15-2148

To Be Argued By:
MARVIN VINING

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHEUNG YIN SUN, LONG MEI FANG, ZONG YANG LI,

Plaintiffs-Appellants,

—against—

MASHANTUCKET PEQUOT GAMING ENTERPRISE, Individually, d/b/a FOXWOODS RESORT CASINO, ANNE CHEN, Individually, JEFF DECLERCK, 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 (NEW HAVEN)

CORRECTED BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

MARVIN VINING
MARVIN VINING,
ATTORNEY AT LAW, LLC
P.O. Box 250
Monticello, Mississippi 39654
(601) 842-2589

Attorneys for Plaintiffs-Appellants Cheung Yin Sun, Long Mei Fang and Zong Yang Li

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Jurisdictional Statement

The District Court had subject matter jurisdiction over all the Defendants pursuant to 42 U.S.C. § 1983 per the Appellants/Plaintiffs' Amended Complaint. See Appendix p. 13 ("A–13"). This Court has jurisdiction pursuant to 28 U.S.C § 1291 because this is an appeal from a final judgment (A–204). This appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A) because plaintiffs filed their Notice of Appeal on June 30, 2015, which was within thirty (30) days of the entry of the final judgment (A–241).

Statement of Issues Presented

1. Did the District Court err in not following the Ninth Circuit precedent of *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015)?

2. Did the District Court abuse the *Twiqbal* standard?

Standard of Review

Questions of sovereign immunity are reviewed *do novo*. *McGinty v. New York*, 251 F.3d 84, 90 (2d Cir. 2001); *Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015).

The grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim is subject to *de novo* review. *Allaire Corp. v. Okumus*, 433 F.3d 248, 249-250 (2d Cir. 2006). All allegations in the complaint must be accepted as true and all

inferences drawn in Plaintiffs' favor. *Allaire Corp.*, 433 F.3d at 249-250; *Caiola v. Citibank, N.A.*, 295 F.3d 312, 321 (2d Cir. 2002).

In reviewing a dismissal for lack of subject matter jurisdiction on appeal, factual findings are reviewed for clear error and legal conclusions *de novo*. *Zappia Middle East Construction Company Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 249 (2d Cir. 2000).

Summary of Argument

I. About the time the complaint in the case at bar was filed, a closely analogous case was working its way through the Ninth Circuit Court of Appeals. Despite the Plaintiffs/Appellants repeatedly bringing *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. June 30, 2015) to the District Court's attention (A–33, A–215-18) the District Court apparently chose to ignore it.

The *Pistor v. Garcia* case changes everything. The plaintiffs in the *Pistor v. Garcia* case, the plaintiffs in the case at bar, and even the District Court below have been laboring under the misperception that in order for an individual tribal officer to lose their sovereign immunity, they must act in concert with a state official and violate a plaintiff's constitutional rights under color of state law. The District Court cited *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989) in favor of this proposition, as well as *Wallet v. Anderson*, 198 F.R.D. 20 (D. Conn. 2000)(A–150).

But *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015) and its derivative case, *Maxwell v. County of San Diego*, 697 F.3d 941 (9th Cir. 2012), are very different. Both cases use a "remedy–focused analysis" where the focus is on whether the tribal official is sued in their individual capacity and therefore damages are sought against the individual, and not the whole tribe.

II. The Plaintiffs/Appellants believe that the district court did not properly applied the *Twiqbal* standard. The district court's ruling of August 3, 2015 plainly shows that, despite various plausible factual alternatives presented in Plaintiffs' Amended Complaint, the district court invariably chose the alternatives that denied Plaintiffs' cause of actions (see A–264-67). However, "When there are well–pleaded factual allegations, a court should assume their veracity then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

This District Court's error was compounded by the fact that it "looped back through" the sovereign immunity analysis by failing to follow *Pistor v. Garcia*, thus completely ignoring many glaringly obvious intentional tort actions pled in Plaintiffs' Amended Complaint.

Statement of Facts

The Plaintiffs below are advantage gamblers who were able to beat the Foxwoods casino in Connecticut (more formally known as the Mashantucket Pequot Gaming Enterprise, an Indian tribal casino) out of large sums of money at mini–baccarat by a strategy known as "edge–sorting." A detailed explanation of edge–sorting can be found in Plaintiffs' Amended Complaint (A–13, A–60-5). But the simple explanation is that edge–sorting works because playing–card backs are not symmetrical side–to–side, hence if one turns or "sorts" favorable cards opposite in orientation than the rest of the deck, an observant player can tell the difference and gain a statistical edge over the house. It is important to note that the randomness element essential to all gambling contracts is not removed. See Anthony Cabot & Robert Hannum, *Advantage Play and Commercial Casinos*, 74 Miss. L.J. 681, 683 (2005). Despite having a statistical advantage, it is still quite possible for an edge–sorter to have extended periods of losses.

