162, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), tribal immunity does extend to activities off the reservation. *Winnebago Tribe of Nebraska v. Stovall,* 216 F.Supp.2d 1226, 1235–36 (D.Kan., 2002) (citing *Kiowa,* 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981); aff'd 314 F.3d 1202 (10th Cir.2003). The allegations of the Complaint are sufficient at this early stage to overcome the argument that Defendants may have some authority over tribal assets outside the reservation.

4. *Tax Refund Suit*

***8** Defendants contend that Plaintiffs fail to state a claim for a tax refund because the time to petition for reassessment of their taxes has expired and they are not entitled to a refund as they have failed to pay the tax. However, the Complaint does not bring a claim for a tax refund nor contain allegations that Plaintiffs are entitled to a tax refund. On the contrary, the allegations of the Complaint are that Mainstay has been working with Defendants to determine how much money Mainstay owes, and has paid Defendants a partial refund on money owed. Compl., ¶ 26. Thus, the Court does not find merit in Defendants' tax refund argument, and will not dismiss the suit on the grounds that it is actually a tax refund case.

5. *Nonjudicial Collection*

In Defendants' Reply brief, they attempt to distinguish nonjudicial collection from judicial suits, arguing that the doctrine of sovereign immunity does not bar nonjudicial collection activity. Defendants contend that to the extent that Indian tribes have sovereign immunity, it is only immunity against suit, and not immunity against nonjudicial collection activities such as the liens and levies at issue in this case. Plaintiffs address this argument in the Sur–Reply, arguing that the doctrine of tribal sovereign immunity is broader than simply immunity from suit, and extends to immunity from state administrative proceedings such as Defendants' nonjudicial collection activity. Plaintiffs note that Defendants fail to cite any authority supporting the theory that tribal sovereign immunity from state jurisdiction applies only to court proceedings and not to state administrative processes.

Tribal sovereign immunity is based on Congress' recognition that Indian tribes possess the attributes of a common law sovereign. *See In re Greene,* 980 F.2d 590, 596 (9th Cir.1992). Plaintiffs contend that there is no meaningful distinction between a sovereign being involuntarily subjected to state court proceedings, including the court's authority to enforce its decision, and a sovereign being involuntarily subjected to a state administrative process, including the state agency's authority to administratively enforce its decision. Consistent with this reasoning, courts have recognized tribal immunity from state administrative processes. *In Middletown Rancheria of Pomo Indians v. Workers' Comp. Appeals Bd.,* 60 Cal.App.4th 1340, 1347–48, 71 Cal.Rptr.2d 105 (1998), the court ruled that the tribe had sovereign immunity from the workers' compensation process and that the Worker's Compensation Appeals Board had no jurisdiction over the tribe to enforce its laws, based on sovereign immunity.

In *Winnebago Tribe,* the District Court issued a preliminary injunction, affirmed by the Tenth Circuit, barring the State of Kansas from enforcing its Motor Vehicle Fuel Tax Act against a tribal corporation. Kansas was, among other things, seizing the tribal corporation's property, entering orders for jeopardy assessments, and issuing tax warrants. The court granted the tribe's motions for a temporary restraining order and a preliminary injunction, finding that these nonjudicial collection activities to violate the tribe's sovereign immunity. *Winnebago Tribe,* 216 F.Supp.2d at 1235–1240.

*9 Tribal immunity is a matter of federal law and not subject to diminution by the states. *Kiowa,* 523 U.S. at 756. In the absence of countervailing authority, the Court finds persuasive Plaintiffs' argument that sovereign immunity bars nonjudicial collection activities, as the state cannot circumvent tribal immunity by obtaining through administrative procedures what could not be obtained through the judicial process. At this stage in the proceedings, the Court will not dismiss the Complaint on the basis of Defendants' argument that the distinction between liens and levies obtained through a state administrative procedure and those obtained through a judicial process is sufficient to overcome the protections of tribal sovereign immunity.

6. ***25 U.S.C. § 476***

Lastly, Defendants' Reply brief raised the argument that "Plaintiffs allege in their Complaint, but do not brief in opposition to EDD's motion, that Defendants' nonjudicial collection activity violates 25 U.S.C. section 476."Reply, p. 11. Defendants contend that 25 U.S.C. § 476 is not a source of substantive rights, and that the Complaint should be dismissed for that reason. Defendants did not raise any argument against 25 U.S.C. § 476 in their Motion to Dismiss, thus the Court asked Plaintiffs to address this new argument in the Sur–Reply.

The Indian Reorganization Act of 1934 ("IRA") provides that an Indian tribe may elect to organize (pursuant to its terms) and to adopt a constitution, which shall become effective upon ratification by the tribe and approval of the Secretary of the Interior. 25 U.S.C. § 476(a). The Complaint alleges that "Blue Lake Rancheria is governed by a Constitution, adopted under the Indian Reorganization Act, 25 U.S.C. § 476, and approved by the Secretary of the United States Department of Interior."Compl., ¶ 17. Section 476(e) provides that, upon approval of the constitution:

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments.

Plaintiffs point out that Defendants offer no authority to support their argument that Section 476 is not a source of substantive rights and mandates dismissal of the complaint. Further, Plaintiffs argue that the Supreme Court has directed that statutes are to be construed liberally in favor of Indian tribes, with ambiguous provisions interpreted in their benefit. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* 502 U.S. 251, 269, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992). The Ninth Circuit has viewed Section 476 as endowing tribes with the right to lease tribal land only with the tribes' consent. *See Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253, 1259 (9th Cir.1976) (noting that Section 476"explicitly gives the tribe the right to prevent the lease of tribal lands."). Thus, Plaintiffs' contend that Section 476 has been recognized as a source of substantive rights regarding a tribes' control of its property. While the impact of Section 476 has not been extensively briefed, the Court at this time is not persuaded by Defendants' unsupported argument that Plaintiffs' Complaint must be dismissed for failure to state a claim as to which relief may be granted under 25 U.S.C. § 476.

IV. ORDER

*10 For the reasons set forth above, Defendants' motion to dismiss is DENIED. Defendants are ordered to file their Answer to the Complaint within twenty (20) days of the date of this Order.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 6100845

Footnotes

1 This matter was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). Oral argument was scheduled for September 21, 2011.

2 The Court did not hold an evidentiary hearing in relation to this motion, but did hold an extensive hearing reviewing all evidence presented in connection with the preliminary injunction; the same evidence which Defendants now ask the Court to consider.

End of Document

2005 WL 3510348

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New London.

SENECA NIAGARA FALLS GAMING CORP.

v.

KLEWIN BUILDING CO., INC. et al.

No. 4004218. | Nov. 30, 2005.

Attorneys and Law Firms

Murtha Cullina LLP, Hartford, for Seneca Niagara Falls.

Zeisler & Zeisler, Bridgeport, Robert Wright, Attorney at Law, Wethersfield, for Klewin Bldg. Co. Inc.

Updike Kelly & Spellacy, Hartford, for TD Banknorth.

Opinion

SEYMOUR L. HENDEL, J.T.R.

***1** This is an application brought by the plaintiff for a limited order pursuant to Connecticut General Statutes § 52-422 [1] to aid it in a pending arbitration, which application seeks temporary and permanent injunctions and the imposition of a constructive trust against a sum of $14,551,977.49 deposited by the plaintiff in an account maintained by defendant Klewin Building Company, Inc. (Klewin Building) with defendant TD Banknorth, N.A. (Banknorth) pursuant to agreements by the parties under a construction contract entered into by the plaintiff and Klewin Building. The plaintiff seeks an injunction compelling the defendants to place the sum in a certain "positive pay" account maintained by Klewin Building with Banknorth and precluding the defendants from using the sum other than for payment of Klewin Building's subcontractors and architect for amounts due them under the construction project which is the subject of the construction contract. Defendant C.R. Klewin Gaming and Hospitality, Inc. was joined as a party defendant by agreement. Klewin Building and defendant C.R. Klewin Gaming and Hospitality, Inc. are hereinafter referred to as the "Klewin defendants."

The Klewin defendants filed an answer, special defense and counterclaim. The amended counterclaim asserts four causes of action: a violation of the Connecticut Unfair Trade Practices Act, unlawful interference with business relations, conversion and civil theft. The Klewin defendants also filed an application for immediate temporary injunction and application for temporary injunction seeking to enjoin the plaintiff from hiring any persons presently or formerly employed by Klewin Building and from using any drawings and other documents created and/or furnished by Klewin Building pursuant to the construction contract.

The plaintiff has filed this motion to dismiss counterclaims and application for immediate temporary injunction on the basis that the claims asserted by the Klewin defendants are barred by the doctrine of sovereign immunity and on the basis that the Klewin defendants failed to establish jurisdiction for their claims as an application pursuant to Connecticut General Statutes § 52-422 because none of their claims are being arbitrated.

The plaintiff's primary basis for its motion to dismiss is that the Klewin defendants' counterclaims are barred by the doctrine of sovereign immunity. It is well established that, absent a clear and unequivocal waiver by an Indian tribe or a congressional abrogation, the doctrine of sovereign immunity bars suit against a tribe. *Romanella v. Hayward,* 933 F.Supp. 163, 167 (D.Conn.) (1996), aff'd114 F.3d 15 (2ndCir.1997). Any waiver of immunity is to be interpreted liberally in favor of the tribe and restrictively against the claimant. *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community,* 138 Ariz. 378, 674 P.2d 1376, 1381 (Ariz.App.1983). Entities created by an Indian tribe to further governmental purposes cannot be sued absent a waiver of immunity. *Weeks Constr., Inc. v. Ogala Sioux Housing Auth.,* 797 F.2d 668, 671 (8th Cir.1986). A tribe's sovereign immunity is not limited to governmental activities, but extends to commercial activities as well. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 118 S.Ct. 1700, 1705, 140 L.Ed.2d 981 (1998). The United States Supreme Court has acknowledged the significance of gaming in furthering the self-determination and economic development of Indian tribes. *California v. Cabazon Board of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083, 1092-93, 94 L.Ed.2d 244 (1987). Because of the doctrine of tribal immunity, "businesses that deal with Indian tribes do so at great financial risk."*S. Unique. Ltd. v. Gila River Pima-Maricopa Indian Community, supra,* at 1384-85.

***2** In the present case, the Klewin defendants contend that the plaintiff is not a tribal agency sufficiently connected to and controlled by a sovereign Indian tribe so as to enjoy sovereign immunity.

The court has reviewed extensive documentation concerning the status of the plaintiff, including: the Constitution of the Seneca Nation of Indians (Nation), the Council Resolution Granting the Charter of the plaintiff, the Charter and By-Laws of the plaintiff, a lease by the Nation to the plaintiff of real estate located in Niagara Falls, New York, and a Council resolution regarding dividends.

The documentation establishes the following. The Nation is a federally recognized Indian tribe which is the duly-authorized governing body of the Seneca tribe. The Nation's legislative power is vested in the Council, which is composed of sixteen elected members of the Tribe. Under federal law and a compact with the State of New York, the Nation is permitted to conduct casino operations on tribal land, including land in Niagara Falls, New York. The Council adopted a resolution granting a corporate charter to the Seneca Gaming Corporation (Gaming Corporation) as a governmental instrumentality and subordinate arm of the Nation to develop and operate the Nation's gaming facilities, which were recognized as of vital importance to the economy of the Nation and the general welfare of its members. The plaintiff was granted a corporate charter by a resolution of the Council as a wholly-owned subsidiary of the Gaming Corporation to develop and operate the Nation's casino in Niagara Falls, New York. The plaintiff was created to improve the well-being of the Nation and its members as a governmental instrumentality of the Nation having autonomous existence separate and apart from the Nation and was deemed to be a subordinate arm of the Nation entitled to all of the privileges and immunities of the Nation.

The documentation further establishes the following. The Council appoints the plaintiff's board of directors, a majority of whom must be enrolled Senecas. The Council fills vacancies on the board and may remove any board member for cause. In addition, Council authorization is required for significant corporate acts, including transactions involving any management contract, financing, substantial expenditures of money, giving significant guarantees, incurring significant liabilities, loans to tribal entities, purchase or sale of real estate, significant expenditures for personal property, transactions involving bonds, obligations, shares or securities of others, participation with others in any transaction which the plaintiff would have power to do by itself, significant expenditures of resources for the Niagara Falls Gaming Facility and waiver of the Nation's sovereignty. The plaintiff pays $1,000,000 per month from the profits of the Seneca Niagara Casino to the Nation as rent under its lease with the Nation and makes other substantial cash payments and real estate distributions to the Nation and the Gaming Corporation. The plaintiff must submit quarterly and annual reports of the casino's financial condition, activities, significant problems and accomplishments and future plans to the Gaming Corporation, which submits similar reports to the Nation.

***3** In their briefs and arguments on the issue of whether the plaintiff is an entity to which the Nation's immunity extends, the parties have extensively briefed and argued the case of *Ransom v. St. Regis Mohawk Educ. & Comm. Fund, Inc.*, 86 N.Y.2d 553, 635 N.Y.S.2d 116, 658 N.E.2d 989 (1995). In *Ransom,* the plaintiffs were Mohawk Indians who were former employees of the defendant, a non-profit District of Columbia corporation which provided education, health care, social and historical services to residents of the St. Regis Mohawk Reservation. The plaintiffs brought suit for wrongful termination against the directors of the Fund. The Fund claimed sovereign immunity.

The New York Court of Appeals set forth, at page 559, the following seven-part test for determining whether a tribal entity is an arm of the tribe entitled to share the tribe's immunity from suit:

(1) whether the entity is organized under the tribe's laws or constitution rather than federal law;

(2) whether the organization's purposes are similar to or serve those of the tribal government;

(3) whether the organization's governing body is comprised mainly of tribal officials;

(4) whether the tribe has legal title or ownership of property used by the organization;

(5) whether tribal officials exercise control over the administration or accounting activities of the organization;

(6) whether the tribe's governing body has power to dismiss members of the organization's governing body; and,

(7) more importantly, whether the corporate entity generates its own revenue, whether a suit against the corporation will impact the tribe's fiscal resources, and whether the sub-entity has the power to bind or obligate the funds of the tribe.

In upholding the claim of tribal immunity, the court stated at page 560:

> The conclusion that respondent Fund is a tribal entity which enjoys sovereign immunity from suit is fully supported by the record. The Fund was established to enhance the health, education and welfare of Tribe members, a function traditionally shouldered by tribal government. Additionally, the Fund received its resources from the Tribe, and the Tribe was designated by the Fund as the recipient of its funds and services. Critically, under its by-laws, the Fund's governing body may only be comprised of elected Chiefs of the Tribe. Thus, the Fund's provision of social services on behalf of and under the direct fiscal and administrative control of the Tribe renders it an entity so closely allied with and dependent upon the Tribe that it is entitled to the protection of tribal sovereign immunity.

In *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (1996), the Minnesota Supreme Court quoted the first six *Ransom* factors, but omitted the seventh factor of the test. After reviewing *Ransom* and other cases, the court, at page 294, set forth three principal factors to be considered in determining whether tribal sovereign immunity extends to a tribal business entity:

***4** (1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial;

2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and

(3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity.

