15-2148

To Be Argued By:
Stephen R. Sarnoski
Assistant Attorney General

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

CHEUNG YIN SUN, LONG MEI FANG, ZONG YANG LI,
Plaintiffs-Appellants

v.

MASHANTUCKET POQUOT GAMING ENTERPRISE, Individually, d/b/a/ FOXWOODS RESORT CASINO, ANNE CHEN, Individually, JEFF DECLERK, Individually, EDWARD GASSER, Individually, GEORGE HENNINGSEN, Individually, FRANK LEONE, Individually, MICHAEL ROBINSON, MICHAEL SANTAGATA, CHESTER SICARD,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT-APPELLEE
MICHAEL ROBINSON

GEORGE JEPSEN
ATTORNEY GENERAL

Stephen R. Sarnoski
Assistant Attorney General
110 Sherman Street
Hartford, CT 06105
Tel. (860) 808-5450
Email: stephen.sarnoski@ct.gov

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over all of the defendants pursuant to 28 U.S.C. § 1331 as applicable through 42 U.S.C. § 1983 as alleged in the Plaintiffs-Appellants' Amended Complaint dated August 21, 2014. *See* Corrected Appendix, p. A-13. This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1291 because this is an appeal from a final judgment. *See* Judgment Appealed From, dated June 1, 2015, Corrected Appendix, p. A-204. This appeal was timely filed pursuant to Federal Rules of Appellate Procedure, Rule 4(a)(1)(A). *See* Plaintiffs' Notice of Appeal, dated June 30, 2015, Corrected Appendix, p. A-241.

COUNTER-STATEMENT OF THE ISSUES

1. Did the District Court err in entering an Order, absent objection, granting defendant's Motion for Judgment on the Pleadings, dismissing plaintiff's claims against defendant Michael Robinson for having failed to effect service of process?

STATEMENT OF THE CASE

This is a civil rights action filed pursuant to 42 U.S.C. § 1983 by plaintiffs Cheung Yin Sun, Long Mei Fang, and Zong Yang Li ("Plaintiffs"), against the Mashantucket Pequot Gaming Enterprise, doing business as Foxwoods Resort Casino ("MPGE"); Tribal officers Anne Chen, Jeff DeClerck, Edward Gasser, George Henningsen, Frank Leone, Michael Santagata, and Chester Sicard

(collectively, the "Tribal defendants"); and Detective Michael Robinson of the Connecticut Department of Emergency Services and Public Protection, Division of State Police. *See* Amended Civil Complaint dated August 21, 2014, Corrected Appendix, p. A-13. The plaintiffs claim that the MPGE, the Tribal defendants, and Connecticut State Police Detective Michael Robinson conspired to commit fraud by inviting the plaintiffs to the Foxwoods Casino with the intent of refusing to honor the plaintiffs' potential winnings, *see* Amended Complaint, Corrected Appendix, p. A-13, ¶¶ 22-23; converted money the plaintiffs deposited with the MPGE, *id.*, ¶ 24; falsely imprisoned the plaintiffs, *id.*, ¶ 25; seized the plaintiffs' winnings via false arrest and wrongful threat of criminal prosecution, *id.*, ¶ 26; forced the plaintiffs to assent to a hearing that would result in a final, non-appealable decision regarding the ownership of the winnings, *id.*, ¶ 27; and denied the plaintiffs of independent counsel and a neutral decision maker at the hearing, thereby effecting a governmental taking of their private property without due process of law in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution, *id.*, ¶¶ 28-29.

The defendant, Detective Michael Robinson, sought judgment on the pleadings in this lawsuit grounded upon (1) the lack of personal jurisdiction as a result of insufficient service of process upon him; (2) the failure to state a claim upon which relief could be granted against him because the doctrine of collateral

estoppel, or issue preclusion, with regard to the ownership of the gambling chips and the financial interests they represent, prevented the plaintiffs from re-litigating a question which had already once been fully and fairly litigated and decided against them; and (3) the failure to state a claim against the defendant Michael Robinson under the due process clause of the Fifth and Fourteenth Amendments for violation of the plaintiffs' rights pertaining to their allegedly unlawful detention along with the seizure of the gambling chips. *See* Motion for Judgment on the Pleadings, Corrected Appendix, p. A-86; Defendant Michael Robinson's Memorandum of Law in Support of Motion for Judgment on the Pleadings, dated January 22, 2015, Corrected Appendix, p. A-89.

On August 27, 2014, the plaintiffs mailed a summons along with a copy of their Amended Civil Complaint filed on August 21, 2014 to the defendant, Detective Michael Robinson at Connecticut State Police Headquarters, 1111 Country Club Road in Middletown, Connecticut. *See* Memorandum Supporting Motion for Judgment on the Pleadings, Exhibit A, Affidavit of Michael Robinson, Corrected Appendix, p. A-119. The Casino Unit, at which Detective Robinson was then assigned was located at the Foxwoods Resort Casino in Ledyard, Connecticut. *Id.* The envelope containing the Summons and the Amended Complaint was administratively forwarded to Detective Robinson at the Casino Unit in Ledyard. However, during the interim, Detective Robinson was reassigned

to the State Police Background Investigations Unit at the State Police Complex in Meriden, Connecticut. *Id.,* at pp. A-119-20. As a result, Detective Robinson did not receive the envelope until October 21, 2014 when he found it placed in his interdepartmental mailbox at the Backgrounds Investigations Unit. Detective Robinson was never personally served with a summons or complaint related to this lawsuit. *Id.*

On January 22, 2015, counsel, on behalf of Detective Robinson, filed a Motion for Judgment on the Pleadings. *See* Motion for Judgment on the Pleadings, Corrected Appendix, p. A-86. Plaintiff's response to Robinson's motion was ordered filed by February 12, 2015. *See* Record on Appeal, Document Entry #20. On February 27, 2015, the MPGE and the Tribal defendants jointly filed a Motion to Dismiss, *see* Tribal Defendants' Motion To Dismiss, Appendix, p. A-131, with responses due by March 20, 2015. *See* Record on Appeal, Document Entry #31.

On March 13, 2015, plaintiffs moved to extend the date upon which their response to the Tribal defendants' motion to dismiss was due.[1] *See* Motion for Extension of Time to Respond to Plaintiffs' Motion to Dismiss, dated March 13, 2015, Corrected Appendix, p. A-202. The court extended the deadline for the

[1] Notably, the plaintiffs never requested an extension of the originally assigned February 12, 2015 due date for their already long overdue response to Detective Robinson's Motion for Judgment on the Pleadings.

plaintiffs' response to the Tribal defendants' Motion to Dismiss until April 30, 2015. *See* Record on Appeal, Document Entry ## 35 and 36.

Absent objection, or a motion from the plaintiffs to further extend the existing deadlines for responses to the defendants' motions, the court granted both the Motion for Judgment on the Pleadings and the Motion to Dismiss on May 29, 2015, "because the plaintiffs have failed to take the necessary steps to establish the court's personal jurisdiction as to any of the defendants." *See* Record on Appeal, Document Entry #37. Thereafter, judgment was entered in favor of the defendants and the case was closed on June 1, 2015. *See* Judgment, Corrected Appendix, p. A-204.

On June 3, 2015, the plaintiffs filed a Motion to Reopen. *See* Plaintiffs' Motion to Reopen Suit, dated June 3, 2015, Corrected Appendix, p. A-206. Simultaneously, the plaintiffs also filed a reply to the Tribal Defendants' Motion to Dismiss.[2] *See* Plaintiffs' Reply and Memorandum to Tribal Defendants' Motion to Dismiss, dated June 3, 2015, Corrected Appendix, p. A-214. The MPGE and the Tribal defendants filed a Memorandum in Opposition to the Motion to Reopen on

[2] In the Motion to Reopen, the plaintiffs asked the court to consider the plaintiffs' reply as applicable to both the Tribal defendants' Motion to Dismiss and Detective Robinson's Motion for Judgment on the Pleadings. However, the memorandum submitted by the plaintiffs nowhere addressed the Motion for Judgment on the Pleadings or the arguments Robinson made in his memorandum in support of the Motion for Judgment on the Pleadings.