Prior to the incidents at Foxwoods that gave rise to this lawsuit, Plaintiff Cheung Yin Sun played numerous edge–sorting sessions with famous poker player Phil Ivey, spawning civil suits all over the world for tens of millions of dollars in winnings.[1] The ironic thing about edge–sorting is that every casino Sun and her playing partners beat had it completely within their power to prevent it. The

1 See the Wikipedia.org reference for "Edge sorting," harvested March 9, 2015.

customary rules of mini–baccarat do not allow the player to handle the cards. If the player cannot handle the cards, they surely cannot sort them, and that puts a complete stop to edge–sorting right there. But what Sun and her playing partners did was very clever: they would ask and obtain permission from casino supervisors to have the dealers turn the cards they wanted to sort *for them*, often asking the dealer to reorient the cards for "luck." In other words, in all these edge–sorting cases the casinos willingly modified their own terms of play. Some casinos, like Crockfords in London or Borgata in Atlantic City, were bad losers and chose to bring civil lawsuits.

Plaintiffs allege that Foxwoods took a darker route. Plaintiffs allege in their Amended Complaint that Foxwoods personnel may have known exactly who Cheung Yin Sun, the infamous "Queen of Sorts" was, after her having beaten them a previous session. They may have deliberately invited her back for the purpose of "free–rolling" her—keeping her losses if she lost, but having her arrested and prosecuted for cheating if she won. Plaintiffs sued the tribal Defendant listed in their individual capacities, along with Defendant officer Robinson for various tort–like offenses (false arrest, false imprisonment, conversion of the Plaintiffs' $1.6 million in front money).

The Plaintiffs sued officer Robinson and the other tribal Defendants in their individual capacities in a deliberate attempt to model their case after *Pistor v.*

Garcia, 791 F.3d 1104, 1110 (9th Cir. 2015). However, in their original complaint, Plaintiffs pursued a novel approach to breaking up the sovereign immunity of the Mashantucket Pequot tribe itself based on research that the Pequots were never a genuine Indian tribe. Plaintiffs eventually abandoned this approach for several reasons: one, even if the Pequots were not a genuine Indian tribe estoppel would probably come into play to challenges to their sovereign status; and two, Plaintiffs lacked the financial resources for so bold an attack. Accordingly, Plaintiffs filed to dismiss all claims against the Mashantucket Pequot tribe itself, leaving only the individual Defendants (A–230). The District Court ruled this motion moot, since it dismissed all Plaintiffs' claims before it could rule on it.

The Proceedings Below

The procedural path of this case below is a very convoluted one. This case was brought in the United States District Court, District of Connecticut, before the Honorable Judge Janet C. Hall. Plaintiffs filed their initial Complaint July 31, 2014 (A–5), then shortly afterwards their Amended Complaint on August 21, 2014 (A–13). Some of the tribal Defendants began complaining that they were not served in accordance with tribal law, but Plaintiffs believed this was a circular argument pertaining to the underlying question of tribal sovereign immunity and thought it best to go forward with the litigation, believing the Defendants had in fact been properly served. On January 22, 2015, Defendant Robinson filed a Motion for

Judgment on the Pleadings, with responses due by February 12, 2015. (A–86) On February 27, 2015, MPGE and the tribal Defendants jointly filed a Motion to Dismiss for Lack of Jurisdiction (A–131). The Plaintiffs' attorneys (Marvin Vining of Mississippi, and local counsel Sebastian DeSantis of New London) sought multiple continuances during this time due to their heavy caseloads. Then, unfortunately, DeSantis' law office basically went on meltdown. Due to multiple communication breakdowns, exacerbated by the district court's failure to grant Vining's *pro hac vice* admission (A–122), Plaintiffs failed to timely respond to these motions and their complaint was dismissed on June 1, 2015 (A–204).[2] Plaintiffs filed a motion to reopen the case based on excusable neglect August 3, 2015 (A–206). In the District Court's own words,

> The conduct that the plaintiffs attempt to couch as the product of excusable neglect resulted from, inter alia: miscommunication between the plaintiffs' two attorneys; the attorneys' heavy caseloads; the denial of the out-of-state attorney's pro hac vice application and his subsequent alleged inability to access the docket through the CM/ECF website; the abrupt departure of local counsel's administrative staff from his law firm; and local counsel being on his honeymoon. See Mot. to Reopen at 2-3.