Based on this three-factor test, the court held that the defendant, a casino owned by a tribal corporation, was immune from suit by a former employee for tortious acts that occurred both within and without Indian country. The court found that the corporation had been created for the specific purpose of improving the financial and general welfare of the tribe; the corporation was wholly owned by the tribe as a governmental unit, rather than being organized under state law; the board of directors of the corporation had to include at least three members of the tribal Council; a majority of the directors had to be tribal members and directors could be removed by a tribal court proceeding commenced by tribal members; and federal policies supported Indian gaming as a means of promoting tribal welfare.

The California Court of Appeals adopted the *Gavle* three-factor test in *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 84 Cal.Rptr.2d 65 (1999). The plaintiff, who was injured in a fight at the defendant tribal corporation's casino, brought suit against the casino claiming negligence. The court held that the corporation was formed for the benefit of the tribal members, the corporation was closely related to the tribe and federal policies furthered immunity in the case and, therefore, the corporation was entitled to tribal immunity.

The plaintiff satisfies the three-part *Gavle* test for tribal immunity because it was created to improve the well-being of the Nation and its members, it is very closely related in its structure and business operations to the Nation and federal policies support gaming as a source of income for Indian tribes.

The plaintiff also meets the seven-factor *Ransom* test for tribal entity immunity, as follows:

(1) The plaintiff is incorporated under Seneca tribal law and not federal or state law. The present case appears to be a case of first impression in Connecticut involving an incorporated entity of the tribe. Incorporated tribal entities have been accorded tribal immunity in the *Ransom, Gavle* and *Trudgeon* decisions. In *Ransom,* the incorporation was under District of Columbia law and in *Gavle* and *Trudgeon* the incorporations were under tribal law, as in the present case.

(2) The plaintiff was created to improve the well-being of the Nation and its members which is the same as the purpose of the Nation. It is responsible for developing and operating the Nation's gaming facility, which is the main source of income to provide for the general welfare of the Nation's members, the principal purpose of both the Nation and the plaintiff.

***5** (3) A majority of the members of the plaintiff's board of directors must be enrolled Senecas. Two of the present directors are the president and treasurer of the Nation.

(4) Although the plaintiff owns the Niagara Falls casino and the personal property used in the casino, the Nation owns the real estate upon which the casino is situated. By its ownership of the real estate, the Nation ultimately will acquire title to the casino.

(5) The Tribe maintains oversight and control over the administration and accounting activities of the plaintiff. All important corporate acts require the approval of the Council. Reports of the casino's financial condition, activities, significant problems and accomplishments and future plans must be submitted to the Gaming Corporation quarterly and annually.

(6) The Council may remove any member of the plaintiff board of directors for cause.

(7) The plaintiff generates its own income from the profits of its casino. Because the plaintiff is a corporation, suit against it will not directly impact the Nation's fiscal revenues. However, if a large judgment is entered against the plaintiff as a result of a suit, payment of such judgment could result in the plaintiff being unable to make the $1,000,000 monthly rental payments to the Nation, thereby substantially impacting the Nation. Similarly, as a corporation, the plaintiff does not have the power to bind or obligate the funds of the Nation, but its failure to make monthly rental payments would have a significant effect on such funds. The funds which the plaintiff administers, in practical effect, are the funds of the Nation and the manner in which the plaintiff handles such funds redownds to the benefit or detriment of the Nation.

It should be noted with respect to the seventh factor that the *Ransom* court found the tribal entity involved in the case, a District of Columbia corporation, was entitled to tribal immunity, even though its corporate status would prevent a suit against it from directly impacting the tribe's revenues and the entity would not have power to bind or obligate the funds of the tribe. Furthermore, in both *Gavle* and *Trudgeon* the entities were tribal corporations, as is the plaintiff in this case with similar corporate limitations, and both corporations were held to have tribal immunity.

New London County, because it is the site of the two largest Indian casinos in the United States, has been the source of many cases involving the immunity of the tribal entities. A review of the following cases arising in New London County reveals that tribal immunity was found to exist as to an entity of the tribe in each case. *Kizis v. Morse Diesel International, Inc.*, 260 Conn. 46, 794 A.2d 498 (2002) (gaming authority); *Worrall v. Mashantucket Pequot Gaming Enterprises*, 131 F.Sup.2d 328 (D.Conn.2001) (gaming enterprise); *Chayoon v. Sherlock*, 2004 Conn.Super. LEXIS 1059, 2004 WL 1052011 (2004) (gaming enterprise); *Mohegan Tribal Gaming Authority v. Fox*, 2003 Ct.Sup. 14444 (2003) (gaming authority); *Paszkowski v. Chapman*, 2001 Conn.Super LEXIS 2551, 2001 WL 1178765 (2001) (gaming authority); *Greenridge v. Volvo Car Finance, Inc.*, 2000 Conn.Super. LEXIS 2240 (2000) (gaming commission); *Burnham v. Pequot Pharmaceutical Network*, 1998 Conn.Super. LEXIS 1734, 1998 WL 345463 (1998) (for-profit commercial health care organization); *Mashantucket Pequot Gaming Enterprises v. CCI, Inc.*, 1994 Conn.Super. LEXIS 1775, 1994 WL 373122 (1994) (gaming enterprise).

***6** In all of the above cases, except *Burnham*, the tribal entities were the casino operating arms of the Indian tribes involved in the cases. The casino entities were similar in their operations and purposes to the operations and purposes of the plaintiff in this case. In *Burnham*, The tribal entity was a for-profit health care organization conducting business off the tribal reservation, which is clearly less closely connected to the tribe than the operations of the plaintiff in this case.

The Klewin defendants, both in their briefs and oral argument, failed to cite any case in which a tribal entity owning and operating an Indian casino has been denied inmunity from suit in a state court nor could the court find any such case.

Accordingly, for the reasons stated above, the court finds that the plaintiff is a tribal entity entitled to tribal immunity.

The Klewin defendants claim that, even if the plaintiff is a tribal entity entitled to tribal immunity, the plaintiff has

waived its sovereign immunity by instituting this action in the state court.

The simple answer to the Klewin defendants' claim is our Supreme Court's statement in *Schaghticoke Indians of Kent, Connecticut, Inc. v. Potter,* 217 Conn. 612, 622, fn. 9, 587 A.2d 139 (1991), that, while the plaintiff Indian tribe therein "sought out a state forum in this action, unilateral action of this sort is insufficient to constitute consent or otherwise give the state jurisdiction."The Klewin defendants rely on the legal principle of equitable recoupment as an exception to sovereign immunity. Equitable recoupment recognizes that, by bringing a claim, a tribe necessarily waives immunity for matters arising out of the same transaction or occurrence which is the subject matter of the tribe's suit to the extent of defeating the tribe's claims, but not to the extent of a judgment which is affirmative in the sense of involving relief different in kind or nature or exceeding the relief sought by the tribe. *Jicarilla Apache Tribe v. Andrus,* 687 F.2d 1324, 1344 (10th Cir., 1982). In *Jicarilla,* the Tenth Circuit held that counterclaims raised by lessees against the tribe for breach of leases were not permissible in the action brought by the tribe against the Secretary of the Interior and oil and gas lessees claiming the Secretary had failed to comply with his regulations when advertising oil and gas leases on the reservation.

The Klewin defendants rely on *Rupp v. Omaha Indian Tribe,* 45 F.3d 1241 (8th Cir., 1995), and *Wyandotte Nation v. City of Kansas, Kansas,* 200 F.Sup.2d 1279 (D.C.Kan.2002). In each of these cases, the plaintiff Indian tribe sought to quiet title against the defendants. The courts allowed counterclaims by the defendants to quiet title because the very same issues were involved in the defendants' claims to quiet title as in the plaintiffs' claims to quiet title. The *Wyandotte* court, however, did not allow the defendants' claim for reimbursement of improvements they had made to the land in question because, although "the reimbursement action arises out of the same transaction or occurrence which is the subject matter of the suit, it clearly is different in kind and nature from the quiet title and trespass claims brought by the tribe and exceeds the amount of relief sought by the tribe."*Id.,* at 1286. (Internal quotation marks omitted.) In the present case, the defendants' counterclaims similarly are clearly different in kind and nature from the plaintiff's request for temporary injunction and exceed the relief sought by the plaintiff.

***7** The Klewin defendants also cite a case which arose in this jurisdiction, *Mohegan Tribal Gaming Authority v. Kohn Pedersen Fox,* 2003 Ct.Sup. 14444 (2003), in which the plaintiff tribe sought damages for negligent performance of an architectural and engineering contract and the defendants asserted counterclaims arising out of an owner-controlled project professional liability insurance policy. Because the primary agreement contained a sovereign immunity waiver provision permitting state court jurisdiction and the contract was part of the agreement, the court denied the tribe's motion to dismiss. In the present case, no such waiver exists. Moreover, the doctrine of equitable recoupment did not enter into the court's decision.

In a case in this jurisdiction strikingly similar to the facts in the present case, *Mashantucket Pequot Gaming Enterprise v. CCI, Inc., supra,* the plaintiff, an Indian gaming entity operating a bingo hall and casino, filed an action seeking temporary and permanent injunctive relief against the defendant, a supplier of computer-related services, to prohibit disclosure of personal information under an invasion of privacy theory. The defendant filed a counterclaim alleging violation of several Connecticut statutes and breach of contract. The court found that the plaintiff was an economic subdivision of the tribe and could invoke sovereign immunity and granted the plaintiff's motion to dismiss the counterclaims.

Accordingly, the court finds that by instituting this action the plaintiff has not waived its sovereign immunity as to the Klewin defendants' counterclaims and the counterclaims must be dismissed.

The plaintiff further claims as a basis for its motion to dismiss the Klewin defendants' counterclaims that the Klewin defendants failed to establish jurisdiction for their claims pursuant to Connecticut General Statutes § 52-422 because none of their claims are being arbitrated. Inasmuch as the court has found that the counterclaims are barred by the doctrine of sovereign immunity, it is not necessary for the court to address this issue.

For the reasons stated above, the court grants the plaintiff's motion to dismiss the Klewin defendants' counterclaims and application for immediate temporary injunction.

All Citations

Not Reported in A.2d, 2005 WL 3510348, 40 Conn. L. Rptr. 366

Footnotes

1 Section 52-422 provides:

> At any time before an award is rendered pursuant to an arbitration under this chapter, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when said court is not in session, any judge thereof, upon application of any party to the arbitration, may make forthwith such order or decree, issue such process and direct such proceedings as may be necessary to protect the rights of the parties pending the rendering of the award and to secure the satisfaction thereof when rendered and confirmed.

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2015 WL 5157426
United States Court of Appeals,
Eleventh Circuit.

State of ALABAMA, Plaintiff–Appellant,
v.
PCI GAMING AUTHORITY, Buford Rolin, Stephanie Bryan, Robert McGhee, David Gehman, sued in their official capacity, et al., Defendants–Appellees.

No. 14–12004. | Sept. 3, 2015.

Synopsis

Background: State brought action in state court against Indian tribal officials and gaming authority that was wholly owned by Indian tribe to enjoin gaming at casinos on Indian lands within state borders, which state argued were a public nuisance. Gaming authority and tribal officials removed action to federal court. The United States District Court for the Middle District of Alabama, W. Keith Watkins, Chief Judge, 15 F.Supp.3d 1161, dismissed. State appealed.

Holdings: The Court of Appeals, Jill Pryor, Circuit Judge, held that:

[1] gaming authority shared tribes immunity from suit;

[2] Congress did not intend to displace *Ex Parte Young* doctrine in Indian Gaming Regulatory Act (IGRA), and thus tribal officials were not immune from suit;

[3] Indian casino was not located on state land, and thus tribal officials were immune from state's nuisance claim;

[4] amendment of state's complaint to challenge Secretary of Interior's taking of land into trust on behalf of tribe would have been futile; and

[5] as a matter of first impression, Congress did not intend to create an implied right of action that would have given states the right to sue tribal officials to enjoin a certain class of gambling on tribal land under IGRA.

Affirmed.

West Headnotes (36)

[1] **Indians**
Establishment and Regulation in General

Indian Gaming Regulatory Act (IGRA) does not govern gaming that occurs outside of Indian lands; a state's authority to regulate such gaming is capacious. Indian Gaming Regulatory Act, § 2 et seq., 25 U.S.C.A. § 2701 et seq.

Cases that cite this headnote

[2] **Indians**
Other Gaming

Indian Gaming Regulatory Act (IGRA) divides gaming on Indian lands into three classes and provides a different regulatory scheme for each class. Indian Gaming Regulatory Act, § 4, 25 U.S.C.A. § 2703.

Cases that cite this headnote

[3] **Indians**
Other Gaming

Under the Indian Gaming Regulatory Act (IGRA), the extent to which a tribe may engage in class II or class III gaming depends on how the state where the Indian lands are located has chosen to regulate such games in the state as a whole. Indian Gaming Regulatory Act, § 11, 25 U.S.C.A. § 2710.

Cases that cite this headnote

[4] **Indians**
Status of Indian Nations or Tribes

Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories.

Cases that cite this headnote

[5] **Indians**
Sovereign Immunity

Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers.

Cases that cite this headnote

[6] **Indians**
Sovereign Immunity

A suit against an Indian tribe is barred unless the tribe clearly waived its immunity or Congress expressly abrogated that immunity by authorizing the suit.

Cases that cite this headnote

[7] **Indians**
Actions

Gaming authority that was wholly owned by Indian tribe shared tribe's immunity from suit, where authority operated as an arm of the tribe.

Cases that cite this headnote

[8] **Indians**
Actions

Congress did not intend to displace the *Ex Parte Young* doctrine, which held that a state official engaged in an ongoing violation of federal law was not entitled to immunity, in the Indian Gaming Regulatory Act (IGRA), and thus the *Young* doctrine applied to individual Indian tribal officials sued in their official capacities and such officials were not immune from state's suit against them under the IGRA that sought to enjoin gaming on tribal land within state, where IGRA did not contain a detailed remedial scheme, nor a remedy for a state to directly enforce its gaming laws on Indian lands. 18 U.S.C.A. § 1166.

Cases that cite this headnote

[9] **Federal Courts**
Suits for Injunctive or Other Prospective or Equitable Relief; Ex Parte Young Doctrine
Federal Courts
Agencies, Officers, and Public Employees

When a state official violates federal law, he is stripped of his official or representative character and no longer immune from suit.

Cases that cite this headnote

[10] **Federal Courts**
Suits for Injunctive or Other Prospective or Equitable Relief; Ex Parte Young Doctrine
Federal Courts
Agencies, Officers, and Public Employees

An allegation of an ongoing violation of federal law by a state officer where the requested relief is prospective is ordinarily sufficient to invoke the *Ex ParteYoung* doctrine, such that the state officer is not immune from suit.

Cases that cite this headnote

[11] **Federal Courts**
Suits for Injunctive or Other Prospective or Equitable Relief; Ex Parte Young Doctrine
Federal Courts
Indians

Although tribal officials are generally entitled to immunity for acts taken in their official capacity and within the scope of their authority, they are subject to suit under the doctrine of *Ex parte Young* when they act beyond their authority by violating a federal statute.