June 5, 2015. *See* Tribal Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Reopen, dated June 5, 2015, Corrected Appendix, p. A-233.

In the interim, on June 4, 2015, the plaintiffs moved to dismiss the MPGE as a defendant. *See* Plaintiffs' Motion to Dismiss the Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resorts Casino as a Defendant, dated June 3, 2015, Corrected Appendix, p. A-230. The MPGE offered no opposition.

The plaintiffs appealed from the District Court's entry of final judgment in favor of the defendants, on June 30, 2015. *See* Plaintiffs' Notice of Appeal, dated June 30, 2015, Corrected Appendix, p. A-241. The District Court denied the plaintiff's previously filed Motion to Reopen on August 3, 2015. *See* Ruling Re: Plaintiffs' Motion to Reopen, dated August 3, 2015, Corrected Appendix, p. A-254. No further notice of appeal was filed therefrom.

STATEMENT OF THE FACTS

This lawsuit stems from a December 23-24, 2011, visit by the plaintiffs to the Mashantucket Pequot Gaming Enterprises, Foxwoods Resorts Casino in Ledyard, Connecticut for the purpose of engaging in "high-stakes" gambling. The three plaintiffs deposited a total of approximately $1.6 million in front money in order to play Mini-Baccarat. *See* Amended Complaint, Corrected Appendix, p. A-13, ¶ 11. During the course of their play, after fraudulently professing "superstitious" beliefs, one or more of the plaintiffs requested, and were granted,

permission to engage in a technique called "edge-sorting" in which, at the request of the players, certain cards were turned around by casino dealers before being returned to the discard racks so that their values could be identified by astute players in future hands, even while face-down and after being shuffled, by noting subtle variances in the edge designs on the backs of the cards, resulting in shifting the betting advantage in favor of the individual players. *See* Amended Complaint, Exhibit B, Corrected Appendix, p. A-42.[3] Using this technique, the plaintiffs won approximately $1.148 million in chips during a single evening of play. *See* Amended Complaint, Corrected Appendix, p. A-13, ¶ 11 and Exhibit A thereto at Corrected Appendix, p. A-39. When the plaintiffs attempted to redeem their chips, Foxwoods Resorts Casino management accused them of cheating and refused to redeem their winnings. *Id.*

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[3] Fed.R.Civ.P., Rule 10(c) provides that, "A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." *See also, L–7 Designs, Inc. v. Old Navy, LLC,* 647 F.3d 419, 422 (2d Cir. 2011) (explaining that conversion to a motion for summary judgment is not necessary under Fed.R.Civ.P., 12(d) if the "matters outside the pleadings" consist of (1) documents attached to the complaint or answer, (2) documents incorporated by reference in the complaint (and provided by the parties), (3) documents that, although not incorporated by reference, are "integral" to the complaint, or (4) any matter of which the court can take judicial notice for the factual background of the case).

Several days later, on the evening of December 26, 2011, Foxwoods Resorts Casino Surveillance Senior Investigator Jeff DeClerck, one of the Tribal defendants, met with Detective Michael Robinson of the Connecticut State Police Casino Unit to discuss whether criminal charges could be brought against the plaintiffs. *See* Amended Complaint, Exhibit D, Corrected Appendix, at p. A-58. Learning that the Casino had, in fact, "authorized and changed the proper Baccarat table procedures to acknowledge good customer service with their high-rolling patrons," that Casino officials had been aware of the card-sorting scam, but had not trained its personnel to recognize the technique, and that, since learning about the technique on or about November 9, 2011, the Casino had made no attempt to replace the cards it was using at the gambling tables, Detective Robinson declined to seize the contested gambling chips or to arrest the plaintiffs. All of the parties were informed of his decision, following which Detective Robinson closed his investigation noting "No Criminal Aspect." Thereafter, on December 29, 2011, Detective Robinson was informed by Investigator DeClerck that the plaintiffs and the Tribal defendants were attempting to bring the matter to a civil conclusion. *See* Amended Complaint, ¶ 12, Corrected Appendix pp. A-16-17 and Exhibit C, Connecticut State Police Investigative Report 11-00692262 dated December 29, 2011, Corrected Appendix, pp. A-58, 78-79.

In order to resolve the dispute, the plaintiffs agreed with the Foxwoods Resorts Casino to put their chips in escrow pending a final decision by the Mashantucket Pequot Tribal Nation Gaming Commission (MPTNGC) regarding the disposition of the winnings.[4] *See* Amended Complaint, Escrow Agreement at Exhibit D, Corrected Appendix, p. A-80. In the Escrow Agreement dated December 29, 2011, the plaintiffs conceded that the MPTNGC had jurisdiction and authority over the dispute, and that the decision of the MPTNGC would be final and non-appealable. *Id.,* at ¶¶ 3 and 4. The defendant, Connecticut State Police Detective Michael Robinson, did not sign and was not a party to the Escrow Agreement. *See* Amended Complaint, Exhibit D, Corrected Appendix, at p. A-83.

[4] The Mashantucket Pequot Tribal Nation has an established governmental agency called the Mashantucket Pequot Gaming Commission solely devoted to protecting the integrity of the gaming operations by enforcing the Standards of Operation and Management which are based on industry standards and federal minimum internal controls established by the National Indian Gaming Commission (NIGC). The Gaming Commission is made up of six members, led by a Chairman and five commissioners, and includes a local team of more than 30 full-time personnel. All members of the commission are appointed to staggered three-year terms by the Tribal Council. The Gaming Commission has the authority to investigate any aspect of the gaming operations to protect the public interest in the integrity of the gaming activities and to prevent improper or unlawful conduct, and further has the authority to issue fines, and deny, suspend or revoke employee licenses as appropriate. *See* Mashantucket Pequot Tribal Laws, Tribal Gaming Commission, Title 3, § 7 (2008) available online at http://www.mptnlaw.com/laws/Titles%201%20-%2023.pdf; *see also,* http://www.mptn-nsn.gov/gamingcommission.aspx, last visited on April 20, 2015.

Chester Sicard, MPTNGC Director of Inspections Division, investigated the incident and completed a report which determined that the plaintiffs had violated provisions of the MPTNGC Standards of Operation and Management[5] concerning the rules of table games at the Foxwoods Resorts Casino by altering their wagers after cards had been dealt. *See* Amended Complaint, Exhibit A, MPTNGC Inspection Division Director Sicard's Investigative Report and Conclusions dated February 13, 2012, Corrected Appendix, p. A-39. Director Sicard concluded that, as a result of their violation of the rules and regulations governing gaming at the Mashantucket Pequot Gaming Enterprise (MPGE), the plaintiffs were "not entitled to the chips that were 'won' while wagering at the game of Mini Baccarat," and that, "[a]s such, the chips are the property of the MPGE and are to be returned to the MPGE within ten business days." *Id.* In his report, Director Sicard indicated that, if the plaintiffs disagreed with his decision, they were entitled to request an Administrative Hearing on the matter from the MPTNGC within ten business days.

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

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

See Amended Complaint, Exhibit A, Corrected Appendix, p. A-40.

The plaintiffs filed a timely administrative appeal from Director Sicard's decision, and were granted a *de novo* hearing before the full Commission.[6] *See* Amended Complaint, Exhibit B, Notice of Decision, In the Matter of Appeal Hearing AD 12-09, Mashantucket Pequot Tribal Nation Gaming Commission dated August 6, 2012, p. 2, Corrected Appendix, p. A-42. The July 10, 2012 hearing encompassed three days of testimony from four witnesses, as well as the introduction of various documentary and video evidence, concluding with closing arguments on July 13, 2012. *Id.,* Corrected Appendix, pp. A-43-44.