(A–259). This brief description does not even touch the surface of the perfect storm that happened to Plaintiffs' co–counsel. Not only was local counsel DeSantis in the middle of getting married and his honeymoon, he was in the middle of a lengthy

[2] Note that plaintiffs' Amended Complaint anticipated many of the arguments that were actually brought in the pretrial motions to dismiss. (A–32 to 36)

murder trial, and his paralegal–office manager suffered a mental breakdown leaving his office filing system in a real mess. Vining was supposed to be lead counsel, but he was locked out of PACER and doing any electronic filing because the district court repeatedly refused his *pro hac vice* application. Both attorneys believed they had good service of process because they relied on the paralegal-office manager. Neither realized that there may have been defects in the service of process until, basically, the district court claimed that it was too late to do anything about it. And here is what is really outrageous: DeSantis' new paralegal-officer manager researched with the district court clerks why Vining's motion for *pro hac vice* admission was unable to process. It was because the old paralegal-office manager filed the online application online, and the system had last year's form!

Regardless of this convoluted procedural history, Plaintiffs/Appellants confidently assert that the central issue on this appeal is tribal sovereign immunity. That is because in denying Plaintiffs' motion to reopen the case, ultimately, the district court concluded that Plaintiffs did not have a meritorious claim and grounded its ruling upon squarely on tribal sovereign immunity. To quote the district court exactly:

> Although the plaintiffs' excusable neglect argument is tenuous, at best, *because the court ultimately concludes that the plaintiffs do not possess a meritorious claim*, see infra § IV.B, the court does not decide whether "the circumstances of the case present grounds justifying relief" based on the plaintiffs' counsel's excusable neglect.

(A–261)(emphasis added). The district court's discussion of whether Plaintiffs have a meritorious claim is found in § IV.B of this ruling (A–261). And there is no denying that this section of the district court's ruling is all about whether the tribal Defendants are entitled to cloak themselves in sovereign immunity. Furthermore, on page 19 of this ruling (A–272) the district court notes that it could have cured all the Plaintiffs' service of process issues *sua sponte* had it wanted to; but it did not feel obligated to because it had already decided that the Plaintiffs did not have a meritorious claim. Thus, the district court likewise based its ruling to dismiss for faulty service of process on tribal sovereign immunity.

For this reason, the Plaintiffs/Appellants will not spend any more time briefing the excusable neglect and service of process issues. The details are found in the record if this Court wishes to study them. A reasonable inference can be drawn from the facts that the real reason Plaintiffs were unable to file return waivers of service of process is because each Defendant was served but deliberately chose to thwart process. If true, that hardly seems fair. Regardless, once the sovereign immunity issue is broken open it will become plainly obvious that Plaintiffs did in fact have meritorious claims, that those claims were wrongfully dismissed, and it would be a miscarriage of justice to deny Plaintiffs their day in court.

Argument

I. THE SECOND CIRCUIT SHOULD FOLLOW THE NINTH CIRCUIT PRECEDENT OF *PISTOR V. GARCIA*. AND IF IT DOES, SUITS AGAINST TRIBAL OFFICIALS IN THEIR INDIVIDUAL CAPACITY NO LONGER NEED TO BE TIED TO 42 U.S.C. § 1983 ACTIONS IN ORDER FOR SOVERIGN IMMUNITY NOT TO APPLY.

In its final ruling denying Plaintiffs motion to reopen, the district court justified dismissing all of Plaintiffs' claims because the court felt they were not meritorious. Specifically, the District Court followed *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989) that held in relevant part:

> If appellants are able to prove that the individual tribal defendants acted in concert with the police defendants, whose actions we have here held to be 'under color of state law,' their actions cannot be said to have been authorized by tribal law."

869 F.2d 1348 n.9. Plaintiffs cited *Evans* in the Amended Complain in support of the same proposition. But as stated earlier, Plaintiffs were mistaken, as were the Plaintiffs in the *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015).