Cases that cite this headnote

[12] **Federal Courts**
Agencies, Officers, and Public Employees

State officials are immune from suit in federal court for claims arising under state law because it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.

Cases that cite this headnote

[13] **Indians**
Tribal Officers and Officials

The immunity tribal officials enjoy from state law claims brought in federal court is narrower than the immunity of state officials from such claims; specifically, tribal officials may be subject to suit in federal court for violations of state law under the fiction of *Ex parte Young,* which held that a state official engaged in an ongoing violation of federal law is not entitled to immunity, when their conduct occurs outside of Indian lands.

Cases that cite this headnote

[14] **Indians**
Tribal Officers and Officials

When not on Indian lands, members of a tribe, including tribal officials, are subject to any generally applicable state law.

Cases that cite this headnote

[15] **Indians**
Tribal Officers and Officials

Tribal officials are not immune from a state law claim seeking to enjoin gaming because tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct under state law that occurs off Indian lands.

Cases that cite this headnote

[16] **Indians**
Actions

Indian casino was not located on state land, and thus individual Indian tribal officials, sued in their official capacities, were immune from state's suit under state nuisance law to enjoin operation of casino, despite state's contention that Supreme Court determined that casinos were not located on Indian lands because the Secretary of the Interior lacked authority to take land into trust on behalf of the Tribe under the Indian Reorganization Act (IRA); state could not raise a collateral challenge to the Secretary's authority to take lands into trust in unrelated lawsuit that was not brought under the Administrative Procedure Act (APA), which would have been the proper method for challenging Secretary's actions. Indian Reorganization Act, § 5, 25 U.S.C.A. § 465; 5 U.S.C.A. § 702.

Cases that cite this headnote

[17] **Federal Civil Procedure**
Form and Sufficiency of Amendment; Futility

Amendment of state's complaint against gaming authority of Indian tribe and tribal officials to include an Administrative Procedure Act (APA) claim challenging the Secretary of the Interior's taking of land into trust on behalf of the tribe would have been futile, and thus district court did not abuse its discretion in denying state the opportunity to amend its complaint, assuming state properly sought leave to amend its complaint, where six-year general statute of limitations for APA claims had run on Secretary's acceptance of lands at issue into trust for the tribe, and state did not argue that it was unaware that the Secretary was taking the land at the time such action was finalized. 5 U.S.C.A. § 702; 28 U.S.C.A. § 2401(a).

Cases that cite this headnote

[18] **Administrative Law and Procedure**
Determination of Validity; Presumptions

The exception to the Administrative Procedure Act's (APA) statute of limitations for as-applied challenges gives a party ultimately affected by a rule an opportunity to question the rule's validity when the party could not have brought a timely challenge. 5 U.S.C.A. § 702; 28 U.S.C.A. § 2401(a).

Cases that cite this headnote

[19] **Indians**
Sovereign Immunity

Tribal immunity is a matter of federal law and is not subject to diminution by the states.

Cases that cite this headnote

[20] **Action**

Statutory Rights of Action

The mere fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.

Cases that cite this headnote

[21] **Action**

Statutory Rights of Action

A statute may, but does not necessarily, create a cause of action either expressly or by implication.

Cases that cite this headnote

[22] **Action**

Statutory Rights of Action

The question of the existence of a statutory cause of action is one of statutory construction.

Cases that cite this headnote

[23] **Action**

Statutory Rights of Action

To determine whether a statute provides an express right of action, courts look for an express provision granting a federal cause of action to enforce the provisions of that act.

Cases that cite this headnote

[24] **Action**

Statutory Rights of Action

In determining whether a statute gives rise to an implied right of action, the judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.

Cases that cite this headnote

[25] **Action**

Statutory Rights of Action

In the absence of congressional intent to create an implied right of action, a cause of action does not exist, and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.

Cases that cite this headnote

[26] **Action**

Statutory Rights of Action

There must be clear evidence of Congress's intent to create a cause of action.

Cases that cite this headnote

[27] **Action**

Statutory Rights of Action

To determine whether Congress intended to create an implied right of action, first and foremost, courts look to the statutory text for rights-creating language, which explicitly confers a right directly on a class of persons that includes the plaintiff in the case.

Cases that cite this headnote

[28] **Action**

Statutory Rights of Action

The second step for a court determining whether a statute gives rise to an implied right of action is to examine the statutory structure within which the provision in question is embedded, keeping in mind the cardinal principle that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.

Cases that cite this headnote

[29] **Action**

Statutory Rights of Action

The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.

Cases that cite this headnote

[30] **Action**

Statutory Rights of Action

The third step for a court determining whether a statute gives rise to an implied right of action is to look to legislative history and context within which a statute was passed.

Cases that cite this headnote

[31] **Action**

Statutory Rights of Action

In determining whether a statute gives rise to an implied right of action, courts consider legislative history if, and only if, statutory text and structure have not conclusively resolved whether a right of action should be implied, and courts view legislative history suggesting the existence of an implied right of action with a skeptical eye.

Cases that cite this headnote

[32] **Indians**

Preemption

Congress did not intend to create an implied right of action that would have given states the right to sue Indian tribal officials to enjoin a certain class of gambling on tribal land under Indian Gaming Regulatory Act (IGRA), even though IGRA extended state laws regarding gambling into Indian country; IGRA did not contain language extending a state's power to enforce state law in Indian country, nor did it include other rights-creating language, it specifically addressed incorporation of state criminal punishments into federal law, but was silent regarding civil remedies, Congress's stated intent under IGRA was that federal government would be principal authority regulating Indian gaming, IGRA contained express remedies for tribal violations of it, not including a state's enforcement of state laws, and IGRA created a careful balance of federal, state, and tribal interests, which would have been upset by giving states power to enforce state laws in Indian country. 18 U.S.C.A. § 1166.

Cases that cite this headnote

[33] **Action**

Statutory Rights of Action

A statute that merely describes how the federal government will effectuate or enforce rights does not contain rights-creating language for a private cause of action.

Cases that cite this headnote

[34] **Action**

Statutory Rights of Action

Where the focus of a statute is removed from the individuals who will ultimately benefit from its protection, the statute does not contain rights-creating language for a private cause of action.

Cases that cite this headnote

[35] **Indians**

Offenses and Prosecutions

Under section of Indian Gaming Regulatory Act (IGRA) applying state criminal laws regarding gambling to tribal land, if a person commits in Indian country an act involving gaming that would be a crime under state law, his actions constitute a federal crime. 18 U.S.C.A. § 1166(b).

Cases that cite this headnote

[36] **Indians**

Tribal-State Compacts

Congress intended for a state to have a right of action under the Indian Gaming Regulatory Act (IGRA) to enjoin class III gaming only where the gaming is unauthorized by a compact between the state and the tribe allowing some class III gaming. Indian Gaming Regulatory Act, § 11(d)(7)(A)(ii), 25 U.S.C.A. § 2710(d)(7)(A)(ii).

Cases that cite this headnote

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Appeal from the United States District Court for the Middle District of Alabama. D.C. Docket No. 2:13–cv–00178–WKW–WC.

Before MARCUS, JILL PRYOR and EBEL,* Circuit Judges.

Opinion

JILL PRYOR, Circuit Judge:

***1** Alabama sued under state and federal law to enjoin gaming at casinos owned by the Poarch Band of Creek Indians (the "Tribe") and located on Indian lands within the state's borders.[1] As the Tribe itself is unquestionably immune from suit, Alabama instead named as defendants PCI Gaming Authority ("PCI"), an entity wholly owned by the Tribe that operates the casinos, and tribal officials in their official capacity.

Alabama claims that the gaming at the casinos constitutes a public nuisance under Alabama law and should be enjoined. It puts forth two novel theories to explain why its state law applies to the Tribe's casinos. First, Alabama asserts that the Secretary of the Interior (the "Secretary") lacked authority to take land into trust for the Tribe; therefore, the Tribe's casinos are not located on Indian lands, and Alabama may regulate the gaming there. Second, Alabama contends that by incorporating state laws governing gambling into federal law, 18 U.S.C. § 1166 creates a right of action for a state to sue in federal court to enforce its laws on Indian lands. The district court rejected these arguments and dismissed the action on the grounds that the defendants were entitled to tribal immunity on nearly all of Alabama's claims and Alabama failed to state a claim for relief. After careful consideration of the briefs and the record, and with the benefit of oral argument, we affirm the district court's judgment in favor of the defendants.

I. FEDERAL REGULATION OF GAMING ON INDIAN LANDS

Congress passed the Indian Gaming Regulatory Act ("IGRA"), 18 U .S.C. §§ 1166–68, 25 U.S.C. §§ 2701–21, to address "the rapidly expanding field of Indian gaming."*Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians (Tamiami II)*, 63 F.3d 1030, 1032 (11th Cir.1995);[2] *see also*25 U.S.C. § 2701(1) (explaining IGRA was enacted because "numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands"). IGRA was enacted in response to the United States Supreme Court's decision in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), which held that because Congress had not regulated Indian gaming, the states lacked authority to regulate gaming on Indian lands. *See Michigan v. Bay Mills Indian Cmty.*, —— U.S. ——, ——, 134 S.Ct. 2024, 2034, 188 L.Ed.2d 1071 (2014).[3]

[1] IGRA regulates gaming that occurs on Indian lands, which include "any lands title to which is [ ] held in trust by the United States for the benefit of any Indian tribe ... and over which an Indian tribe exercises governmental power."25 U.S.C. § 2703(4)(B).[4] IGRA does not govern gaming that occurs outside of Indian lands; a state's authority to regulate such gaming is "capacious." *Bay Mills,* 134 S.Ct. at 2034.

[2] As for gaming on Indian lands, IGRA provides "a comprehensive approach to the controversial subject of regulating tribal gaming, [and strikes] a careful balance among federal, state, and tribal interests."*Florida v. Seminole Tribe of Fla. (Seminole Tribe II),* 181 F.3d 1237, 1247 (11th Cir.1999).[5] IGRA "divides gaming on Indian lands into three classes—I, II, and III—and provides a different regulatory scheme for each class."[6] *Seminole Tribe of Fla. v. Florida (Seminole Tribe I),* 517 U.S. 44, 48, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). IGRA defines class II gaming to include bingo and permits the use of "electronic, computer, or other technologic aids" in connection with the game. 25 U.S.C. § 2703(7)(A)(i).[7] Class III gaming is "all forms of gaming that are not class I gaming or class II gaming" and includes slot machines and other casino games. 25 U.S.C. § 2703(8); *Seminole Tribe I,* 517 U.S. at 48.

***2** **[3]** Under IGRA, the extent to which a tribe may engage in class II or class III gaming depends on how the state where the Indian lands are located has chosen to regulate such games in the state as a whole.[8] With respect to class II and class III gaming, IGRA permits a tribe to conduct each class of gaming only if such gaming is allowed in some

form within the state where the Indian lands are located. 25 U.S.C. § 2710(b)(1), (d)(1) (allowing class II or class III gaming when the state where the gaming occurs "permits such gaming for any purpose by any person, organization or entity"). IGRA imposes an additional requirement before a tribe can conduct class III gaming: the tribe and state must agree to a compact regulating the gaming, which the Secretary must approve. *Id.* § 2710(d)(1), (d)(3). A state must negotiate a tribal-state compact governing class III gaming in good faith. *Id.* § 2710(d)(3)(A).

IGRA expressly provides both tribes and states with limited express rights of action to sue in federal court with respect to tribal-state compacts. If a state fails to negotiate a tribal-state compact in good faith, a tribe may bring a civil action against the state in federal court. *Id.* § 2710(d)(7)(A)(i). But IGRA limits the remedies available to the tribe in such an action. The tribe may not obtain broad injunctive relief; the ultimate remedy available is that the Secretary may set forth the terms under which the tribe may engage in class III gaming on Indian lands within the state. *Id.* § 2710(d)(7)(B)(iv), (vii). IGRA also expressly provides states with a cause of action to sue to enjoin "class III gaming activity located on Indian lands" that is "conducted in violation of any Tribal–State compact."*Id.* § 2710(d)(7)(A)(ii). No remedy other than an injunction is provided. *See id.*

IGRA authorizes the National Indian Gaming Commission (the "NIGC") to regulate gaming on Indian lands. The NIGC is tasked with "monitor[ing] class II gaming conducted on Indian lands on a continuing basis" and is authorized to "inspect and examine" the premises where class II gaming occurs.[9] *Id.* § 2706(b)(1), (b)(2). In addition, the NIGC may fine a tribe or close a gaming facility if it finds a tribe has conducted class III gaming on Indian lands without a compact. *Id.* § 2713(a)(1), (b).

In addition to this civil and regulatory scheme governing gaming on Indian lands, IGRA includes three provisions codified in the criminal code, only one of which is relevant here.[10] Section 1166, titled "Gambling in Indian country," applies to class III gaming conducted in the absence of a tribal-state compact. 18 U.S.C. § 1166(c). This section incorporates "all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto" into federal law. *Id.* § 1166(a). These state laws "shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State."[11] *Id.* Section 1166 makes it a federal crime to commit an act or omission involving gambling where the conduct "would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred," under the state's laws "governing the licensing, regulation, or prohibition of gambling."*Id.* § 1166(b). The punishment for this federal crime is the same as the punishment would be under state law for the state crime. The United States has the exclusive jurisdiction to bring criminal prosecutions for violations of § 1166(b).*Id.* § 1166(d).

II. FACTUAL BACKGROUND

***3** The Tribe owns three casinos located within the state of Alabama, all of which are situated on lands held in trust by the United States for the benefit of the Tribe.[12] At the casinos, there are hundreds of machines that appear to be electronic bingo games but, Alabama alleges, are actually slot machines. These gaming devices "play like, look like, sound like, and attract the same class of customers as acknowledged slot machines," and nearly identical machines are marketed as slot machines.[13] First Am. Compl. at 6 ¶¶ 17–18 (Doc. 10).[14]

Under IGRA, the Tribe may operate bingo games but not slot machines at the casinos. Although the Alabama Constitution generally prohibits bingo gaming, Ala. Const. art. IV, § 65, nonprofit entities and private clubs are permitted to operate bingo games for prizes or money in some towns and counties for charitable, educational, or other lawful purposes. *See* Ala. Const. amends. 386–87, 413, 440, 506, 508, 542, 549–50, 565, 569, 599, 612, 674, 692, 732, 743–44. Because some bingo gaming is allowed under Alabama law and the NIGC Chairperson approved the Tribe's ordinance to participate in class II gaming, the Tribe may operate bingo games at its casinos. The Tribe may not, however, operate slot machines at its casinos because Alabama prohibits the operation of slot machines within the state. *See, e.g.*, Ala.Code § 13A–12–27(a)(1) (criminalizing the possession of slot machines).

Alabama originally sued PCI as well as thirteen individuals (the "Individual Defendants")[15] in state court, seeking an injunction and a declaratory judgment on the ground that the operation of illegal slot machines at the Tribe's three casinos constitutes a public nuisance under Alabama law. *See*Ala.Code § 6–5–121 (authorizing Alabama to bring a lawsuit to abate a public nuisance). After the defendants

removed the action to federal court, Alabama amended its complaint to add a claim based on the same alleged state law violation (public nuisance) under IGRA, 18 U.S.C. § 1166.[16] Alabama alleged that because the tribe was conducting unauthorized class III gaming, the state could sue under § 1166 to enjoin the gaming.