The opinion of the Gaming Commission included detailed findings of fact outlining the specific nature of the card play during the relevant evening of gambling, including that the plaintiffs requested modification of table rules and practices, professing the reasons therefor as based on their "superstitions," and that

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[6] Mashantucket Pequot Tribal Laws, Tribal Gaming Commission, Title 3, § 7(b)(14) (2008) provides that:

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

table personnel and floor supervisors allowed the modifications to the game rules requested by the plaintiffs, including edge-sorting the cards and "past-posting" their wagers,[7] as routine "concessions" granted to high-roller patrons in the commonly held belief that baccarat was a pure game of chance and that, "all things being equal, systems do not generally work with baccarat." *Id.,* Corrected Appendix, pp. A-44-48, A-54. The Commission decision noted that the effect of the concessions requested by the plaintiffs and granted by MPGE staff was to alter the normal 1%± house edge to a 20%± edge in favor of the players. *Id.,* Corrected Appendix, p. A-54. Finding that the plaintiffs engaged in "improper and unlawful conduct," and citing Title 3 (Gaming), §§ 7(b)(2) and 7(b)(14), of the Mashantucket Pequot Tribal Code,[8] the Mashantucket Pequot Tribal Gaming

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[7] "Past-posting" involves the alteration of wagers after the cards have been dealt. The practice includes changing the side of the bet from/to the "Banker" or "Player," increasing the original bet, or making initial wagers after the cards are dealt face-down, but before their values are revealed. *See* Amended Complaint, Exhibit B, Corrected Appendix, pp. A-47-48.

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

> b. Powers and duties of Commission. The Commission shall have the following powers and duties:
>
> (2) The Commission may on its own initiative investigate any aspect of the operations of the Enterprise in order to protect the public interest in the integrity of such gaming activities and to prevent

(Footnote Cont'd on next page)

Commission, sitting *en banc,* ruled that the subject gaming cheques/plaques be returned to the MPGE. *Id.,* Corrected Appendix, pp. A-55-56. In response, the plaintiffs filed suit.

(Footnote cont'd from previous page)

> improper or unlawful conduct in the course of such gaming activities, and shall investigate any report of a failure of the Enterprise to comply with the provisions of the Compact or this Law and may require the Enterprise to take any corrective action deemed necessary by the Commission upon such terms and conditions as the Commission may determine appropriate. The Commission may compel any person employed by or doing business with the Enterprise to appear before it and to provide such information, documents or other materials as may be in their possession to assist in any such investigation.
>
> . . . .
>
> (14) The Commission may receive any complaint from an employee of the Enterprise or any member of the public who is or claims to be adversely affected by an act or omission of the Enterprise which is asserted to violate this Law, the Compact, or the Standards of Management and Operation adopted pursuant to this Law, and may upon consideration of such complaint order such remedial action as it deems appropriate to bring the Enterprise into compliance with such provisions. The Commission may for this purpose, in its sole discretion, conduct a hearing and receive evidence with regard to such complaint if it deems an evidentiary proceeding useful in the resolution of such complaint.

See Amended Complaint, Exhibit B, Corrected Appendix, p. A-55.

SUMMARY OF ARGUMENT

The District Court correctly granted defendant Robinson's Motion for Judgment on the Pleadings. The plaintiffs failed to properly serve process upon defendant Michael Robinson in accordance with the requirements of Fed.R.Civ.P., Rule 4. After specific notice and ample opportunity to do so, the plaintiffs' never cured this fundamental jurisdictional defect by effecting proper service of process on Detective Robinson. Upon a careful review of the underlying facts and circumstances, and only after the plaintiffs failed to file a timely objection to the pending Motion for Judgment on the Pleadings, the District Court granted judgment in favor of the defendants upon the basis of the plaintiffs' failure to effect proper service of process. The plaintiffs have since failed to adequately brief the issue of personal jurisdiction before this court, failed to identify any reasonable basis for a finding of excusable neglect, failed to identify a meritorious claim which could be pressed against this defendant and, as a result, have proffered no justification for altering the judgment below on appeal.

Even if this court were to find that the District Court abused its discretion in rendering judgment in favor of Defendant Robinson on the basis of the plaintiffs' failure to establish personal jurisdiction due to insufficient service of process, no purpose would be served by reopening the case. The plaintiff has failed to plausibly allege that Detective Robinson was responsible for the fraud, conversion

and false imprisonment allegedly committed in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, focusing instead on the Tribal defendants with regard to these claims.

Moreover, the ownership of the disputed gambling chips has already been fully and fairly litigated by the plaintiffs before the Mashantucket Pequot Tribal Nation Gaming Commission on appeal from the denial of their claim to ownership of the contested gambling chips by MPTNGC Inspection Division Director, Chester Sicard. After a lengthy hearing, the MPTNGC decided that ownership of the contested chips rightfully belonged with the MPGE. The decision on the part of the MPTNGC was final and non-appealable. The plaintiffs are now collaterally estopped from raising the same ownership issue again in this action.

The plaintiffs have also failed to state claims for violation of their constitutional rights under the due process clauses of the Fifth and Fourteenth Amendments. Since the plaintiffs' claims of wrongdoing arise out of the alleged December 24, 2011, false arrest and unlawful seizure of the plaintiffs' gaming chips by Detective Robinson during the course of his criminal investigation into the Mashantucket Pequot Gaming Enterprise's complaint of cheating, it is the Fourth Amendment and its standard of objective reasonableness, and not the murky tenets of substantive due process under the Fifth and Fourteenth

Amendments, which rightfully determine the outcome of this dispute, at least as to Detective Robinson. The plaintiffs have raised no such Fourth Amendment claims.

The plaintiffs' claims for the alleged lack of procedural due process must likewise fail. The contested hearing before the MPTNGC provided a meaningful post-deprivation remedy for the alleged taking of the plaintiffs' gaming chips. Even so, Detective Robinson played no part in the MPGE administrative review of the circumstances surrounding the review proceedings. Absent state action in the underlying proceedings through which ownership of the gaming chips was determined, no constitutional claim for deprivation of rights and privileges under the Fifth and Fourteenth Amendments by Detective Robinson is properly raised.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED DEFENDANT MICHAEL ROBINSON'S MOTION FOR JUDGMENT ON THE PLEADINGS FOR LACK OF PERSONAL JURISDICTION.

A. Plaintiff's Counsel's Repetitive Failure to Properly Manage Their Case, Serve Process Upon the Defendants, and Respond to Pending Motions and Deadlines Imposed by the District Court Constituted Inexcusable Neglect Justifying Dismissal.

The party who seeks to invoke a court's jurisdiction bears the burden of establishing that jurisdiction. *Thompson v. County of Franklin,* 15 F.3d 245, 249 (2d Cir. 1994) (citing *Warth v. Seldin,* 422 U.S. 490, 518 (1975)). *See also, Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.,* 84 F.3d 560, 566 (2d

Cir. 1996) (personal jurisdiction must be established by the plaintiff over each defendant on whose behalf the lack of jurisdiction is alleged).

On appeal from a decision of the District Court to dismiss a pending lawsuit for insufficient service of process, such dismissal will be affirmed unless the complaining party can demonstrate an abuse of discretion on the part of the court. *Zapata v. City of New York,* 502 F.3d 192, 195 (2d Cir. 2007); *Murray v. Pataki,* 378 Fed.Appx. 50, 51 (2d Cir. 2010). "A court abuses its discretion when (1) its decision rests on an error of law or a clearly erroneous factual finding; or (2) cannot be found within a range of permissible decisions." *Padilla v. Maersk Line Ltd.,* 721 F.3d 77, 83 (2d Cir. 2013) (citations omitted). *See also, Lynch v. City of New York,* 589 F.3d 94, 99 (2d Cir. 2009) (quoting *Sims v. Blot,* 534 F.3d 117, 132 (2d Cir. 2008)).

When this lawsuit was filed on August 1, 2014, Subsection (e) of Rule 4 of the Federal Rules of Civil Procedure provided that:

> Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:
>
> (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or
>
> (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's

> dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Id.