In contrast to *Evans* and related cases, the Ninth Circuit held in *Pistor v. Garcia* that whether the tribal Defendants were acting under color of state or tribal law does not matter for the purposes of the tribal sovereign immunity analysis, although it will matter for the purposes of deciding whether Plaintiffs can succeed in their 1983 claims. The determining factor for tribal sovereign immunity analysis in the Ninth Circuit is whether the tribal "were sued in their individual rather than

their official capacities, as any recovery will run against the individual tribal defendants, rather than the tribe." *Pistor v. Garcia*, 791 F.3d at 1108. The Ninth Circuit had reach the same conclusion in *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013) but it took the opportunity is *Pistor v. Garcia* to clarify its earlier ruling. As the Ninth Circuit explained in *Pistor*, the same principles that apply to sovereign immunity analysis among U.S. and state governmental officials "fully apply to tribal sovereign immunity." The Court continued:

> Although "'[t]ribal sovereign immunity 'extends to tribal officials when acting in their *official* capacity and within the scope of their authority'" *Cook*, 548 F.3d at 727 (emphasis added) (quoting *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002); *see also Miller*, 705 F.3d at 928 (same), tribal defendants sued in their *individual* capacities for money damages are not entitled to sovereign immunity, even though they are sued for actions taken in the course of their official duties. *See Maxwell*, 708 F.3d at 1089. As the Tenth Circuit has explained: 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 . . . . 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.

Pistor v. Garcia, 791 F.3d at 1112.

II. THE DISTRICT COURT ABUSED THE *TWIQBAL* STANDARD.

A. THE PROPER *TWIQBAL* STANDARD DOES NOT CLOSE OFF PLAUSIBLE CAUSES OF ACTION.

The applicable standard for 12(b)(6) motions for failure to state a claim upon which relief can be granted is found in two U.S. Supreme Court cases: Bell *Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). These cases are usually grouped together and referred to colloquially as *Twiqbal*. Rather than simply describing the case in sufficient detail to put the defendant on notice, which was the old 12(b)(6) standard, the *Twiqbal* cases now require that Plaintiffs demonstrate that their claims are "plausible" in their complaints. Mere legal conclusions are not entitled to the presumption of veracity. However, "[w]hen there are well–pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

Sometimes district courts can overreach on their application of the *Twiqbal* cases and deny Plaintiffs their rightful day in court. An important case that put the *Twiqbal* cases into proper perspective is the Second Circuit's decision in *Anderson News LLC v. American Media Inc.*, 680 F.3d 162 (2d Cir. 2012). In *Anderson News*, magazine wholesaler Anderson News LLC and Anderson Services LLC (collectively, "Anderson") claimed that a group of national magazine publishers (including Time Inc. and Rodale Inc.) and their distributors (including Curtis

Circulation Co.) violated Section 1 of the antitrust laws by conspiring to drive Anderson out of business after it sought to impose new surcharges on publishers. The publishers and distributors eventually moved to dismiss Anderson's complaint, arguing that the complaint failed to set forth a plausible basis for finding a conspiracy under *Twombly* and *Iqbal*. The district court ultimately granted the motion and dismissed the complaint, holding that Anderson's antitrust allegations did not meet *Twombly*'s plausibility standard. In its ruling, the district court concluded that the complaint's allegations presented only an "economically implausible antitrust conspiracy" theory based on "sparse parallel conduct allegations."

On appeal to the Second Circuit, Judge Amalya Kearse, writing for a unanimous panel, held that the district court erred in ruling that the alleged conspiracy was facially implausible under the standards set forth in *Twombly* and *Iqbal*. The Second Circuit addressed the proper application of the plausibility requirement: "The question at the pleading stage is not whether there is a plausible alternative to the Plaintiff's theory; the question is whether there are sufficient factual allegations to make the complaint's claim plausible." Further, because "the plausibility standard is lower than a probability standard," there may be "more than one plausible interpretation of a defendant's words, gestures, or conduct." "But on a Rule 12(b)(6) motion *it is not the province of the court to dismiss the complaint*

on the basis of the court's choice among plausible alternatives." *Anderson News LLC v. American Media Inc.*, 680 F.3d 162, 189 (2d Cir. 2012) (emphasis added).