The defendants moved to dismiss the amended complaint under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). The district court granted the motion, dismissing the amended complaint on the following grounds: (1) lack of subject matter jurisdiction as to the state law public nuisance claim because IGRA completely preempts it;[17] (2) lack of subject matter jurisdiction as to all claims against PCI based on tribal sovereign immunity; (3) lack of subject matter jurisdiction as to the state law public nuisance claim against the Individual Defendants based on tribal sovereign immunity; (4) alternatively, failure to state a claim upon which relief can be granted as to the state law public nuisance claim because the gaming occurs on Indian lands, where IGRA expressly preempts state law; and (5) failure to state a claim as to the federal claim because IGRA, through § 1166, does not create a right of action for Alabama to sue tribal officials. This is Alabama's appeal.

III. STANDARD OF REVIEW

*4 We are called upon here to review the district court's determinations that (1) PCI was entitled to tribal sovereign immunity on all claims; (2) the Individual Defendants were entitled to tribal sovereign immunity as to Alabama's state law claim but not its claim under IGRA; and (3) Alabama failed to state a claim for relief. We review each of these rulings *de novo*. *See Seminole Tribe II,* 181 F.3d at 1240–41.

IV. TRIBAL SOVEREIGN IMMUNITY

We have an obligation to make sure we have jurisdiction to hear this action, which requires us to first consider whether the defendants enjoy tribal sovereign immunity from Alabama's claims. *See id.* at 1240–41 n. 4; *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.,* 261 F.3d 1032, 1034 (11th Cir.2001). We conclude that PCI is entitled to tribal sovereign immunity on all claims against it, and the Individual Defendants are entitled to tribal sovereign immunity on Alabama's state law claim, but not its claim under IGRA.

[4] [5] [6] "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories."*Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (quoting *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831)). Indian tribes therefore possess " 'the common-law immunity from suit traditionally enjoyed by sovereign powers.' " *Seminole Tribe II,* 181 F.3d at 1241 (quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)). A suit against a tribe is "barred unless the tribe clearly waived its immunity or Congress expressly abrogated that immunity by authorizing the suit." *Id.* Although the Supreme Court has expressed doubts about "the wisdom of" tribal immunity, the Court nonetheless has recognized that "the doctrine of tribal immunity is settled law and controls" unless and until Congress decides to limit tribal immunity. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751, 756–58, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); *see also Bay Mills,* 134 S.Ct. at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity."). Here, the Tribe has not waived its immunity and Congress has not expressly abrogated it. The question we face is whether PCI and the Individual Defendants also enjoy tribal immunity.

A. PCI

[7] Alabama argues that PCI does not share in the Tribe's immunity because PCI is a business entity separate from the Tribe that engages in commercial, not governing, activities. We conclude that PCI shares in the Tribe's immunity because it operates as an arm of the Tribe.[18]

First, the Supreme Court has not "drawn a distinction between governmental and commercial activities of a tribe" when deciding whether there is tribal immunity from suit. *Kiowa Tribe,* 523 U.S. at 754–55. Second, we agree with our sister circuits that have concluded that an entity that functions as an arm of a tribe shares in the tribe's immunity. *See Allen v. Gold Country Casino,* 464 F.3d 1044, 1046 (9th Cir.2006) ("When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe."); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.,* 207 F.3d 21, 29 (1st Cir.2000) ("The Authority, as an arm of the Tribe, enjoys the full extent of the

Tribe's sovereign immunity."); *Hagen v. Sisseton–Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir.2000) (holding that entity that "serves as an arm of the tribe ... is thus entitled to tribal sovereign immunity"). Because Alabama does not dispute that PCI operates as an arm of the Tribe, PCI shares the Tribe's immunity.

B. Individual Defendants

1. Immunity as to IGRA Claim

***5** **[8]** We now turn to whether the Individual Defendants, individuals sued in their official capacity, enjoy immunity from Alabama's IGRA claim. We hold that they do not. Because Alabama alleges that the Individual Defendants are committing ongoing violations of IGRA, a federal law, and seeks declaratory and injunctive relief to stop the violations, the officials are not entitled to immunity.

[9] **[10]** In *Ex parte Young,* the Supreme Court recognized an exception to sovereign immunity in lawsuits against state officials for prospective declaratory or injunctive relief to stop ongoing violations of federal law. 209 U.S. 123, 155–56, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Under the legal fiction established in *Ex Parte Young,* when a state official violates federal law, he is stripped of his official or representative character and no longer immune from suit. *Id.* at 159–60. "An allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction," such that the state officer is not immune from suit. *Idaho v. Couer d'Alene Tribe of Idaho,* 521 U.S. 261, 281, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

[11] We previously have extended the *Ex parte Young* doctrine to tribal officials. Although tribal officials are generally entitled to immunity for acts taken in their official capacity and within the scope of their authority, "they are subject to suit under the doctrine of *Ex parte Young* when they act beyond their authority" by violating a federal statute. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians (Tamiami III)*, 177 F.3d 1212, 1225 (11th Cir.1999). Because Alabama alleges that the Individual Defendants are engaged in ongoing conduct that violates federal law, the Individual Defendants are not entitled to immunity. [19]

In an attempt to avoid the application of *Ex parte Young,* the Individual Defendants argue that the "Supreme Court [in *Seminole Tribe I*] held that the *Ex parte Young* theory is not available in IGRA enforcement actions between tribes and states."Appellees' Br. at 52. We disagree. The Supreme Court's decision in *Seminole Tribe I* addressed only whether *Ex parte Young* permitted a state official to be sued under the provision of IGRA that gives a tribe an express cause of action to sue to compel a state to negotiate in good faith a tribal-state compact governing class III gaming based on the limited remedial scheme available to a tribe to vindicate this right. *See* 517 U.S. at 47. *Seminole Tribe I* neither addressed nor decided whether state and tribal officials are immune from other IGRA-based claims to enforce rights for which the statute does not set forth such a detailed, limited remedial scheme.

In *Seminole Tribe I,* the tribe sued the governor of Florida in his official capacity, as well as the state of Florida, seeking injunctive relief after the governor refused to negotiate a tribal-state compact governing class III gaming. *Id.* at 51–52. The Supreme Court held that the Eleventh Amendment barred the suit against Florida and that the governor also enjoyed immunity. The *Ex parte Young* doctrine did not apply to the tribe's claim against the governor for failing to negotiate a compact in good faith because "Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right."*Id.* at 72, 74. Under this detailed scheme, a tribe has only a "modest" remedy when a state fails to negotiate a compact in good faith:

> ***6** [T]he only remedy prescribed is an order directing the State and the Indian tribe to conclude a compact within 60 days. And if the parties disregard the court's order and fail to conclude a compact within the 60–day period, the only sanction is that each party then must submit a proposed compact to a mediator who selects the one which best embodies the terms of the Act. Finally, if the State fails to accept the compact selected by the mediator, the only sanction against it is that the mediator shall notify the Secretary of the Interior who then must prescribe regulations governing class III gaming on the tribal lands at issue.

Id. at 74–75 (construing 25 U.S.C. § 2710(d)(7)). The Supreme Court explained that applying the *Ex parte Young* doctrine—which would permit a tribe to sue a state official for broad injunctive relief to compel negotiations-would be inconsistent with and undermine the limited remedy IGRA sets forth. *Id.* at 75 ("[I]t is difficult to see why an Indian

tribe would suffer through the intricate scheme of § 2710(d)(7) when more complete and more immediate relief would be available under *Ex parte Young*.").

The Supreme Court did not address the argument that the Individual Defendants raise here: whether the *Ex parte Young* doctrine applies when a state sues a tribal official under 18 U.S.C. § 1166 seeking to enjoin class III gaming. Reviewing this issue of first impression, we hold that the *Ex parte Young* doctrine applies to a claim under § 1166. In *Seminole Tribe I,* the Supreme Court recognized an exception to *Ex parte Young* that applies when a federal statute contains a detailed remedial scheme. *Id.* at 74–75; see *also Vann v. Kempthorne,* 534 F.3d 741, 755 (D.C.Cir.2008) (explaining that the *Seminole Tribe I* exception applies only "if we can discern an intent to displace *Ex parte Young* suits through the establishment of a more limited remedial regime"). As described in more detail in Section V, *infra,* in § 1166 Congress created no remedy for a state to enforce directly its gaming laws on Indian lands, much less a detailed remedial scheme. In the absence of such a remedial regime, we cannot conclude that Congress intended § 1166 to displace *Ex parte Young.*

2. Immunity as to State Law Claim

We now address whether tribal immunity bars Alabama's state law nuisance claim brought against the Individual Defendants in their official capacity. First we consider whether the Individual Defendants enjoy immunity from Alabama's state law claim. We then turn to Alabama's argument that the Individual Defendants waived their immunity from the state law claim when they removed the case to federal court.

a. Scope of Immunity

[12] Federal courts have long recognized that state officials are immune from state law claims brought against them in their official capacity because the *Ex parte Young* doctrine does not reach such claims. *See Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.,* 633 F.3d 1297, 1305 n. 15 (11th Cir.2011). The Supreme Court has explained that the rationale for the *Ex parte Young* doctrine "rests on the need to promote the vindication of federal rights," but in a case alleging that a state official has violated state law, this federal interest "disappears." *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 105–06, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). State officials are immune from suit in federal court for claims arising under state law because "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."*Id.* at 106.

*7 **[13]** **[14]** **[15]** The immunity tribal officials enjoy from state law claims brought in federal court is narrower than the immunity of state officials from such claims, however. Specifically, tribal officials may be subject to suit in federal court for violations of state law under the fiction of *Ex parte Young* when their conduct occurs outside of Indian lands. *See Bay Mills,* 134 S.Ct. at 2034–35. In *Bay Mills,* the Supreme Court held that a *tribe* enjoyed immunity from suit by a state to enjoin alleged illegal gaming occurring at a casino that was not on Indian lands. However, the state had other remedies and could sue "*tribal officials*... (rather than the Tribe itself) seeking an injunction for, say, gambling without a license [under state law]." *Id.* at 2035 (emphasis added). This is because "a State, on its own lands, has many other powers over tribal gaming that it does not possess (absent consent) in Indian territory"; when not on Indian lands, members of a tribe, including tribal officials, "are subject to any generally applicable state law."*Id.* at 2034–35. And tribal officials are not immune from a state law claim seeking to enjoin gaming because "analogizing to *Ex parte Young,* tribal immunity does not bar such a suit for injunctive relief against *individuals,* including tribal officers, responsible for unlawful conduct" under state law that occurs off Indian lands. *Id.* at 2035 (internal citation omitted).

[16] Alabama acknowledges that the Individual Defendants enjoy immunity from its state law claim if the casinos are located on Indian lands. While conceding that the Secretary took the lands where the casinos are located into trust for the Tribe, Alabama argues that under the Supreme Court's decision in *Carcieri v. Salazar,* 555 U.S. 379, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009), the Tribe's casinos are not located on Indian lands because the Secretary lacked authority to take land into trust on behalf of the Tribe under IRA. We reject this argument because Alabama cannot raise a collateral challenge to the Secretary's authority to take lands into trust (and consequently, the status of the Tribe's lands) in this lawsuit. We therefore conclude that the Individual Defendants are entitled to immunity on Alabama's state law claim.

In *Carcieri,* the Secretary decided to take a parcel of land into trust for the Narragansett Indian tribe. Rhode Island appealed the decision to the Interior Board of Indian Appeals, which upheld the Secretary's decision. Rhode Island then sought review of the agency action in federal court under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. The

Supreme Court was presented with the question of whether IRA authorized the Secretary to take lands into trust on behalf of the Narragansett tribe, which had not been federally recognized when IRA was enacted in 1934. As described above, IRA authorized the Secretary to take lands into trust "for the purpose of providing land for Indians," defining Indians as "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction."25 U.S.C. §§ 465, 479. Because "the term 'now under federal jurisdiction' in § 479 unambiguously refer[red] to those tribes that were under the federal jurisdiction of the United States when [ ] IRA was enacted in 1934," the Supreme Court held the Secretary lacked authority to take land into trust for a tribe that was not under federal jurisdiction in 1934. 555 U.S. at 395–96.

***8** But the Supreme Court's decision in *Carcieri* holding that the Secretary lacked authority to take land into trust for the Narragansett tribe in a lawsuit against the Secretary raising a timely APA claim does not mean that Alabama may collaterally attack the Secretary's authority to take lands into trust for the Tribe in this case. Unlike Rhode Island in *Carcieri,* Alabama has not brought an APA claim against the Secretary. Because *Carcieri* involved a timely challenge under the APA, the Supreme Court did not address whether the Secretary's authority to take land into trust may be reviewed outside an APA action. [20]

The proper vehicle for Alabama to challenge the Secretary's decisions to take land into trust for the Tribe is an APA claim. *See Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak,* —— U.S. ——, ——, 132 S.Ct. 2199, 2208, 183 L.Ed.2d 211 (2012) (characterizing a challenge to the Secretary's land-into-trust decision as a "garden-variety APA claim"). We hold that Alabama cannot raise in this lawsuit a collateral challenge to the Secretary's authority to take the lands at issue into trust.

We find persuasive the opinion of the Ninth Circuit sitting en banc, which recently held that California could not raise a collateral attack—that is, make a challenge outside an APA claim—to the Secretary's authority to take lands into trust for an Indian tribe. *Big Lagoon Rancheria v. California,* 789 F.3d 947 (9th Cir.2015) (en banc). In *Big Lagoon,* a tribe sued California contending that the state had failed to negotiate in good faith a tribal-state compact governing class III gaming. *Id.* at 952. California argued, based on *Carcieri,* that it had no obligation to negotiate a compact because the tribe was not under federal jurisdiction as of 1934; thus, the tribe's casinos were not located on Indian lands. *Id.* The Ninth Circuit rejected California's reliance on *Carcieri,* which did not "address whether the [Secretary's] entrustment decisions can be challenged outside an action brought under the APA or outside the statute of limitations for APA actions."*Id.* at 953. The Ninth Circuit explained that California raised "a belated collateral attack" on the Secretary's decision to take land into trust, which could only be reviewed under "a petition for review pursuant to the APA."*Id.*

[17] Perhaps tacitly recognizing that we can review the Secretary's authority to take lands into trust only under the APA, Alabama argues the district court should have permitted it to amend its complaint to add the Secretary as a party and assert an APA claim. Even assuming, *arguendo,* that Alabama properly sought leave from the district court to amend its complaint to add an APA claim against the Secretary, [21] we cannot say that the district court abused its discretion when it denied Alabama the opportunity to amend its complaint because amendment would have been futile. *See Hall v. United Ins. Co. of Am.,* 367 F.3d 1255, 1263–64 (11th Cir.2004) (no abuse of discretion in denying leave to amend when amendment would have been futile).