With reference to Rule 4(e)(1), Conn. Gen. Stat. § 52-57(a) provides, in pertinent part, that "process in any civil action shall be served by leaving a true and attested copy of it, including the declaration or complaint, with the defendant, or at his usual place of abode, in this state." In Connecticut, where a particular method of serving process is pointed out by statute, that method must be followed. Unless service of process is made as the statute prescribes, the court to which it is returnable does not acquire jurisdiction. *See Tarnopol v. Connecticut Siting Council,* 212 Conn. 157, 163 n. 8 (1989); *Hyde v. Richard,* 145 Conn. 24, 25 (1958); *FitzSimmons v. International Association. of Machinists,* 125 Conn. 490, 493 (1939). *See also, United States Guarantee Company v. Giarelli,* 14 Conn. Sup. 400 (1947) (Handing copy of writ, summons and complaint to clerk at desk in lobby of hotel in which defendant resided did not constitute valid service of process on defendant, notwithstanding that clerk within a brief period delivered process to defendants). Federal law is similar. *See Omni Capitol Intern v. Rudolph Wolff & Co., Ltd.,* 484 U.S. 97, 103 (1987) (Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied).

In addition, on August 1, 2014, Fed.R.Civ.P., Rule 4(m) provided, in relevant part, that

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

Id.

It is clear from the uncontested affidavit of Detective Robinson attached to the Motion for Judgment on the Pleadings, *see* Corrected Appendix, p. A-119, that service of process in a manner consistent with Fed.R.Civ.P., Rule 4(e) is lacking in this case as the defendant was not properly served within the 120 days allotted by the rule. The plaintiffs failed to reply to the defendant's motion, or otherwise contest the lack of proper service of process, much less cure this glaring jurisdictional defect, despite notification of their obligation to do so. As such, Detective Robinson's affidavit stands alone in support of the dismissal of the plaintiff's case for insufficient service of process.

If, however, the plaintiffs demonstrate good cause for their failure to properly serve process upon the defendants, the court is obligated by Rule 4(m) to extend the time for service of process by an appropriate period. When assessing

good cause, or "excusable neglect," courts in the Second Circuit look to the so-called *"Pioneer"* factors, including: "(1) the danger of prejudice to the [defendant], (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the [plaintiffs], and (4) whether the [plaintiffs] acted in good faith." *Padilla,* 721 F.3d at 83 (citing *Silivanch v. Celebrity Cruises, Inc.,* 333 F.3d 355, 366 (2d Cir. 2003) (quoting *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership,* 507 U.S. 380, 395, (1993)) (quotation marks and brackets in original omitted). No one factor is dispositive. In the Second Circuit, however, courts focus most closely on the third *Pioneer* factor – the reason for the delay, including whether it was in the reasonable control of the [plaintiffs]." *Padilla,* 721 F.3d at 83.

The courts have made it clear that "[g]ood cause is generally found only in exceptional circumstances where the plaintiff's failure to serve process in a timely manner was the result of circumstances beyond its control." *Beauvoir v. U.S. Secret Service,* 234 F.R.D. 55, 56 (E.D.N.Y. 2006) (citations omitted). "It is well settled that an attorney's inadvertence, neglect, mistake or misplaced reliance does not suffice to establish good cause for failure to make proper service within 120 days." *Mused v. U.S. Department of Agriculture Food and Nutrition Service,* 169

F.R.D. 28, 32 (W.D.N.Y. 1996). *See also, Feingold v. Hankin,* 269 F.Supp.2d 268, 276 (S.D.N.Y. 2003) (same).

With regard to the first *Pioneer* factor, the danger of prejudice to the defendants, Detective Robinson cannot, of course, speak for the Tribal defendants. As for himself, however, the failure of the plaintiffs to properly effect service of process prevented Detective Robinson from learning of the lawsuit until October 21, 2014 – a mere two months before expiration of the statute of limitations applicable to this civil rights action. Indeed, to date, the plaintiffs have never perfected service of process upon Detective Robinson. Irreparable harm to the defendants in this case, therefore, must be all but assumed.

In *Zapata,* 502 F.3d at 198, this court previously opined on this point, observing

> It is obvious that any defendant would be harmed by a generous extension of the service period beyond the limitations period for the action, especially if the defendant had no actual notice of the existence of the complaint until the service period had expired; and it is equally obvious that any plaintiff would suffer by having the complaint dismissed with prejudice on technical grounds—this is no less true where the technical default was the result of pure neglect on the plaintiff's part. But in the absence of good cause, no weighing of the prejudices between the two parties can ignore that the situation is the result of the plaintiff's neglect. Thus, while we disagree with the district court's formulation that a dispositive degree of prejudice to the defendant is "assumed" when [a] statute of limitations would bar the re-filed action, we leave to the district courts to decide on the facts of each case how to weigh the prejudice to the defendant that arises from the necessity of defending an action after both the original service period and the statute of limitations have passed before service.

Id.

The Second Circuit has, thus, indicated that the more important inquiry is whether there exists good cause to justify the plaintiff's failure to effect proper service of process. In the absence of such, this court has determined to leave to the District Court the weighing of the relative equities with regard to prejudice to the respective parties caused by the dismissal of the lawsuit, particularly where, as here, the applicable statute of limitation has expired.

The lower courts have often reminded us that "[n]either actual notice nor absence of prejudice to the defendant provides an adequate basis for excusing noncompliance with Rule 4(m), unless plaintiff has diligently attempted to complete service." *Mused,* 169 F.R.D. at 34; *see also Sartor v. Toussaint,* 70 F. App'x. 11, 13 (2d Cir. 2002) (summary order) ("Nor can actual notice of suit cure a failure to comply with the statutory requirements for serving process."); *McGann v. New York,* 77 F.3d 672, 674–75 (2d Cir. 1996) (affirming dismissal of a *pro se* complaint for failure to comply with Fed.R.Civ.P., Rule 4(c)(2)(C) even though the defendant had actually received the summons and complaint). While the defendants must concede that the plaintiffs made some feeble effort to give notice by mailing a copy of the summons and complaint to Detective Robinson at State Police headquarters in Middletown, Connecticut, the facts, as set forth in Detective Robinson's affidavit, *see* Defendant Michael Robinson's Memorandum of Law in

Support of Motion for Judgment on the Pleadings, Exhibit A, Corrected Appendix, p. A-119, demonstrate that the efforts of the plaintiffs were anything but diligent.

The second *Pioneer* factor, the length of the delay and its impact on judicial proceedings, should be decided in favor of the defendants in view of the plaintiffs' failure to address service of process in a timely manner, even after having been advised that this was a jurisdictional issue that they needed to address. Here, plaintiffs' counsel was advised of the shortcomings relative to their attempts to serve process upon Detective Robinson in January of 2015 via the Motion for Judgment on the Pleadings. However, counsel for the plaintiffs made no attempt to rectify this problem by seeking leave of court to extend the time in which to perfect service of process under Rule 6(b) of the Federal Rules of Civil Procedure.[9]

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[9] Fed.R.Civ.P., Rule 6, entitled "Computing and Extending Time; Time for Motion Papers," provides, in relevant part, as follows:

> (b) Extending Time.
> (1) *In General.* When an act may or must be done within a specified time, the court may, for good cause, extend the time:
>
> (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
>
> (B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(Footnote Cont'd on next page)

Even then, the plaintiffs' intransigence in failing to directly address the failure to serve process upon Detective Robinson, insisting instead on briefing the question of whether the Tribal defendants enjoy sovereign immunity, has served only to exacerbate the already lengthy delay in service of process upon Detective Robinson and to obfuscate the issues properly before this court. As a result, the second *Pioneer* factor should be decided in favor of Detective Robinson.

Nevertheless, it is the third and fourth of the *Pioneer* factors - the reason for the delay, including whether it was within the reasonable control of the plaintiffs, and whether the plaintiffs acted in good faith - that most strongly support the affirmance of the decision of the District Court. In its Motion to Reopen, *see* Corrected Appendix, p. A-206, and thereafter during the course of oral argument, *see* Transcript of Oral Argument, dated July 20, 2015, Corrected Appendix, p. 274, the plaintiffs' counsel listed as justification for a finding of excusable neglect such reasons as miscommunication between local and out-of-state counsel, the attorneys' heavy caseloads, the abrupt departure of local counsel's administrative staff from his law firm, local counsel's honeymoon, and the unexpected denial of out-of-state counsel's *pro hac vice* application filed on February 16, 2015, *see*

(Footnote cont'd from previous page)

> (2) *Exceptions.* A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

Motion Pro Hac Vice, Corrected Appendix, p. A-122; Record on Appeal, Docket Entry #28, Order Denying Without Prejudice to Renewal for Failure to Comply with Local Rule 83.1(d) #27 Motion to Appear (February 17, 2015).

These circumstances, cited as being a "perfect storm" in the plaintiffs' brief, were all under the control of counsel. As such, the enumerated problems do not begin to establish those sorts of "exceptional circumstances" which might form the basis for the abuse of discretion finding on the part of this court on appeal required in order to overturn the final judgment of the District Court. In the wake of any of those events which plaintiffs' counsel now claims should excuse their failures, plaintiff's counsel had the ability and the obligation to request an appropriate extension of time in which to properly effect service of process on the defendants, and in which to file proper replies to the pending motions, but failed to do so. Such delay attributable solely to plaintiffs' counsel's failure to act with diligence cannot be characterized as "excusable neglect." *See Dominguez v. United States,* 583 F.2d 615, 617 (2d Cir. 1978). As a result the District Court's granting of Detective Robinson's Motion for Judgment on the Pleadings, and the subsequent dismissal of this case, was clearly not an abuse of discretion. Accordingly, the District Court's judgment should be affirmed.

Admittedly, even in the absence of good cause, "district courts may still exercise their discretion to grant extensions under Rule 4(m) …." *Zapata,* 502

F.3d at 193. Central to whether the court should favorably consider such an extension is the question of whether the applicable statute of limitations would otherwise bar the refiling of an action dismissed without prejudice. Detective Robinson concedes that the applicable statute of limitations has run and the option of merely refiling the plaintiffs' action and effecting proper service of process is no longer feasible. *See, e.g., Walker v. Jastremski,* 159 F.3d 117, 119 (2d Cir. 1998) (§ 1983 actions filed in the District of Connecticut are subject to a three-year statute of limitations).

Courts have consistently considered the fact that the statute of limitations has run on the plaintiff's claims as a factor favoring the plaintiffs in a Rule 4(m) analysis. *See Morris v. Ford Motor Co.,* No. 07-CV-424S, 2009 WL 2448473, *4 (W.D.N.Y August 7, 2009). Case law indicates, however, that expiration of the statute of limitations does not require a court to use its discretion to grant an extension of time for service in every time-barred case. *See Knorr v. Coughlin,* 159 F.R.D. 5, 7 (N.D.N.Y. 1994) ("the fact that dismissal will impact the statute of limitations does not compel the court to excuse the violation"). And while this factor might, in some cases, alone justify extending the time for service of process, *Morris,* 2009 WL 2448473, at *4 (citing *Beauvoir,* 234 F.R.D. at 58), the Second Circuit has directed that:

> Where, as here, good cause is lacking, but the dismissal without prejudice in combination with the statute of limitations would result in

> a dismissal *with prejudice,* we will not find an abuse of discretion in the procedure used by the district court, so long as there are sufficient indications on the record that the district court weighed the impact that a dismissal or extension would have on the parties.

Zapata, 502 F.3d at 197. "But in the absence of good cause, no weighing of the prejudices between the two parties can ignore that the situation is the result of the plaintiff's neglect." *Id.,* at 198.

Here, as noted by the District Court in its Ruling Re: Plaintiffs' Motion to Reopen, dated August 3, 2015, *see* Corrected Appendix, p. A-272, the plaintiffs never moved under Fed.R.Civ.P., Rule 6(b) for an extension of time in which to effect proper service of process. Even so, the District Court's ruling, *see* Corrected Appendix, p. A-254, contains ample indication that it carefully weighed the impact that a dismissal or extension would have on the parties, and decided to dismiss the case. Indeed, questions concerning the applicable statute of limitations were twice raised by the court and discussed with counsel during oral argument on the plaintiffs' Motion to Reopen before the court filed its decision on that motion. *See* Transcript of Oral Argument, Corrected Appendix, pp. A-298-99, 307.

As more fully argued below, the District Court's denial of the plaintiffs' Motion to Reopen, deemed to have been filed pursuant to Fed.R.Civ.P., Rule 60(b), is not at issue herein. The substantive arguments before this court on appeal are limited solely to the question of whether the District Court properly dismissed the plaintiffs' case for lack of personal jurisdiction due to insufficient service of

process upon the defendants. However, the ruling on the Motion to Reopen does provide a detailed analysis of the District Court's thinking underlying its decision to grant Detective Robinson's Motion for Judgment on the Pleadings on the basis of the plaintiffs' failure to establish personal jurisdiction. Analysis of the District Court's observations with regard to personal jurisdiction is particularly important since the plaintiffs have curiously chosen to compound their already difficult posture by failing to brief the central issue on appeal – the question of personal jurisdiction - deciding instead to concentrate their remarks on the question of Tribal sovereign immunity, an issue which is decidedly not before this court on appeal.

In its ruling on the Motion to Reopen, the District Court took great pains to describe the nature and extent of plaintiffs' counsel's lack of due diligence in pursuing this case on behalf of their clients. The court noted that, despite the fact that out-of-state counsel's *pro hac vice* application was denied, he still had the ability to manually monitor the progress of the case via PACER. The court further noted that local counsel would have received electronic notice of the denial of his co-counsel's *pro hac vice* application, and should have exercised greater diligence in assuring that the procedural defects were remedied, and that all deadlines were kept despite the various personal and professional challenges set forth by plaintiffs' counsel.

In short, the District Court made it clear that the "perfect storm" described by the plaintiffs in their appellate brief should have been nothing more than a minor tempest in a teapot. Plaintiffs' counsel always maintained the ability to remedy their procedural shortcomings and provide the necessary responses to the pending motions, or seek appropriate extensions of time in which to do so. The District Court correctly found that counsel's consistent failure to proactively manage their case did not warrant a finding of excusable neglect requiring an extension of time in which to serve process upon the defendants. Given the egregious nature of plaintiffs' counsels' lack of due diligence, the District Court further declined to *sua sponte* grant an extension of time to serve process upon the defendants. Instead, the District Court determined that dismissal of the case was appropriate.

At first blush, the District Court's dismissal of the plaintiffs' case against Detective Robinson as a result of counsel's failure to properly serve process upon and establish personal jurisdiction over this defendant may seem as too harsh a sanction, the effect of which must be borne principally by the clients who, no doubt, were unaware of the inaction of their chosen representatives. However, in its ruling denying the plaintiffs' motion to reopen the judgment, the District Court correctly observed that, "the Second Circuit has rather consistently refused to relieve a client of the burdens of final judgment entered against him due to the

mistake or omission of his attorney by reason of the latter's … inability to efficiently manage his caseload." Ruling Re: Plaintiffs' Motion to Reopen, Corrected Appendix, p. A-261 (citing *U.S. v. Cirami,* 535 F.2d 736, 739 (2d Cir. 1976)); *see also, Vaden v. State of Connecticut, Department of Corrections,* 557 F.Supp.2d 279, 293 (D.Conn. 2008). This court should not stray from this well-established precedent on the basis of the record before it in the instant appeal. As explained by the Supreme Court in the *Pioneer* case itself,

> In other contexts, we have held that clients must be held accountable for the acts and omissions of their attorneys. In *Link v. Wabash R. Co.,* 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), we held that a client may be made to suffer the consequence of dismissal of its lawsuit because of its attorney's failure to attend a scheduled pretrial conference. In so concluding, we found "no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client." *Id.,* at 633, 82 S.Ct., at 1390. To the contrary, the Court wrote: "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Id.,* at 633–634, 82 S.Ct., at 1390 (quoting *Smith v. Ayer,* 101 U.S. 320, 326, 25 L.Ed. 955 (1880)).