***9** A six-year general statute of limitations applies to APA claims brought against the United States; the statute begins to run when the agency issues the final action that gives rise to the claim. *See*28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."); *U.S. Steel Corp. v. Astrue,* 495 F.3d 1272, 1280 (11th Cir.2007). Because the Secretary accepted the lands at issue into trust for the Tribe in 1984, 1992, and 1995, the statute of limitations to challenge those decisions had run by 1991, 1999, and 2002, respectively.

Alabama attempts to skirt the time bar by invoking an exception to the APA's statute of limitations for as-applied challenges. We have allowed an untimely challenge to a regulation on which an agency relies in taking final agency action on the ground that the regulation was outside the agency's statutory authority. *See Legal Envtl. Assistance Found., Inc. v. EPA,* 118 F.3d 1467, 1472–73 (11th Cir.1997) (citing *NLRB Union v. Fed. Labor Relations Auth.,* 834 F.2d 191, 194–97 (D.C.Cir.1987)). But we are unpersuaded that the exception applies in this case.

[18] The exception gives a party ultimately affected by a rule "an opportunity to question [the rule's] validity" when

the party could not have brought a timely challenge. *NLRB Union,* 834 F.2d at 196 (internal quotation marks omitted). Alabama does not argue it was unaware that the Secretary was taking land into trust for the Tribe; indeed, record evidence confirms that Alabama was given notice when the Secretary took the lands into trust. Because Alabama could have brought a timely APA challenge, we will not carve out an exception to the six-year statute of limitations. *See Big Lagoon Rancheria,* 789 F.3d at 954 n. 6 (rejecting, based on evidence showing that California had previously acknowledged that the Secretary had taken the land at issue into trust, the argument that the state should be permitted to raise an untimely challenge to the Secretary's land-into-trust decision).

We are in no position, given the procedural posture of this case, to disturb the Secretary's long-ago decisions to take the lands in question into trust—decisions which Alabama could have but chose not to challenge at the time. As the district court found, the deeds to the lands on which the casinos sit demonstrate the United States holds title in trust for the benefit of the Tribe. Because the lands at issue are properly considered "Indian lands," the Individual Defendants are immune from Alabama's state law claim. [22]

b. Waiver of Immunity

[19] Alabama argues in the alternative that the Individual Defendants waived their immunity from the state law claim by removing the case to federal court. Alabama's argument rests on the assumption that the Individual Defendants enjoy immunity from the state law claim in federal court but not in state court. The sole case on which Alabama relies addresses *state* officials' immunity from state law claims in state court, not *tribal* officials' immunity from state law claims in state court. *See Ala. Dep't of Transp. v. Harbert Int'l, Inc.,* 990 So.2d 831, 840 (Ala.2008), *abrogated in part by Ex parte Moulton,* 116 So.3d 1119 (Ala.2013). State law cannot limit the Individual Defendants' immunity because "tribal immunity is a matter of federal law and is not subject to diminution by the States."*Bay Mills,* 134 S.Ct. at 2031 (internal quotation marks omitted); *see also Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.,* 692 F.3d 1200, 1206 (11th Cir.2012) (explaining that a tribe's sovereign immunity "is not the same thing as a state's Eleventh Amendment immunity" because tribes are more akin to foreign sovereigns). Because the premise of Alabama's argument—that the Individual Defendants were not immune from the state law claim in state court-does not hold up, Alabama's waiver argument fails.

***10** In summary, PCI is entitled to tribal sovereign immunity as to all of Alabama's claims; thus, the district court properly dismissed all claims against PCI. The Individual Defendants are entitled to tribal sovereign immunity on Alabama's state law claim but not its federal law claim under IGRA.

V. RIGHT OF ACTION UNDER § 1166

Because tribal sovereign immunity does not bar Alabama from bringing a federal claim against Individual Defendants under IGRA to enjoin alleged illegal class III gaming activities at the casinos, we now consider the Individual Defendants' argument that Alabama failed to state a claim for relief on the ground that 18 U.S.C. § 1166 provides Alabama with no right of action. Alabama argues that § 1166 gives states a right of action to bring federal claims against tribal officials who violate state gambling laws.

The Supreme Court has suggested in *dicta* that a state cannot sue under § 1166: "[I]f a tribe opens a casino on Indian lands before negotiating a compact, the surrounding State cannot sue; only the Federal Government can enforce the law."*Bay Mills,* 134 S.Ct. at 2034 n. 6 (citing 18 U.S.C. § 1166(d)). Similarly, in *dicta* in *Seminole Tribe II,* we expressed "some doubt about whether [§ 1166] would permit a state to bring an action in federal court seeking state-law injunctive relief against a tribe for violating state gambling laws."181 F.3d at 1246 n. 13. With this question of first impression now squarely before us, we hold that § 1166 does not provide states with either an express or implied right of action to sue tribal officials to enjoin unlawful gaming on Indian lands.

[20] **[21]** **[22]** It is well established that the mere "fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person."*Cannon v. Univ. of Chicago,* 441 U.S. 677, 688, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). A statute may, but does not necessarily, create a cause of action either expressly or by implication. *See Transamerica Mortg. Advisors, Inc. v. Lewis,* 444 U.S. 11, 15, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979)."The question of the existence of a statutory cause of action is, of course, one of statutory construction."*Touche Ross & Co. v. Redington,* 442 U.S. 560, 568, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979).

A. Express Right of Action

[23] We begin with the question whether § 1166(a) provides a state with an express cause of action to sue tribal officials. To determine whether a statute provides an express right of action, we look for an "express provision granting [ ] a federal cause of action to enforce the provisions of that act."*Smith v. Russellville Prod. Credit Ass'n,* 777 F.2d 1544, 1547 (11th Cir.1985).

Under § 1166(a), with respect to class III gaming conducted without a tribal-state compact, "all State laws pertaining to the licensing, regulation, or prohibition of gambling ... shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State."18 U.S.C. § 1166(a). Although § 1166(a) contemplates that for purposes of federal law, state laws pertaining to class III gaming shall apply in Indian country as they do in the rest of the state, § 1166 lacks any language explicitly creating a federal cause of action for a state to sue to enforce its laws. [23] Accordingly, we hold that § 1166 does not create an express right of action.

B. Implied Right of Action

***11** We turn now to the more difficult question, whether § 1166 creates an implied right of action for a state to sue tribal officials to enjoin violations of state gaming laws occurring on Indian lands. After considering our law governing implied rights of action, which requires clear evidence of congressional intent; our prior decision in *Seminole II;* and the statutory text, structure, and legislative history of IGRA, we hold that § 1166 does not create an implied right of action for states to sue tribal officials to enforce state gambling laws.

1. Congressional Intent

[24] **[25]** **[26]** In determining whether a statute gives rise to an implied right of action, " '[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.' " *Love v. Delta Air Lines,* 310 F.3d 1347, 1352 (11th Cir.2002) (quoting *Alexander v. Sandoval,* 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001)). In the absence of congressional intent to create an implied right of action, " 'a cause of action does not exist[,] and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.' " *Id.* (quoting *Sandoval,* 532 U.S. at 286–87). "There must be clear evidence of Congress's intent to create a cause of action." *McDonald v. S. Farm Bureau Life Ins. Co.,* 291 F.3d 718, 723 (11th Cir.2002) (internal quotation marks omitted).

[27] To determine whether Congress intended to create an implied right of action, "[f]irst and foremost, we look to the statutory text for 'rights-creating' language."*Love,* 310 F.3d at 1352 (quoting *Sandoval,* 532 U.S. at 288); *see also Armstrong v. Exceptional Child Ctr., Inc.,* ——U.S. ——, ——, 135 S.Ct. 1378, 1387, 191 L.Ed.2d 471 (2015) (explaining that there was no implied right of action when a statute "lack[ed] the sort of rights-creating language needed to imply a private right of action"). Rights-creating language "explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff in the case."*Cannon,* 441 U.S. at 690 n. 13. Rights-creating language does "more than create a generalized duty for the public benefit, states more than declarative language, and focuses more than just 'on the person regulated.' " *Shotz v. City of Plantation,* 344 F.3d 1161, 1167 (11th Cir.2003) (quoting *Sandoval,* 532 U.S. at 289).

[28] **[29]** "Second, we examine the statutory structure within which the provision in question is embedded."*Love,* 310 F.3d at 1353. In considering the statutory scheme, we keep in mind the "cardinal principle" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."*TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) (internal quotation marks omitted). Additionally, we have explained that when the "statutory structure provides a discernible enforcement mechanism ... we ought not imply a private right of action."*Love,* 310 F.3d at 1353. In other words, "the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval,* 532 U.S. at 290; *see also Animal Legal Def. Fund v. U.S. Dep't of Agric.,* 789 F.3d 1206, 1217 (11th Cir.2015) ("Where Congress knows how to say something but chooses not to, its silence is controlling."(internal quotation marks omitted)).

***12** **[30]** **[31]** Third, we look to "legislative history and context within which a statute was passed."*Love,* 310 F.3d at 1353. We consider legislative history "if—and only if—statutory text and structure have not conclusively resolved whether a[ ] right of action should be implied."*Id.* Moreover, we view legislative history suggesting the existence of an implied right of action "with a skeptical eye." *Id.*

2. Our *Seminole Tribe II* Decision

In *Seminole Tribe II,* we held that the provision of IGRA requiring a tribal-state compact for a tribe to engage in class III gaming, 25 U.S.C. § 2710(d)(1)(C), created no implied right of action for a state to sue a tribal official to enjoin class III gaming occurring without a compact.[24] 181 F.3d at 1246. We explained that neither the statutory scheme of IGRA nor IGRA's legislative history provides evidence that Congress intended to create such an implied right of action. *Id.* at 1247–49. While Florida argued in *Seminole Tribe II* that through § 1166 the tribe had committed "federal crimes by violating [Florida's] state-law ban on slot machines, which applies to the Tribe's lands for purposes of federal law," the state did "not contend that [§ 1166] implicitly provide[d] it with a right of action."*Id.* at 1240, 1247. In other words, the question whether § 1166 created an implied right of action was not before us in *Seminole Tribe II.*

Although we did not address in *Seminole Tribe II* whether § 1166 gives rise to an implied right of action, our discussion of IGRA's statutory scheme and legislative history nevertheless applies to our analysis of the issue in this case. We explained in *Seminole Tribe II* that because Congress provided a "multitude of express remedies" in IGRA, we would not read into IGRA an additional implied right of action. *Id.* at 1248–49. We also described how IGRA's legislative history showed that Congress carefully balanced federal, state, and tribal interests, ultimately limiting the application of state laws on tribal lands. *Id.* at 1247 (citing S.Rep. No. 100–446, at 5–6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 307476). Recognizing an implied right of action under IGRA, we said, would "upset the carefully-struck congressional balance of federal, state, and tribal interests and objectives."*Id.* at 1248. With these principles in mind, we consider whether Congress intended to create an implied right of action in § 1166.

3. Analysis of 18 U.S.C. § 1166(a)

[32] In § 1166(a), Congress did not intend to create an implied right of action that would give states the right to sue to enjoin class III gambling even if such gambling was a nuisance that could be enjoined under state law. We reach this conclusion after considering the text of § 1166 and the structure and legislative history of IGRA. *See Love,* 310 F.3d at 1352–53.

a. Rights–Creating Language

We begin by looking to the text of § 1166(a) for rights-creating language.Section 1166(a) states:

> ***13** Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.[25]

The plain language of § 1166(a) has the effect of incorporating state laws pertaining to the licensing, regulation, or prohibition of gambling into federal law such that those state laws extend into Indian country, where they did not previously reach. Congress clearly expressed that the laws that were incorporated included, but were not limited to, state criminal laws. Although § 1166(a) extends the reach of state law, it does not correspondingly extend a state's power to enforce state law in Indian country because § 1166 does not contain rights-creating language.

[33] The Supreme Court has held that statutes decreeing that "[n]o person ... shall ... be subjected to discrimination,"*Cannon,* 441 U.S. at 681, 690 (citing 42 U.S.C. § 2000d), and that "no person shall be denied the right to vote,"*Allen v. State Bd. of Elections,* 393 U.S. 544, 555–57, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969) (citing 42 U.S .C. § 1973c, (current version at 52 U.S.C. § 10304(a))), contained rights-creating language. *See also Shotz,* 344 F.3d at 1167 (concluding that a statute stating that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter" contained rights-creating language (citing 42 U.S.C. § 12203(a)). In contrast, a statute that merely describes how the *federal government* will effectuate or enforce rights does not contain rights-creating language. *See Sandoval,* 532 U.S. at 288–89 (holding that a statute, which did not focus on "the individuals who will ultimately benefit from [its] protection" and instead described how rights created in other provisions will be effectuated, did not contain rights-creating language).

[34] Section 1166(a) contains no language conferring rights on states or any other potential plaintiff who would have a claim under state law. Unlike statutes that contain rights-creating language, § 1166 does not identify a class of persons or entities protected under the statute. Although § 1166(a) states that "all State laws ... shall apply in Indian country in the

same manner ... as such laws apply elsewhere in the State," this language does not indicate that Congress intended the states to be beneficiaries under the statute. The plain language shows that the focus of § 1166(a) is on "State laws," not the states themselves. Where, as here, the focus of a statute is "removed from the individuals who will ultimately benefit from [its] protection," the statute does not contain rights-creating language. *See Sandoval,* 532 U.S at 289.

b. Statutory Structure

The statutory structure of § 1166 supports our conclusion that the text of § 1166(a) does not reflect congressional intent to create an implied right of action. To the contrary, the structure of § 1166 undercuts Alabama's argument that subsection (a) incorporates all remedies available under state law into federal law. The structure of IGRA as a whole also belies congressional intent to create an implied right of action under § 1166(a) for states to sue to enjoin unlawful gaming because IGRA expressly prescribes other remedies applicable when a tribe conducts class III gaming without a tribal-state compact.

(i) Section 1166

***14** As discussed above, § 1166(a) provides that in the absence of a tribal-state compact, all state laws (whether criminal, civil, or regulatory) pertaining to gambling are incorporated into federal law so that state laws prohibiting class III gaming apply on Indian lands. But § 1166(a) does not address how these state laws are to be enforced. Read in its entirety, § 1166 supports our conclusion that Congress did not intend silently to create an implied right of action for states to sue to enjoin gambling occuring on Indian lands in violation of state law.

[35] The remainder of § 1166 focuses on how state criminal laws pertaining to gaming apply in Indian country. Subsection (b) states:

> Whoever in Indian country is guilty of any act or omission involving gambling ... which ... would be punishable if committed ... within the jurisdiction of the State ... under the laws governing the licensing, regulation, or prohibition of gambling ... shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 1166(b).[26] Under this subsection, if a person commits in Indian country an act involving gaming that would be a crime under state law, his actions constitute a federal crime. Furthermore, the punishment for this federal crime is the same as the punishment would be for the same crime under state law.[27] Subsection (d)[28] then clarifies that the United States has "exclusive jurisdiction" over these criminal prosecutions.*Id.* § 1166(d).