Pioneer, 507 U.S. at 396-97.

As a result, the District Court did not abuse its discretion by dismissing the case against Detective Robinson.

B. Reopening This Case to Permit the Plaintiffs to Serve Process Upon the Defendants Would be Futile in Light of Their Failure to State Meritorious Claims Against This Defendant in the First Place.

Ultimately, the District Court denied the Motion to Reopen, not merely as a result of counsels' inexcusable failure to properly manage their case, but due to the fact that there did not exist a meritorious claim in the first place. *See* Ruling Re: Plaintiffs' Motion to Reopen, dated August 3, 2015, Corrected Appendix, p. A-261. Obviously, it would serve no point, and waste scarce governmental resources, to find an abuse of discretion by the District Court in not permitting the plaintiffs an extension of time in which to effect proper service of process upon the defendants, and to reopen this matter on appeal, only to have it once again fail as a result of the plaintiffs' failure to state a meritorious claim. *See Snyman v. W.A. Baum Co.*, 360 F.Appx. 251, 254 (2d Cir. 2010) (the district court may properly consider the merits of the underlying action in determining whether to grant a motion pursuant to Rule 60(b)). Viewed in terms of the first *Pioneer* factor discussed above, undue prejudice is also caused the defendants by reopening a case, such as this one, to permit service of process where it is clear that no meritorious claim exists, thereby forcing the parties to expend untold time and both public and private resources in pursuing litigation which is doomed from the outset.

As recognized by the District Court, a claim is meritorious "so long as it is sufficiently grounded in law so as to give the fact finder some determination to make." *Jolin v. Castro,* 238 F.R.D. 48, 51 (D.Conn. 2006) (citing *American Alliance Insurance Co. v. Eagle Insurance Co.,* 92 F.3d 57, 61 (2d Cir.1996) (default judgment context)). The plaintiffs' Amended Complaint failed to meet this standard.

As a threshold matter, however, the matters raised by the plaintiff in their Motion to Reopen were not properly preserved for appeal and, therefore, should not be considered by this court except as required within the context of the *Pioneer* factors. As set forth in the foregoing Statement of the Case, on June 30, 2015, the plaintiffs appealed directly from the District Court's Final Judgment in this matter dated June 1, 2015. While, during the interim, the plaintiffs filed their Motion to Reopen on June 3, 2015, this motion was not decided by the District Court until August 3, 2015. As provided for by Federal Rules of Appellate Procedure, Rule 4(a)(4)(B)(ii), "[a] party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), … must file a notice of appeal … within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion."

Construing the plaintiffs' Motion to Reopen as having been filed pursuant to Fed.R.Civ.P., Rule 60(b), as did the District Court in its August 3, 2015 ruling

denying the plaintiffs' Motion to Reopen, *see* Corrected Appendix, p. A-254, if the plaintiffs intended to appeal the District Court's denial of their Motion to Reopen, a new or amended notice of appeal was required to be filed on or before September 2, 2015. *See* F.R.A.P., Rule 4(a)(1)(A) (In a civil case … the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of judgment or order appealed from). As no such notice of appeal was filed, the issues properly before this court are limited to those upon which the District Court relied in granting the defendants' motions and entering final judgment; specifically, "[t]he Motion for Judgment on the Pleadings (doc. no. 20) and Motion to Dismiss (doc. no. 31) are both granted absent objection *because the plaintiffs have failed to take the necessary steps to establish the court's personal jurisdiction as to any of the defendants.* Accordingly, the case is dismissed." *See* Record on Appeal, Document Entry #37 dated May 29, 2015 (emphasis supplied).

The Court should not improvidently inject into this appeal issues which are not now properly before it. Rather, the court should observe the cardinal principle of judicial restraint that, "if it is not necessary to decide more, it is necessary not to decide more." *See, e.g., PDK Labs., Inc. v. United States Drug Enforcement Administration,* 362 F.3d 786, 799 (D.C.Cir. 2004) (Roberts, J., concurring in part and concurring in judgment).

1. Sovereign Immunity.

Putting the procedural viability of this claim aside, the substantive question of tribal sovereign immunity does not directly affect the interests of Detective Robinson, the sole non-Tribal defendant. Therefore, the viability of this claim is not addressed in detail herein.

2. Conspiracy.

Similarly, the District Court in its August 3, 2015 ruling denying the plaintiffs' Motion to Reopen Suit adequately discussed the fundamental failures in the plaintiffs' attempt to plead a conspiracy claim between Detective Robinson and the Tribal defendants. As the sole governmental defendant, however, existence of a conspiracy is not a necessary prerequisite to stating a viable § 1983 civil rights claim against Detective Robinson for false arrest and illegal seizure of the plaintiffs' gambling winnings. Accordingly, detailed analysis of the basis for the District Court's finding that the plaintiffs failed to state a claim upon which relief could be granted for conspiracy against the MPGE and Tribal defendants under the

Ashcroft v. Iqbal, 556 U.S. 662 (2009) pleading standard is also unnecessary here.[10]

Even so, it is clear that the plaintiffs have failed to adequately plead their claims against Detective Robinson in other respects as well, and that permitting them to cure the deficiencies in service of process upon this defendant will not cure the remaining substantive defects in their Amended Complaint.

3. Fraud.

In paragraph 14 of their Amended Complaint, *see* Corrected Appendix, p. A-13, the plaintiffs allege that "if Foxwoods and Foxwoods Management knew that plaintiffs were edge-sorting and let them practice their form of advantage play anyway - intending to keep their losses if they lost but not honor their winnings if

[10] At the pleadings stage of the proceeding, the court must assume the truth of "all well-pleaded, nonconclusory factual allegations" in the complaint. *Kiobel v. Royal Dutch Petroleum Co.,* 621 F.3d 111, 123 (2d Cir. 2010) (citing *Ashcroft v. Iqbal,* 556 U.S. 662 (2009)). A complaint must plead sufficient facts to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678 (citations omitted). The plausibility standard does not impose an across-the-board, heightened fact pleading standard. *Boykin v. KeyCorp,* 521 F.3d 202, 213 (2d Cir. 2008). The plausibility standard does not "require[ ] a complaint to include specific evidence [or] factual allegations in addition to those required by Rule 8." *Arista Records, LLC v. Doe 3,* 604 F.3d 110, 119 (2d Cir. 2010). Although "detailed factual allegations" are not required, a complaint must offer more than "labels and conclusions," or "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement." *Twombly,* 550 U.S. at 555, 557 (2007).

they won - this would be intentional fraud. Upon information and belief, plaintiffs will show this is exactly what Foxwoods and Foxwoods Management did and intended to do." *Id.* *See also,* Amended Complaint, Corrected Appendix, p. A-13 at ¶ 19 ("… careful examination of the November 2011 casino consultant reports reveal that Foxwoods and Foxwoods Management deliberately and maliciously defrauded plaintiffs."); ¶ 20 ("The MPTNGC was an integral part of this fraudulent scheme. Which is to say, all the proceedings before the MPTNGC were but an elaborate ruse to separate plaintiffs from their winnings; the MPTNGC completely disregarded the rights of the Plaintiffs."). In the absence of any factual allegations directed toward Detective Robinson, it would appear that the fraud claim is exclusively directed against the MPGE and the Tribal defendants.