Alabama reasons that because it may sue to enjoin illegal gambling as a nuisance under state law, it has a similar right of action under § 1166(a). Underlying Alabama's argument is the assumption that § 1166(a) incorporated the entirety of a state's law pertaining to the licensing, regulation, or prohibition of gambling into federal law, including all civil remedies and criminal punishments. Alabama's interpretation cannot be correct because it would render subsection (b), which states specifically that state criminal punishments are incorporated into federal law, superfluous. *See TRW Inc.,* 534 U.S. at 31 (rejecting construction that would render a provision of a statute superfluous). In other words, the fact that in § 1166(b) Congress expressly incorporated the punishments from state *criminal* laws into federal law is evidence that Congress did not intend § 1166(a) to incorporate into federal law the entirety of a state's substantive laws and remedies regarding gambling.

Alabama also argues that because subsection (d) specifies only that the United States has exclusive jurisdiction over criminal prosecutions, we should infer that the United States and the states share jurisdiction to enforce state civil laws regarding gaming.[29] Alabama's argument again rests on the flawed assumption that § 1166 incorporates into federal law all state law remedies. As discussed above, although § 1166(b) explicitly provides that a person violating a state criminal law pertaining to gambling on Indian land shall be punished under federal law as she would be under state law, there is no provision explicitly creating a federal remedy for violation of a state civil law. *See*18 U.S.C. § 1166.[30] Because of this omission, which we must presume to have been intentional, we cannot conclude from the fact that the United States has exclusive authority to bring criminal prosecutions that the United States and the states both may enforce state civil laws. *See Animal Legal Def. Fund,* 789 F.3d at 1217.

(ii) IGRA

***15** The statutory scheme of IGRA as a whole provides additional evidence that Congress did not intend in § 1166 to create an implied right of action for states. As an initial matter, we must bear in mind Congress's stated intent that under IGRA the federal government would be the principal authority regulating Indian gaming. *See*25 U.S.C. § 2702(3) (expressing congressional intent for IGRA to establish "independent Federal regulatory authority ... [and] Federal standards" to govern gaming on Indian lands).

In IGRA, Congress created express remedies for states when a tribe engages in class III gaming in the absence of a tribal-state compact or conducts class III gaming that violates the terms of a compact. First, Congress authorized the NIGC to levy fines or close a gaming facility if a tribe engages in class III gaming without a tribal-state compact.[31] *See Seminole Tribe II,* 181 F.3d at 1248 (citing 25 U.S.C. § 2713). Second, a state may sue in federal court when a tribe violates the terms of a tribal-state compact by conducting class III gaming that is not permitted by the compact. *See*25 U.S.C. § 2710(d)(7)(A)(ii).

Because IGRA expressly provides these remedies, we "should not expand the coverage of the statute to subsume other remedies."*Seminole Tribe II,* 181 F.3d at 1248 (internal quotation marks omitted).[32] Put differently, the fact that Congress provided these enforcement mechanisms shows that it "intended to preclude" other enforcement mechanisms —like an implied right of action—to prevent tribes from engaging in class III gaming without a compact.*Sandoval,* 532 U.S. at 290; *see Seminole Tribe II,* 181 F.3d at 1248–49 (describing availability of these other remedies as a "clear signal" that Congress did not intend to create an implied right of action for states to sue).

[36] Indeed, if we were to hold that states could sue to enjoin class III gaming when a tribe engaged in class III gaming without a compact, we would undermine IGRA's careful balance of federal, state, and tribal interests.*Seminole Tribe II,* 181 F.3d at 1247. Section 2710(d)(7)(A)(ii) indicates that Congress intended for a state to have a right of action to enjoin class III gaming only where the gaming is unauthorized by a compact between the state and the tribe allowing some class III gaming. Permitting a state to sue to enjoin class III gaming in the absence of a compact "would be tantamount to deleting the second requirement that must be met in order for the state to pursue this express right of action" under § 2710(d)(7)(A)(ii).*Seminole Tribe II,* 181 F.3d at 1249. We cannot "usurp the legislative role by deleting it ourselves, particularly when doing so would undermine one of the few remaining incentives for a state to negotiate a compact with a tribe."*Id.*

Alabama argues that because Congress permitted a tribe to engage in class III gaming only if its lands were "within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity," it must have intended to provide the state with a remedy to enforce its laws prohibiting such gaming. 25 U.S.C. § 2701(5). But, again, the fact that Congress may have intended for a state to be free from Indian gaming within its borders where such gaming was completely prohibited under the state's law does not mean that 18 U.S.C. § 1166 creates a remedy for the state to enforce this right. *See Cannon,* 441 U.S. at 688 ("[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.").

c. Legislative History

***16** After considering the text of § 1166 and the structure of IGRA, we conclude that Congress did not intend to create an implied right of action in § 1166. But even if the statutory text and structure did not conclusively resolve whether there is an implied right of action, the legislative history and context of the statute make Congress's intent clear. As we explained in *Seminole Tribe II,* the legislative history "indicates that Congress, in developing a comprehensive approach to the controversial subject of regulating tribal gaming, struck a careful balance among federal, state, and tribal interests."181 F.3d at 1247 (citing S.Rep. No. 100–446 at 5–6). To strike this balance, Congress placed "limits on the application of state laws and the extension of state jurisdiction to tribal lands."*Id.* (citing S.Rep. No. 100–446 at 5–6). According to the Senate Report, " 'the compact process is a viable mechanism for setting various matters between [states and tribes as] equal sovereigns.' " *Id.* at 1248 (quoting S.Rep. No. 100–446 at 13) (alteration in original). The Senate Report recognized the need for " 'some incentive' " for states to negotiate in good faith. *Id.* (quoting S.Rep. No. 100–446 at 13). Permitting states to sue to enjoin class III gaming without a compact "would surely frustrate [Congress's] intent [as expressed in the legislative history]." *Id.*

Thus, like the district court below, we fail to discern a private right of action that would allow Alabama to bring a federal

claim under IGRA to enjoin the Tribes' alleged class III gaming.

VI. CONCLUSION

We conclude that (1) PCI is entitled to sovereign immunity as to all of Alabama's claims; (2) the Individual Defendants are entitled to sovereign immunity as to Alabama's state law claim; and (3) Alabama failed to state a claim under IGRA because 18 U.S.C. § 1166 gives states no right of action to sue. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

All Citations

--- F.3d ----, 2015 WL 5157426, 25 Fla. L. Weekly Fed. C 1583

Footnotes

* Honorable David M. Ebel, United States Circuit Judge for the Tenth Circuit, sitting by designation.

1 Although we are mindful that the terms "Native American" and "American Indian" may be preferable, we use the term "Indian" throughout this opinion because it is the term used in the statutes at issue in this appeal and in the parties' briefs.

2 *Tamiami,* a case involving a contractual dispute over the management of a bingo gaming facility on Indian lands, came before our Court three times. The first *Tamiami* opinion is irrelevant to the issues presently before us. *See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians,* 999 F.2d 503 (11th Cir.1993).

3 The lack of legislation regulating gaming on Indian lands meant that states could not limit such gaming because "unless and until Congress acts, [ ] tribes retain their historic sovereign authority."*Bay Mills,* 134 S.Ct. at 2030 (internal quotation marks omitted).

4 A separate statute, the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461–79, authorizes the Secretary to accept lands into trust for "the purpose of providing land for Indians."25 U.S.C. § 465. IRA defines Indians as "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction."*Id.* § 479.

5 In *Florida v. Seminole Tribe of Florida,* Florida sued the Seminole tribe and its chairperson, seeking to enjoin the tribe from engaging in unlawful gaming. 181 F.3d at 1239. Florida filed its lawsuit shortly after the Supreme Court held that a lawsuit in which the Seminole tribe had sued Florida and its governor under IGRA was barred by the state's sovereign immunity. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Although the two decisions were issued by different courts in different cases, they are related because both cases involved the same parties and dealt with the state's attempts to regulate gaming on the tribe's lands. Because both decisions are central to our analysis in this case and for clarity, we refer to the Supreme Court's decision as *Seminole Tribe I* and ours as *Seminole Tribe II.*

6 Class I gaming, not at issue here, includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations."25 U.S.C. § 2703(6). Class I gaming is "within the exclusive jurisdiction of the Indian tribes."*Id.* § 2710(a)(1).

7 Class II gaming also includes card games that either "(I) are explicitly authorized by the laws of the State, or (II) are not explicitly prohibited by the laws of the State and are played at any location in the State."25 U.S.C. § 2703(7)(A)(ii).

8 IGRA also requires a tribe to adopt an ordinance or resolution, approved by the chairperson of the National Indian Gaming Commission, authorizing class II or class III gaming. 25 U.S.C. § 2710(b)(1), (d)(1). The Commission consists of three members and operates within the Department of the Interior. *See id.* § 2704.

9 A tribe may be exempt from inspection and examination by the NIGC if the tribe has a certificate for self-regulation. 25 U.S.C. § 2710(c)(5)

10 The two other provisions criminalize theft from, and theft by officers or employees of, gaming establishments on Indian lands. *See*18 U.S.C. §§ 1167–68.

11 "Indian country" is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. Lands taken into trust by the Secretary under IRA are considered part of Indian country. *See United States v. John,* 437 U.S. 634, 648–50, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978).

12 The federal government has recognized the Tribe "as an Indian tribe within the meaning of Federal law."Final Determination for Fed. Acknowledgment of the Poarch Band of Creeks, 49 Fed.Reg. 24,083–01 (June 11, 1984). The lands on which the three casinos are located were taken into trust for the Tribe in 1984, 1992, and 1995, respectively.

13 In reviewing a district court's order granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), we must accept as true the complaint's factual allegations. *Hill v. White,* 321 F.3d 1334, 1335 (11th Cir.2003) (per curiam).

14 Citations to "Doc." herein refer to docket entries in the district court record in this case.

15 Neither party disputes that all of the Individual Defendants are tribal officers; some serve as members of the Tribe's Tribal Council and others as directors of PCI.

16 At the time the case was removed, Alabama had asserted only a state law public nuisance claim. The defendants removed the case pursuant to 28 U.S.C. §§ 1331, 1441, and 1442, asserting that subject matter jurisdiction existed because: (1) federal law completely preempted Alabama's state law claim; (2) the case raised "substantial, actually disputed, federal issues regarding the status of Indian lands held in trust"; and (3) Alabama's claims "call into question the validity of federal law(s), regulations, and administrative decisions pertaining to Indian tribal lands" given that the defendants' interests "in the Indian tribal lands are derived from the federal Secretary of the Interior."Notice of Removal at 1–3 (Doc. 1). Once in federal court, Alabama did not seek remand but instead amended its complaint to add the IGRA claim; at that point the amended complaint clearly invoked federal question jurisdiction. We express no opinion on whether the defendants properly removed the case because, even if federal question jurisdiction did not exist at the time of removal, it clearly existed when the district court entered its judgment. *See Caterpillar, Inc. v. Lewis,* 519 U.S. 61, 64, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996) (even if a case was improperly removed, it "is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered"); *see also H & D Tire & Auto.-Hardware, Inc. v. Pitney Bowes Inc.,* 227 F.3d 326, 328 (5th Cir.2000) ("Even if a federal court lacks jurisdiction at the time of removal and regardless of whether there was an objection to the removal, the judgment will stand if the court had jurisdiction at the time it entered judgment. If, however, the court lacked jurisdiction both at the time of removal and judgment, the judgment cannot stand."(internal citations omitted)).

17 Although the defendants took the position in the district court that IGRA completely preempts state law, they raise no complete preemption argument on appeal and thus have abandoned this argument. *See Beckwith v. City of Daytona Beach Shores,* 58 F.3d 1554, 1564 n. 16 (11th Cir.1995). We therefore do not address this issue.

18 The parties disagree about whether we held in *Freemanville Water System, Inc. v. Poarch Band of Creek Indians* that PCI shares in the Tribe's immunity. 563 F.3d 1205 (11th Cir.2009). In *Freemanville,* we decided that the Tribe and PCI enjoyed immunity from a claim that the Tribe's planned construction of a water system violated federal law. In reaching that conclusion, we did not address whether PCI shares in the Tribe's immunity because the parties agreed that PCI shared in whatever immunity the Tribe enjoyed. *Id.* at 1207 n. 1. As the question of whether PCI shares in the Tribe's immunity was not before us in *Freemanville,* here we address the issue for the first time.

19 Several other circuits similarly have held that the *Ex parte Young* doctrine applies to make tribal officials subject to suit to enjoin ongoing violations of the Constitution or federal law. *See Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1154 (10th Cir.2011) ("recognizing *Ex parte Young* as an exception not just to state sovereign immunity but also to tribal sovereign immunity"); *Vann v. Kempthorne,* 534 F.3d 741, 750 (D.C.Cir.2008) ("Faced with allegations of ongoing constitutional and treaty violations, and a prospective request for injunctive relief, officers of the Cherokee Nation cannot seek shelter in the tribe's sovereign immunity"); *Burlington N. & Santa Fe Ry. Co. v. Vaughn,* 509 F.3d 1085, 1092 (9th Cir.2007) (explaining that the *Ex parte Young* doctrine "has been extended to tribal officials sued in their official capacity"); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.,* 991 F.2d 458, 460 (8th Cir.1993) ("*Ex parte Young* applies to the sovereign immunity of Indian tribes, just as it does to state sovereign immunity.").

20 The Supreme Court explained that its decision did not address the status of lands the Secretary had previously taken into trust for the Narragansett tribe. *Carcieri,* 555 U.S. at 385 n. 3.

21 Alabama never filed a motion to amend its complaint to add the Secretary as a party or to add an APA claim in the district court, but it did request such leave in its response to the United States's *amicus* brief in the district court.

22 Because the Individual Defendants enjoy immunity from Alabama's state law claim, we need not reach whether the state law claim is preempted. In any event, Alabama concedes that its state law claim is preempted if the casinos are located on Indian lands.

23 For examples of language Congress has used in expressly creating a right of action, see 15 U.S.C. § 15(a) ("[A]ny person who shall be injured ... by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States...."); 18 U.S.C. § 2520(a) ("[A]ny person whose wire, oral, or electronic communication is intercepted ... may in a civil action recover...."); 29 U.S.C. § 1132(a)(1)(B) ("A civil action may be brought ... by a participant or beneficiary ...

to recover benefits due to him under the terms of his plan...."); 42 U.S.C. § 1983 ("Every person who, under color of any statute ... subjects.. any citizen of the United States ... to the deprivation of any rights ... shall be liable to the party injured in an action at law....").

24 We framed the issue as whether a state had a "private right of action" to sue a tribal official. *Seminole Tribe II,* 181 F.3d at 1250. Because a state is a public rather than a private actor, we acknowledge that the label of a "private" right of action may not be wholly accurate. Here, however, no party has argued that we should use a different framework to analyze when a state, as opposed to a private party, has an implied right of action. In any event, we note that we have in the past employed the same analysis when deciding whether a state or a private party has an implied right of action. *Compare id.* at 1246–47 (considering whether a state has an implied right of action) and *Fla. Dep't. of Bus. Regulation v. Zachy's Wine & Liquor, Inc.,* 125 F.3d 1399, 1402–03 (11th Cir.1997) (same) *with McDonald,* 291 F.3d at 726 (considering whether an individual has an implied right of action).

25 Subsection (c) specifies that § 1166 applies only to class III gaming conducted outside a tribal-state compact.

26 Subsection (b) is directly modeled on the Federal Assimilative Crimes Act, which states that for federal enclaves, such as military bases, "[w]hoever ... is guilty of any act or omission which ... would be punishable if committed or omitted within the jurisdiction of the State ... in which such place is situated ... shall be guilty of a like offense and subject to a like punishment."18 U.S.C. § 13(a). The Supreme Court has explained that the effect of § 13 is to create in federal enclaves complete "conformity with the criminal laws of the respective States in which the enclaves are situated."*United States v. Sharpnack,* 355 U.S. 286, 293, 78 S.Ct. 291, 2 L.Ed.2d 282 (1958).

27 The Individual Defendants argue that under § 1166(b) the violation of any state gaming laws (civil, criminal, or regulatory) constitutes a federal crime. We disagree. Subsection (b) by its plain language makes conduct a federal crime only when an individual is "guilty" of an act which "would be punishable" under state law. This language limits the scope of subsection (b) to state criminal laws. *See Crime,* Black's Law Dictionary (10th ed.2014) (defining a "crime" as "[a]n act that the law makes punishable").

28 As noted above, subsection (c) specifies that § 1166 applies only to class III gaming conducted in the absence of a tribal-state compact. 18 U.S.C. § 1166(c).

29 In its briefing Alabama argues that the United States has an implied right of action to sue to enforce state gaming laws. Appellant's Br. at 36–37, 43 (citing *United States v. Santee Sioux Tribe of Neb.,* 135 F.3d 558, 562–65 (8th Cir.1998); *United States v. Seminole Tribe of Fla.,* 45 F.Supp.2d 1330, 1331 (M.D.Fla.1999)). But, at the same time, Alabama also argues that "*states* have exclusive authority to bring civil actions under Section 1166(a)." *Id.* at 41 (citing *United States v. Santa Ynez Band of Chumash Mission Indians of Santa Ynez Reservation,* 983 F.Supp. 1317, 1319 (C.D.Cal.1997)). Alabama makes no attempt to reconcile its argument that states have exclusive authority to bring civil actions with its argument that subsection (d) implies that the federal government and states share the right to bring civil actions.

To be clear, the issue of whether the United States has a civil right of action under § 1166 is not before us, and we express no opinion on it.

30 Alabama argues that it is possible for Congress to create a right of action for an individual to sue under a criminal statute, citing a string of statutes that create an express private right of action for violation of federal criminal laws. But because these statutes expressly grant rights of action, they are irrelevant to whether Congress clearly intended to create an implied right of action under § 1166.

31 The NIGC has, in fact, exercised this power, ordering tribes to cease and desist from operating class III gaming without a tribal-state compact. *See, e.g., Coyote Valley Band of Pomo Indians,* CO–04–01 (Nat'l Indian Gaming Comm'n June 10, 2004), http://www.nigc.gov/Reading_ Room/Enforcement_Actions/CO–04–01.aspx; *Seminole Nation of Okla.,* NOV–CO–00–06 (Nat'l Indian Gaming Comm'n May 30, 2000). http:/ / www.nigc.gov/LinkClick.aspx?link=NIGC +Uploads/ readingroom/enforcementactions/seminolenationok/NOVCO0006.pdf. Copies of the Internet materials cited in this opinion are on file in the Clerk's Office. *See* 11th Cir. R. 36, I.O.P. 10.

32 Alabama claims that if states cannot sue, tribes will simply engage in class III gaming without compacts. But, it is mere speculation that the prospect of federal enforcement will not ensure tribes' compliance with IGRA.

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2014 WL 5354956

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut.
Judicial District of New London.

Brian LEWIS et al.
v.
William CLARKE.

No. KNLCV136019099S. | Sept. 10, 2014.

Attorneys and Law Firms

Polito & Quinn LLC, Waterford, for Brian Lewis.

Halloran & Sage LLP, Hartford, for William Clarke.

Opinion

COLE–CHU, J.

***1** The plaintiffs, Brian Lewis and Michelle Lewis, initiated this suit by way of complaint filed on October 21, 2013, against William Clarke and the Mohegan Tribal Gaming Authority (MTGA). Two days later, on October 23, 2013, before the return date, the plaintiffs withdrew the action as to the MTGA. On November 19, 2013, William Clarke appeared by counsel. The next day, the plaintiffs filed an amended complaint in two counts, one each by Brian Lewis and Michelle Lewis against Clarke only ("the complaint"). [1]

On December 31, 2013, Clarke moved to dismiss the complaint. Filed with the motion were an affidavit of Michael Hamilton, a copy of a police report on the subject accident, portions of the Mohegan Tribe of Indians Code and a copy of the Tribal State Compact between the Mohegan Tribe and State of Connecticut. The plaintiffs filed an objection to the motion to dismiss on January 6, 2014. Clarke filed a reply memorandum to the plaintiffs' objection on February 11, 2014, attaching a copy of the Mohegan Tribal Code §§ 4–52 and 4–53 and an Affidavit of Mary Lou Morrissette. On February 14, 2014, the plaintiffs filed a sur-reply. The motion was argued on February 28, 2014. [2] Also on that day, Clarke filed supplemental authorities discussed at oral argument but not included in the briefs. On February 25, 2014, the plaintiffs filed a response to Clarke's supplemental authorities.

FACTS

In deciding a jurisdictional question raised by a motion to dismiss, the court takes the facts to be those alleged, and necessarily implied, in the complaint, construing them in a manner most favorable to the pleader. *Lagassey v. State,* 268 Conn. 723, 736, 846 A.2d 831 (2004). Legal conclusions and opinions are not taken as true. See *Ellef v. Select Committee of Inquiry,* Superior Court, judicial district of Hartford, Docket No. CV–04–0832432–S (April 8, 2004) [36 Conn. L. Rptr. 841]. The interpretation of pleadings is always a question of law for the court. *Boone v. William W. Backus Hospital,* 272 Conn. 551, 559, 864 A.2d 1 n .1, 272 Conn. 551, 864 A.2d 1 (2005). Viewing the complaint in this light, the essential facts are as follows.

On October 22, 2011, the plaintiff Brian Lewis was operating a motor vehicle southbound on Interstate Route 95 in Norwalk, Connecticut. The plaintiff Michelle Lewis was his passenger. Clarke was driving a limousine behind the plaintiffs. Suddenly and without warning, Clarke drove the limousine into the rear of the plaintiffs' vehicle and propelled the plaintiffs' vehicle forward with such force that it came to rest partially on top of a jersey barrier on the left hand side of the highway. The collision and the plaintiffs' resulting injuries were caused by Clarke's negligence. At that time, Clarke was a Connecticut resident, had a Connecticut driver's license, and, according to the affidavit of Michael Hamilton, the MTGA's Director of Transportation, was driving a limousine owned by the MTGA and was employed by the MTGA to do so. [3] Specifically, Clarke was driving patrons of the Mohegan Sun Casino to their homes. The limousine was covered by an automobile insurance policy issued by Arch Insurance.

DISCUSSION

***2** "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss."(Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut,* 282 Conn. 130, 134, 918 A.2d 880 (2007). The party who is asking the court to exercise jurisdiction in his favor must be able to allege facts demonstrating that he is a proper party to make that request. See *St. Paul Travelers Cos. v. Kuehl,* 299 Conn. 800, 808, 12 A.3d 852 (2011). The plaintiff, therefore, bears the burden of proving subject matter jurisdiction. *Fort Trumbull Conservancy, LLC v.*

New London, 265 Conn. 423, 430 n. 12, 829 A.2d 801 (2003). In determining whether a court has subject matter jurisdiction, every appropriate presumption favors finding such jurisdiction. *Keller v. Beckenstein,* 305 Conn. 523, 531, 46 A.3d 102, 107 (2012).

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."(Internal quotation marks omitted.) *Kizis v. Morse Diesel International, Inc.,* 260 Conn. 46, 52, 794 A.2d 498 (2002)."As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."*Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)." 'Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits for damages against a tribe.'*Romanella v. Hayward,* 933 F.Supp. 163, 167 (D.Conn.1996).'However, such waiver may not be implied, but must be expressed unequivocally.'*McClendon v. United States,* 885 F.2d 627, 629 (9th Cir.1989)."*Kizis v. Morse Diesel International, Inc., supra,* at 53, 794 A.2d 498. The tribe must have consented to suit in the specific forum. *Id.,* at 53, 794 A.2d 498, citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

THE PARTIES' CLAIMS

Clarke moves to dismiss the complaint on the ground that the court lacks subject matter jurisdiction because the MTGA is entitled to sovereign immunity, as an entity of the Mohegan Tribe of Indians of Connecticut ("Mohegan Tribe" or "the tribe"), and he is entitled to sovereign immunity as an employee of the MTGA acting within the scope of his employment at the time of the accident. Clarke argues that to deny the present motion would be to abrogate the MTGA's sovereign immunity, and that only the Congress of the United States has that power. Clarke argues that dismissal of this case would not leave the plaintiffs without recourse because they can sue him in the Mohegan Tribal Gaming Court.

The plaintiffs oppose Clarke's motion based on an emerging "remedy-sought" doctrine promulgated by the Ninth and Tenth Circuits of the United States Courts of Appeal. The essence of the "remedy-sought" doctrine is that sovereign immunity does not extend to a tribal employee who is sued in his individual capacity when damages are sought from the employee, not from the tribe, and will in no legally cognizable way affect the tribe's ability to govern itself independently. The plaintiffs claim that, even treating the MTGA as the Mohegan Tribe, their suit against Clarke individually would not infringe on the tribe's sovereign immunity and therefore, immunity should not be extended to him. Essentially, the plaintiffs argue that the tribe's sovereign immunity is limited; that, in a civil context, tribal immunity prevents only claims and judgments for money against the tribe or the MTGA; and that there is no such claim here, nor any possibility of such a judgment. The plaintiffs urge the court to adopt the remedy-sought analysis applied in *Maxwell v. County of San Diego,* 697 F.3d 941 (9th Cir.2012), and find that a tribal employee can be sued in his individual capacity so long as the remedy sought is against the employee individually. [4]

***3** Clarke replies that, in our federal circuit—the United States Court of Appeals for the Second Circuit—and under Connecticut law, it is well settled that tribal employees are immune from suit when acting within the scope of their employment, even where a tribal employee is the sole defendant, and that it is unnecessary and inappropriate to examine whether the tribe is a real party in interest. See *Chayoon v. Sherlock,* 89 Conn.App. 821, 877 A.2d 4, cert. denied, 276 Conn. 913, 888 A.2d 83 (2005). Clarke argues that this court should heed the Tenth Circuit's caution, in *Native American Distributing v. Seneca–Cayuga Tobacco Co.,* 546 F.3d 1288, 1297 (10th Cir.2008), that adoption of the remedy-sought analysis would be like wading into a swamp and reject that analysis. Finally, Clarke claims that, even if this court applies the "remedy sought" analysis, he would still be immune from suit because the MTGA is the real party in interest by virtue of its commitment to indemnify and defend him, its employee.

In the plaintiffs' sur-reply, they argue that the facts of this case differ from those in *Chayoon v. Sherlock, supra,* 89 Conn.App. at 821, 877 A.2d 4. The plaintiffs contend that tribal immunity is not attached to an individual employee sued in his individual capacity. They argue that *Chayoon* is distinguishable because the court found, despite the plaintiff's claim, tribal employees were being sued, in part, in their roles as tribal representatives. See *Chayoon v. Sherlock, supra,* 89 Conn.App. at 829, 877 A.2d 4 (saying defendant is being sued individually does not make it so). The plaintiffs distinguish *Bassett v. Mashantucket Pequot Museum & Research Center, Inc.,* 221 F.Sup.2d 271, 277–78 (D.Conn.2002), also cited by Clarke, because the complaint in *Bassett* alleged that the tribal employees were being sued "individually and as an authorized agent of the Tribe as well as in their

capacities as officers, representatives and/or agents of the [tribal] corporation and/or association."

At oral argument, Clarke cited *Tonasket v. Sargent,* 510 Fed.Appx. 648 (9th Cir., 2013), and *Miller v. Wright,* 705 F.3d 919 (9th Cir., 2013), for the proposition that the remedy-focused analysis employed in *Maxwell* has been abandoned. The plaintiffs dispute that proposition because *Tonasket* and *Miller* did not address the present issue: those decisions involved the execution of a cigarette tax upon a tribal reservation.

ANALYSIS

At the outset, there is no claim by the plaintiffs that the MTGA has waived sovereign immunity or that Clarke has waived his claim to sovereign immunity. Nor does this court perceive that it has any power to "abrogate sovereign immunity" or otherwise assume any power or right reserved to the tribe, let alone to the United States Congress. Rather, the issue presented is whether the MGTA's immunity protects its employee, Clarke, from being sued solely in his individual capacity for an alleged tort occurring off the tribal reservation injuring non-patrons of the MTGA. In other words, the issue is not whether the court has the power to abrogate sovereign immunity, but whether sovereign immunity is present at all. Under the facts of this case, the court concludes that the "remedy-sought" analysis should be applied and, because the remedy sought is not against the MTGA, Clarke is not immune from suit.

***4** Tribal sovereign immunity is limited. "[T]ribal sovereignty is dependent upon, and subordinate to ... the [f]ederal [g]overnment."*Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 156, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980)."The [tribal] sovereign's claim to immunity in the courts of a second sovereign ... normally depends on the second sovereign's law. *Schooner Exchange v. McFadden,* 7 Cranch 116, 136, 3 L.Ed. 287 (1812)."*Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., supra,* 523 U.S. at 760–61 (Stevens, J., dissenting). Tribal immunity "exists only at the sufferance of Congress and *is subject to complete defeasance.*" (Emphasis in original; internal quotation marks omitted.) *Rice v. Rehner,* 463 U.S. 713, 724, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1993). Congress has restricted tribal immunity to matters involving tribal self-governance.*Turner v. United States,* 248 U.S. 354, 358, 39 S.Ct. 109, 63 L.Ed. 291 (1919); *Strate v. A–1 Contractors,* 520 U.S. 438, 459, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997) (immunity has not been extended beyond protecting tribal self government or controlling internal relations); *Rice v. Rehner, supra,* at 724 (immunity limited to actions promoting powers such as self-sufficiency and economic development traditionally reserved to the tribe).

In *Maxwell,* the key Ninth Circuit case applying the "remedy-sought" doctrine, a Viejas tribal fire department ambulance with two tribal employee paramedics was dispatched to the scene of a shooting at the plaintiffs' residence, which was not on the Viejas Indian Reservation. *Maxwell v. County of San Diego,* 708 F.3d 1075 (9th Cir.2013). Following the death of the patient, the plaintiffs brought state law tort claims against the tribal paramedics, individually. Although the Viejas Fire Department was also a defendant, the Viejas Tribe was not a party to the suit.

Carefully considering the purposes of tribal sovereign immunity, the court in *Maxwell* applied a remedy focused analysis, seeking to identify the real party in interest. *Id.,* at 1087–90. The *Maxwell* court determined that the tribal paramedics were not entitled to immunity because the remedy sought by the plaintiffs would operate only against them personally. *Id.,* at 1088. Underlying the test applied in *Maxwell* was the consideration that the court "must be sensitive to whether the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act."(Internal quotation marks omitted.) *Id.,* at 1088.