4. Conversion.

Similarly, with regard to their claim for conversion, the plaintiffs allege only that "[a]s for plaintiffs' $1.6 million in front money deposits, defendants Foxwoods and Foxwoods Management wrongly converted that money for three whole days by falsely imprisoning plaintiffs in their hotel rooms." Amended Complaint, Corrected Appendix, p. A-13 at ¶ 15. The plaintiffs later allege that, upon his arrival, Detective Robinson "acted upon defendants' Foxwoods and Foxwoods Management's behest and forced plaintiffs to surrender their chips/winnings to an escrow agent under threat of criminal prosecution for cheating." *Id.* However, this

conclusory allegation is flatly contradicted by the plaintiffs' own Amended Complaint, Exhibit C, Corrected Appendix, p. A-58, which makes clear that Detective Robinson did not become aware of the dispute until the evening of December 26, 2011, and that as of December 29, 2011, Tribal defendant Jeff DeClerck had advised Detective Robinson that the Casino was going to attempt to resolve the dispute civilly, requiring no further involvement from Detective Robinson is his law enforcement capacity. Detective Robinson's lack of involvement in the dispute is buttressed by the fact that (1) he took no part in the signing of the Escrow Agreement, *see* Amended Complaint, Exhibit D, Corrected Appendix, p. A-80, (2) Foxwoods Casino froze the plaintiffs' assets on December 24, 2011, days before Detective Robinson even became aware of the dispute, Amended Complaint, Exhibit C, Corrected Appendix, p. A-59, and (3) on December 26, 2011, when he first became involved in the case,

> Robinson returned to Sun's room [after reviewing the Casino surveillance video] and told her and her lawyer (who by then was on the end of the telephone and who spoke with Robinson) that he did not think that she had been cheating. However, he told her that he did not have the power to force the casino to pay her and that if she wanted to be paid, she would need to make a formal complaint or bring a civil law suit against Foxwoods.

Amended Complaint, Corrected Appendix, p. 23, at ¶ 12.

The Amended Complaint is devoid of allegations that Detective Robinson ever actually possessed or controlled the disputed gambling winnings. These

allegations, when considered in total, hardly rise to the level of "facial plausibility" required by *Iqbal* in order to state a viable claim for conversion against Detective Robinson.

5. False Imprisonment.

With regard to the claim of false imprisonment, it is clear from the foregoing paragraph that, (1) Detective Robinson was not made aware of the dispute until the evening of December 26, 2011, (2) after his initial investigation Detective Robinson informed the plaintiffs that he did not think they had been cheating, (3) Detective Robinson made no arrests, and (4) Detective Robinson informed the plaintiffs that he had no power to force the casino to return the disputed gambling chips. As a result, the Amended Complaint and its exhibits also fail to plausibly allege that Detective Robinson seized the plaintiffs and falsely arrested or imprisoned them.

6. Collateral Estoppel.

Central to the plaintiff's claims against the defendants concerning the disposition of the disputed gambling winnings is their persistent claim to the rightful ownership of the gaming chips valued at approximately $1.148 million. However, that claim was already fully, fairly, and finally litigated by the plaintiffs before the Mashantucket Pequot Tribal Nation Gaming Commission (MPTNGC) on appeal from the denial of their claim to ownership of the contested gambling

chips by MPTNGC Inspection Division Director Chester Sicard. *See* Amended Complaint at Exhibits A, Corrected Appendix, p. A-39 and B, Corrected Appendix, p. A-42. The plaintiffs are now collaterally estopped from raising the same ownership issue again in this action.

The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as *"res judicata."* Under the doctrine of claim preclusion, a final judgment forecloses "successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *New Hampshire v. Maine,* 532 U.S. 742, 748 (2001). Issue preclusion, in contrast, bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment," even if the issue recurs in the context of a different claim. *Id.,* 532 U.S. at 748-749. By "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate," these two doctrines protect against "the expense and vexation attending multiple lawsuits, conserve[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States,* 440 U.S. 147, 153-154 (1979).

Issue preclusion, or the doctrine of collateral estoppel, provides that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action

involving a party to the first case." *Burgos v. Hopkins,* 14 F.3d 787, 789 (2d Cir. 1994) (quoting *Allen v. McCurry,* 449 U.S. 90, 94 (1980)). A party is barred by issue preclusion from relitigating an issue if a four-part test is met: (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits. *Boguslavsky v. Kaplan,* 159 F.3d 715, 720 (2d Cir. 1998).[11] To determine whether an issue has been "actually litigated" for issue preclusion purposes, the Court reviews the record in the prior case to ensure that the issue has been submitted to the trier of fact for determination. *See Wilder v. Thomas,* 854 F.2d 605, 619 (2d Cir. 1988). Issue preclusion may apply, however, even where the second lawsuit seeks different relief. *See, e.g., Rivera v.*

[11] When issue preclusion is used defensively, as here, mutuality of parties is not required; issue preclusion may be applied as long as the party against whom issue preclusion is asserted had a full and fair opportunity to litigate the issues in the prior case. *See AGLI Gov't Sec., Inc. v. Rhoades,* 963 F.2d 530, 533 (2d Cir. 1992) (citing *Parklane Hosiery* Co., *Inc. v. Shore,* 439 U.S. 322, 326-31 (1979) and *Blonder-Tongue Lab., Inc. v. University of Illinois Foundation,* 402 U.S. 313, 328-30 (1971)); *see also,* 18A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4464(2d.) (noting that the federal courts have abandoned the traditional rule that claim preclusion could not be used by nonparties and instead notes that courts have adopted a rule that nonmutual issue preclusion is permitted unless it would be unfair).

Doe, No. 3:09-CV-0007 (CSH), 2011 WL 1134221 at *6 (D.Conn. 2011); *Flemming v. Goard,* No. 06-CV-26, 2008 WL 4532506 at *3 (N.D.N.Y. 2008).

The doctrine of issue preclusion is no less applicable to the decisions of Indian Tribal Courts than it is to other courts. *See, e.g., Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9, 19 (1987) (Unless a federal court determines that the tribal court lacked jurisdiction, proper deference to the tribal court system precludes relitigation of issues raised and resolved in the tribal courts). The same rule should apply to properly constituted administrative tribunals such as the Mashantucket Pequot Tribal Nation Gaming Commission. As succinctly laid out by the court in *Golden Hill Paugussett Tribe v. Rell,* 463 F.Supp.2d 192, 198-199 (D.Conn. 2006),

> We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

Id. (Internal citations and quotations omitted).

Examination of the plaintiffs' Amended Complaint, and especially Exhibit B, Notice of Decision, In the Matter of Appeal Hearing AD 12-09, Mashantucket Pequot Tribal Nation Gaming Commission dated August 6, 2012, p. 2, Corrected Appendix, p. A-42 attached thereto, clearly demonstrates that the question of

ownership of the contested gambling chips has already been litigated and resolved. The gambling chips belong to Foxwoods Casino, not the plaintiffs. As a result, no claim for conversion of the gambling chips, or for fraud, has been plausibly stated by the plaintiffs against Detective Robinson.

7. Due Process Under the Fifth and Fourteenth Amendments.

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

First of all, as for the plaintiff's due process claim raised under the Fifth Amendment to the U.S. Constitution, such claims do not, standing alone, limit the actions of state officials. *See Brock v. North Carolina,* 344 U.S. 424, 426 (1953); *Ambrose v. City of New York,* 623 F.Supp.2d 454, 466-467 (S.D.N.Y. 2009). The Due Process Clause of the Fifth Amendment operates only as a restraint on the

national government. Allegations of federal action are required to state a claim for deprivation of due process directly in violation of the Fifth Amendment. *See, e.g., Junior Chamber of Commerce v. Missouri State Junior Chamber of Commerce,* 508 F.2d 1031 (8th Cir. 1975); *Flowers v. Webb,* 575 F.Supp. 1450, 1456 (E.D.N.Y. 1983). There are no such allegations made in the instant complaint. Accordingly, the plaintiff's putative Fifth Amendment due process claim must fail.

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

Generally speaking, "the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision-making in this uncharted area are scarce and open-ended." *Collins v. Harker Heights,* 503 U.S. 115 (1992). It has thus admonished the lower courts to "exercise the utmost care" when establishing substantive due process claims not explicitly supported by existing case law, *id.,* and directed that "[w]here a

particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver,* 510 U.S. at 273 (quoting *Graham v. Connor,* 490 U.S. at 395). This well-established principle of constitutional jurisprudence is dispositive of the substantive due process claims under consideration herein.