"Tribal sovereign immunity derives from the same common law immunity principles that shape state and federal sovereign immunity. See *Santa Clara Pueblo v. Martinez,* [*supra,* 436 U.S. at 58]; *Cook [v. Avi Casino Enterprises, Inc.,* 548 F.3d 718, 727 (9th Cir.2008)]. Normally, a suit like this one—brought against individual officers in their individual capacities—does not implicate sovereign immunity."*Maxwell v. County of San Diego, supra,* 708 F.3d at 1088, citing *Miranda B. v. Kitzhaber,* 328 F.3d 1181, 1190 (9th Cir.2003). The plaintiffs in this case seek money damages not from the sovereign Mohegan Tribe but from Clarke personally. See *Alden v. Maine,* 527 U.S. 706, 757, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (states 'immunity from private suit in their own courts distinguished from suits against states' employees). The essential nature and effect of the relief sought can mean that the sovereign is not the real, substantial party in interest. See *Maxwell v. County of San*

Diego, supra, at 1088, citing *Ford Motor Co. v. Department of Treasury of Indiana,* 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945).

***5** Several years before *Maxwell,* the Tenth Circuit stated, "[w]here a suit is brought against the agent or official of a sovereign, to determine whether sovereign immunity bars the suit, we ask whether the sovereign is the real, substantial party in interest. *Frazier v. Simmons,* 254 F.3d 1247, 1253 (10th Cir.2001)... This turns on the relief sought by the plaintiffs*Id.*...'[T]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.'*Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 101, 104 S.Ct. 900 79 L.Ed.2d 67 (1984)... Where, however, the plaintiffs' suit seeks money damages from the officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, sovereign immunity does not bar the suit so long as the relief is sought not from the [sovereign's] treasury but from the officer personally.'*Alden v. Maine,* [*supra,* 527 U.S. at 757, —— S.Ct. at ——]." (Citations omitted; internal quotation marks omitted.) *Native American Distributing v. Seneca–Cayuga Tobacco Co., supra,* 546 F.3d at 1296–97; see also *Nahno–Lopez v. Houser,* 627 F.Sup.2d 1269, 1285 (W.D.Okla.2009) (claims against individuals are not barred if damages are clearly not sought from the tribe)."The general bar against official-capacity claims ... does not mean that tribal officials are immunized from individual-capacity suits *arising out* of actions they took in their official capacities ... (Emphasis in original.) *Native American Distributing v. Seneca–Cayuga Tobacco Co., supra,* at 1296. "Rather, it means that tribal officials are immunized from suits brought against them *because* of their official capacities—that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe."(Emphasis in original.) *Id.,* at 1296.

Clarke argues that, in *Native American Distributing v. Seneca–Cayuga Tobacco Co., supra,* 546 F.3d at 1288, the Tenth Circuit likened the remedy-sought analysis to wading into a swamp. That argument is a mischaracterization. In fact, the Tenth Circuit stated: "[w]e need not wade into this swamp [of analyzing who is the real party in interest] ... because a close reading of the plaintiffs' complaint makes clear that plaintiffs have failed to state a claim against the Individual Defendants in their individual capacities."*Id.,* at 1297. A close reading of the complaint in this case reveals that Clarke is only being sued in his individual capacity. The interpretation of pleadings is always a question of law for the court. *Boone v. William W. Backus Hospital, supra,* 272 Conn. at 559, 864 A.2d 1.

Clarke argues that *Johns v. Voebel,* Superior Court, judicial district of New Haven, Docket No. CV–11–6017037–S (September 23, 2011) [52 Conn. L. Rptr. 641], in which the complaint was dismissed on sovereign immunity grounds, is analogous to the present case. It is true that, in *Johns,* the plaintiff sued a driver employed by the MTGA who, off the tribal reservation, struck the plaintiff's vehicle. *Johns* is distinguishable from this case because the question of whether the tribal employee was being sued solely in his individual capacity was apparently neither raised nor considered by the court. The plaintiff in *Johns* conceded there was sovereign immunity: the issue was whether the tribal employee driver was acting outside the scope of his authority.

***6** The defendant claims that *Bassett v. Mashantucket Pequot Museum & Research Center, Inc., supra,* 221 F.Sup.2d at 271, and *Chayoon v. Sherlock, supra,* 89 Conn.App. at 821, 877 A.2d 4, require a different analysis and dismissal of this case. While the plaintiffs' claims in both those cases were dismissed on sovereign immunity grounds, the defendants were tribal employees sued under theories of vicarious tribal liability. The complaint in *Chayoon* stated that the tribal employees were being sued individually as well as in their "professional capacities." *Chayoon v. Sherlock, supra,* at 828, 877 A.2d 4. In *Bassett,* the District Court found that the defendants were being sued "in their official capacities as officers, representatives, and/or agents of the Tribe."*Bassett v. Mashantucket Pequot Museum and Research Center, Inc., supra,* at 276 n. 9. In *Chayoon* and *Bassett,* both of which predate *Native American Distributing, Nahno–Lopez v. Houser, supra,* and *Maxwell,* tribal employees were sued in their official capacities. Because it was clear that at least part of the remedy sought was against a sovereign, it was unnecessary to analyze whether there was *no* remedy sought against a sovereign. Compare *Maxwell v. San Diego, supra,* 708 F.3d at 1088 (when a case is an official capacity suit, the remedy-sought analysis is not necessary), with *Cook v. Avi Casino Enterprises, Inc., supra,* 548 F.3d at 718 (sovereign immunity barred suit where real defendant in interest was the tribe).

Clarke also relies upon *Kizis v. Morse Diesel International, Inc., supra,* but *Kizis* was an action resulting from a fall at the Mohegan Sun Casino, not off the reservation. *Kizis v. Morse Diesel International, Inc., supra,* 260 Conn. at 48–49, 794

A.2d 498. Accordingly, *Kizis* is readily distinguishable from the present case. Noting that "[t]he tribe has not consented to state jurisdiction over private actions involving matters that occurred *on tribal land...*" the court held that "in this instance, the statutes and compacts cited previously, which have been recognized by both the federal government and the state of Connecticut through compliance with the procedures set forth in the gaming act and the Indian Civil Rights Act, explicitly place the present type of tort action in the jurisdiction of the tribe's Gaming Disputes Court."(Emphasis added; footnote omitted.) *Id.,* at 57–58, 794 A.2d 498. The facts of *Kizis* make it unilluminating to the present case, in which Clarke is alleged to have driven a limousine on non-tribal land into the vehicle of the plaintiffs, who were not invitees of the tribal casino.

The following Superior Court cases are, contrary to the defendant's claim, not inconsistent with the remedy-sought analysis because their facts and claims are distinguishable. In *Durante v. Mohegan Tribal Gaming Authority,* Superior Court, Complex Litigation Docket, judicial district of Hartford, Docket No. X04–HHD–CV–11–6022130–S (March 30, 2012) [53 Conn. L. Rptr. 811], the plaintiff was killed in an automobile accident by a drunk driver who had been served alcohol at the Mohegan Sun Casino and brought suit against the MGTA, the chief executive officer of the MGTA, the chairman of the Mohegan Tribal Counsel, and the permittee of a night club at the tribal casino. Likewise, in *Ross v. Spaziante,* Superior Court, judicial district of New London, Docket No. CV–10–6003909–S, 2011 WL 5842468 (November 1, 2011), the plaintiffs filed suit against the MTGA, the permittee of a tribal casino bar, and others following an automobile accident involving a patron of the bar. Unlike in *Durante* and *Ross,* the MTGA is not a party to this suit and the claims here are not brought against high-ranking tribal officials, as in *Durante,* or based on Dram Shop Act liability of a tribal casino bar, as in *Ross.*In *Vanstaen–Holland v. LaVigne,* Superior Court, judicial district of New London, Docket No. CV–08–5007659–S (February 26, 2009) (47 Conn. L. Rptr. 306), the plaintiffs sued the permittee, the owner, and an employee of an establishment at the Mohegan Sun Casino for reckless service of alcohol to a patron. Again, in *Vanstaen–Holland,* the MTGA was a defendant. *Vanstaen–Holland* does not hold that every tribal employee, as distinguished from officers, is entitled to immunity from personal lawsuits wherever and whenever he or she is working for the tribe.

***7** In the other Superior Court cases cited by Clarke in support of his motion, *McAllister v. Valentino,* Superior Court, judicial district of Fairfield, Docket No. CV–11–5029414–S (April 10, 2012) [53 Conn. L. Rptr. 796], and *International Motor Cars v. Sullivan,* Superior Court, judicial district of New Britain, Docket No. CV–05–4005168–S (June 20, 2006) (41 Conn. L. Rptr. 559), it was held that sovereign immunity operated to bar suits against Connecticut state marshals, based on several factors including finding no allegations that the respective marshals were being sued in their individual capacities and that the sovereign—the state—was therefore the real party in interest. While *McAllister* and *International Motor Cars* involved claims of state, not tribal, sovereign immunity, those decisions essentially applied the remedy-sought analysis, without that label.

Turning in another direction for illumination, federal employees may be sued individually for money damages even though the actions giving rise to the claim were done while they were acting within the duties of their employment.*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). This court is unpersuaded that Clarke's claim to immunity is stronger than that of federal employees. "We see no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles. See *Santa Clara Pueblo,* [*supra,* 436 U.S. at 58] ..."*Maxwell v. County of San Diego, supra,* 708 F.3d at 1089. Mohegan tribal employees are not "absolutely immune from suit" in Connecticut courts. *Wallet v. Anderson,* 198 F.R.D. 20 (D.Conn.2000).

Connecticut law includes clear criteria for determining the party against whom relief is being sought. "[The Connecticut Supreme Court has] identified the following criteria for determining whether an action against an individual is, in effect, against the state and barred by the doctrine of sovereign immunity: (1) a state official has been sued; (2) the suit concerns some manner in which that official represents the state; (3) the state is the real party in interest against whom relief is sought; and (4) the judgment, though nominally against the official, will operate to control the activities of the state or subject it to liability."(Internal quotation marks omitted.) *Gordon v. H.N.S. Management Co.,* 272 Conn. 81, 93–94, 861 A.2d 1160 (2004)."If the plaintiff's complaint reasonably may be construed to bring claims against the defendants in their individual capacities, then sovereign

immunity would not bar those claims."*Miller v. Egan,* 265 Conn. 301, 307, 828 A.2d 549 (2003).

It is Clarke's position that, even if the "remedy-sought" analysis is applied here, the court may and should find that the MTGA is the real party in interest in this suit, so that Clarke should be protected by tribal sovereignty. Clarke asserts that, aside from the insurance policy covering the limousine,[5] the MTGA is obligated to defend and indemnify him pursuant to the Mohegan Tribal Code. Accordingly, just to defend Clarke, let alone pay any judgment against him, would adversely affect the MTGA's treasury. A voluntary undertaking cannot be used to extend sovereign immunity where it did not otherwise exist. See *Group Health, Inc. v. Blue Cross Association,* 625 F.Supp. 69, 76 (S.D.N.Y.1985) (government may not, by indemnity manufacture immunity for its employees). The court finds that Clarke's claims that the MTGA is the real party in interest in this case—the third and fourth factors in *Gordon v. HNS Management Co., supra,* 272 Conn. at 93–94, 861 A.2d 1160—are not supported by the facts. This conclusion is strengthened by the long-standing principle that, in considering whether or not the court has subject matter jurisdiction, the plaintiff's allegations are construed in favor of finding jurisdiction where it is possible, in reason, to do so. *Stone v. Hawkins,* 56 Conn. 111, 115, 14 A. 297 (1888). To extend tribal sovereign immunity to Clarke in this case, where the effect of both the claim and any judgment on the tribal purse and self governance is self-inflicted—that is, the effect results from the MTGA's choices—is beyond the power of this court. Even if by tribal law the MTGA has to indemnify Clarke, that is a tribal choice. This court rejects Clarke's implicit claim that a sovereign may extend immunity to its employees by enacting a law assuming its employees' debts. See *Demery v. Kupperman,* 735 F.2d 1139, 1148 (9th Cir.1984), cert. denied, 469 U.S. 1127, 105 S.Ct. 810, 83 L.Ed.2d 803 (1985) (state may not extend sovereign immunity by legislation assuming employees' debts). To hold that the MTGA has the unilateral power to expand the boundaries of sovereign immunity based on tribal legislation, contract or other form of tribal indemnification of an employee, or of employees generally, is beyond the power of this court because to do so would not only be to change the law of sovereign immunity, but to do so with unknown public policy ramifications. The Mohegan Tribe, or the MTGA as its subsidiary, can elect to waive sovereign immunity, but cannot unilaterally elect to expand it.

CONCLUSION

***8** This court finds no implication of tribal sovereign immunity such that Clarke, a tribal employee sued in his individual capacity, is immune from suit. Therefore, Clarke's motion to dismiss is denied.

All Citations

Not Reported in A.3d, 2014 WL 5354956, 59 Conn. L. Rptr. 75

Footnotes

1 On February 21, 2014, the plaintiffs filed another request for leave to amend their complaint, which request was denied by this court on March 25, 2014, without prejudice to renewal after issuance of this decision on the defendant's motion to dismiss.

2 The parties filed written waivers of the 120–day deadline for this decision, for which the court thanks them and their respective counsel.

3 "[I]f the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss [or] other types of undisputed evidence ... the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts ..." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Conboy v. State,* 292 Conn. 642, 651–52, 974 A.2d 669 (2006).

4 The plaintiffs have cited to the *Maxwell v. County of San Diego* opinion appearing at 697 F.3d 941 (9th Cir.2012). That opinion, however, has been withdrawn by *Maxwell v. County of San Diego,* 708 F.3d 1075 (9th Cir.2013). Accordingly, this court relies on the latter opinion.

5 The defendant argues that the fact that the MTGA had liability insurance on the limousine he was driving does not affect the MTGA's status as real party in interest because the MTGA has a self-insured retention and, even if it did not have that, any claim would affect the MTGA's loss history and cost of coverage. He also claims that, if a judgment were to be entered against him, it would affect the MTGA's administration and hiring abilities, *i.e.,* that allowing this suit to proceed would discourage prospective employees from accepting employment with the MTGA—apparently because they expect,

if hired by the MTGA, to be treated differently when they are alleged to have been negligent drivers than if they were employed by a non-tribe employer. Assuming these effects are real, and not conjectural, the court for two reasons rejects the defendant's claim that they show harm to the MTGA's, or the tribe's, purse or independence. First, the court finds no basis in fact, law or logic on which to conclude that these effects are significant enough to be legally cognizable. Second, considering these claims with all the defendant's claims, let alone separately, they do not meet the four-prong test for finding the MTGA or the tribe the real party in interest in this case. The defendant has not been sued as a tribal official; there is no allegation that the defendant was representing the MTGA or the tribe at the time of the collision (even as employee); the MGTA is not, and cannot for the reasons here stated make itself, the party against whom relief is sought; and a judgment against the defendant will not operate to control the activities of the MTGA or subject it to liability. See *Gordon v. H.N.S. Management Co., supra,* 272 Conn. at 93–94, 861 A.2d 1160.

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