The Supreme Court has made it crystal clear that "all claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a 'substantive due process' approach." *Graham v. Connor,* 490 U.S. at 395 (emphasis in original). *Accord, Dodd v. City of Norwich,* 827 F.2d 1, 3 (2d Cir. 1987); *Troublefield v. City of Harrisburg,* 789 F.Supp. 160, 166-67 (M.D.Pa.1992); *Glasco v. Ballard,* 768 F.Supp. 176, 180 (E.D.Va. 1991). The courts have similarly relegated claims of false arrest and malicious prosecution to a Fourth Amendment analysis.[12] *See, e.g., United States v. Hensley,* 469 U.S. 221,

[12] Regardless, the plaintiffs' claims of false arrest and false imprisonment are fatally undermined by Detective Robinson's investigative report attached to the Amended Complaint as Exhibit C. The report makes clear that the plaintiffs were

(Footnote Cont'd on next page)

231 (1985); *Illinois v. Gates,* 462 U.S. 213, 238 (1983); *Singer v. Fulton County Sheriff's Department,* 63 F.3d 110 (2d Cir. 1995), *cert. denied,* 517 U.S. 1189 (1996). The same analysis pertains to the alleged seizure of the plaintiffs and their gaming chips by Detective Robinson during the course of his investigation into allegations that the plaintiffs engaged in cheating during their gambling activities at Foxwoods Resorts Casino. *See County of Sacramento v. Lewis,* 523 U.S. 833, 843 (1998) (holding that substantive due process analysis is inappropriate if respondents' claim is "covered by" Fourth Amendment). To the questionable extent to which the plaintiffs have alleged a plausible claim against Detective Robinson for the unlawful seizure of their gambling chips during the course of his investigation, such allegations are appropriate for analysis under the Fourth Amendment, not the substantive due process clause of the Fifth and Fourteenth Amendments. No such Fourth Amendment claim is raised within the context of this lawsuit.

Third, to assert a violation of procedural due process rights, a plaintiff must first identify a property right, second show that the state has deprived him of that right, and third show that the deprivation was effected without due process. *Local*

(Footnote cont'd from previous page)

never arrested or otherwise imprisoned by this defendant. *See also,* Amended Complaint, Corrected Appendix, p. A-13 at ¶ 12.

342, Long Island Public Service Employees, UMD, ILA, AFLCIO v. Town Bd. of Huntington, 31 F.3d 1191, 1194 (2d Cir. 1994) (citation omitted). Notice and an opportunity to be heard are the hallmarks of due process. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Brody v. Village of Port Chester,* 434 F.3d 121, 131 (2d Cir. 2005) (holding that "if reasonable notice and opportunity for a hearing are given, due process will be satisfied").

Ordinarily, the Constitution requires some kind of a hearing before the State deprives a person of liberty or property. *New Windsor Volunteer Ambulance Corps, Inc. v. Meyers,* 442 F.3d 101, 115 (2d Cir. 2006) (quoting *Zinermon v. Burch,* 494 U.S. 113, 127 (1990)) (emphasis in original); *see also, WWBITV, Inc. v. Village of Rouses Point,* 589 F.3d 46, 50 (2d Cir. 2009) ("Due process requires that before state actors deprive a person of her property, they offer her a meaningful opportunity to be heard."). However, due process is flexible and calls for such procedural protections as the particular situation demands. *Brody, supra,* 434 F.3d at 134 (quoting *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)). The familiar three-factor test set forth in *Mathews v. Eldridge,* 424 U.S. 319 (1976),

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

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

Here, it was not Detective Robinson who took possession of the plaintiffs' gambling chips. Rather, the plaintiffs' property was independently held by the

MPGE and the Tribal defendants, none of whom were acting as representatives of the state in so doing.

The pleadings clearly indicate that the plaintiffs agreed to submit final adjudication of the ownership rights of the gambling chips to the MPTNGC. *See* Amended Complaint, Exhibit D, Corrected Appendix, p. A-80. Detective Robinson was not a party to, nor in control of, the Escrow Agreement between the plaintiffs and the Mashantucket Pequot Tribal Nation Gaming Enterprises, or the proceedings conducted by the MPTNGC. As such, there appears to have been no "state action" to even form the basis of a claim for deprivation of the plaintiffs' due process rights by this defendant.

Apart from the foregoing, the decision of the MPTNGC depriving the plaintiffs of any interest in the disputed gaming chips which are the subject of the instant claims, and which is entitled to preclusive effect as already argued in this brief, fatally undermines their claims for protection under the due process clauses of either the Fifth or the Fourteenth Amendments.

The plaintiffs have, therefore, failed to articulate a meritorious claim for relief against Detective Robinson under any of the theories briefed above.

CONCLUSION

A methodical analysis of the Federal Rules of Civil Procedure and relevant case law with regard to the threshold requirement to establish personal jurisdiction

over a defendant through the proper service of process under the facts of this case leads to the inescapable conclusion that the failure to do so is exclusively, and inexcusably, the fault of the plaintiffs' counsel. The District Court meticulously considered all of the plaintiffs' arguments attempting to explain the action, or inaction, of their counsel, and concluded that none of the arguments put forth justified their failure to adhere to well-established practice as set forth in Fed.R.Civ.P., Rule 4. The District Court further considered the arguments of plaintiffs' counsel with regard to whether there existed a meritorious claim against Detective Robinson that could be pressed if it decided to allow additional time for service of process upon the defendant. Not surprisingly, however, the District Court concluded that no purpose would be served by doing so.

Despite its recognition that there exists "a strong federal policy in favor of resolving claims on the merits, *John v. City of Bridgeport,* 309 F.R.D. 149, 156 (D.Conn. 2015), the District Court concluded that, while leniency might sometimes be appropriate for those who have in good faith attempted timely service of process, to afford such leniency to litigants who have failed to make even the most basic efforts to comply with the rules in this regard "would turn Rule 4(m) into a toothless tiger." *National Union Fire Insurance Co. v. Sun,* No. 93 Civ. 7170 (LAP), 1994 WL 463009, at *4 (S.D.N.Y. 1994). *See also, Nobriga v. Dalton,* No. 94 CV 1972 (SJ), 1996 WL 294354, at *3 (E.D.N.Y. May 28, 1996) (refusing to

exercise discretion under Rule 4(m) to extend time for filing absent compelling circumstances). For all of the foregoing reasons, the Judgment of the District Court should be affirmed and the appeal dismissed.

Respectfully submitted,
Michael Robinson

GEORGE JEPSEN
ATTORNEY GENERAL

By: _____

Stephen R. Sarnoski
Assistant Attorney General
Fed. Bar No. #ct05129
110 Sherman Street
Hartford, CT 06141-0120
Tel: (860) 808-5450
Fax: (860) 808-5591
Email: stephen.sarnoski@ct.gov

CERTIFICATION OF COMPLIANCE WITH RULE F.R.A.P. RULE 32(a) RE TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that this brief contains 12,186 words, excluding the parts of the brief exempted by F.R.A.P., Rule 32(a)(7)(B)(iii), and complies with the typeface requirements of F.R.A.P., Rule 32(a)(5) and the type style requirements of F.R.A.P., Rule 32 (a)(6) because it has been prepared in a 14-point, proportionally spaced typeface (Times New Roman).

Stephen R. Sarnoski
Assistant Attorney General

CERTIFICATION OF SERVICE

I hereby certify that true and accurate copies of the foregoing brief were electronically filed and served by first class mail, postage prepaid, by Brescia's Printing Service in accordance with Rule 25 of the Federal Rules of Appellate Procedure on this 19th day of May, 2016, to the Clerk of this Court and the following counsel of record:

Marvin Vining, Esq.
Attorney at Law, LLC
P.O. Box 250
Monticello, MS 39654

Attorney Elizabeth Conway, Associate General Counsel
Mashantucket Pequot Tribal Nation
Office of Legal Counsel
2 Matt's Path
P.O. Box 3060
Mashantucket, CT 06338

Thomas J. Murphy, Esq.,
James J. Healey, Esq.
Cowdery & Murphy, LLC
280 Trumbull Street
Hartford, CT 06103

Stephen R. Sarnoski
Assistant Attorney General