For instance, Plaintiffs have alleged a conspiracy between Defendant officer Robinson and the other tribal Defendants acting in their individual capacity. In paragraph 19 of Amended Complaint (A–24-5), Plaintiffs alleged, based on information and belief, that the tribal Defendants knew exactly who Chueng Yin Sun (the "Queen of Sorts") was; that they deliberately invited her back to play; intending to keep her losses if she lost, but criminally prosecute her if she won in order to get their money back. That is one plausible alternative. Another, is that Sun and her playing partners' return to Foxwoods was a pure coincidence. It was reversible error for the District Court to choose among these plausible alternatives. Furthermore, in light of the Ninth Circuit *Pistor v. Garcia*, precedent, it now appears that the alleged conspiracy to "free–roll" Plaintiffs need not have involved Defendant officer Robinson directly. So long as the tribal Defendants were sued in their individual capacities they can be sued for conspiring among themselves to defraud the Plaintiffs and violate their civil liberties.

B. THE DISTRICT COURT'S *TWIQBAL* ERROR WAS COMPOUNDED BY "LOOPING BACK THROUGH" THE SOVERIGN IMMUNITY ANALYSIS BY FAILING TO FOLLOW *PISTIS V. GARCIA*.

By failing to recognize the authority and precedent of *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015) the District Court was completely oblivious to the fact that tribal officers can be sued in their individual capacities for ordinary torts, not just torts relating to a 42 U.S.C. § 1983 action.

As *Pistor v. Garcia* clarified, *Maxwell v. County of San Diego*, 697 F.3d 941 (9th Cir. 2012) did not involve a violation of the Plaintiff's constitutional rights, it was an ordinary negligence case:

> *Maxwell* held that two paramedics employed by a tribe (the Viejo Band) who allegedly had provided grossly negligent care to a shooting victim were not entitled to tribal sovereign immunity from a state tort action brought against them in their individual capacities. (internal citations omitted) *Maxwell* explained: Tribal sovereign immunity derives from the same common law immunity principles that shape state and federal sovereign immunity. Normally, a suit like this one--brought against individual officers in their individual capacities--does not implicate sovereign immunity. The plaintiff seeks money damages not from the state treasury but from the officer[s] personally. Due to the essential nature and effect of the relief sought, the sovereign is not the real, substantial party in interest. (citations omitted) (internal quotation marks omitted)

Pistor v. Garcia, 791 F.3d at 1113.

There were numerous torts pled in Plaintiffs/Appellants' Amended Complaint that do not necessarily hinge upon the 42 U.S.C. § 1983 action. For instance, it is quite plausible that the tribal Defendants committed intentional fraud

upon Plaintiffs by attempting to "free–roll" them as alleged in paragraph 19 of the Amended Complaint (A–25). Other plausible tort actions against the tribal Defendants include conversion of Plaintiffs' $1.6 million in front money, false arrest, and false imprisonment (A–27). Any of these tort actions are enough to survive a Rule 12(b)(6) dismissal if sovereign immunity can no longer be used by the tribal Defendants as a defense. And if the Second Circuit follows the Ninth Circuit precedent of *Pistor v. Garcia*, they should no longer be able to.

Conclusion

The District Court's dismissal of Plaintiffs/Appellants' Amended Complaint should be reversed as a matter of law, and the Plaintiffs/Appellants' Complaint should be remanded with instructions for the District Court to follow the Ninth Circuit precedent of *Pistis v. Garcia* regarding tribal sovereign immunity.

Dated: March 9, 2016

Respectfully submitted,

By: /s/ Marvin Vining

Marvin Vining
Attorney at Law, LLC
P.O. Box 250
Monticello, Mississippi 39654–0250
Tel: (601) 842–2589

Attorney for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32

I certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,728 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I further certify that the foregoing brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2015 in 14-point font of Times New Roman type style.

Dated: March 9, 2016 By: /s/ Marvin Vining

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHEUNG YIN SUN,
LONG MEI FANG,
ZONG YANG LI

v. 3:14CV01098(JCH)

MASHANTUCKET PEQUOT GAMING ENTERPRISE, ANNE CHEN, JEFF DECLERCK, EDWARD GASSER, GEORGE HENNINGSEN, FRANK LEONE, MICHAEL ROBINSON, MICHAEL SANTAGATA, CHESTER SICARD

JUDGMENT

This matter came on before the Honorable Janet C. Hall, United States District Judge, as a result of defendant's Motion for Judgment on the Pleadings and defendants' Motion to Dismiss.

The Court has reviewed all of the papers filed in conjunction with the Motions and on May 29, 2015, entered an Order, absent objection, granting defendant's Motion for Judgment on the Pleadings, dismissing plaintiff's claims against defendant Michael Robinson; and granting defendants' Motion to Dismiss, dismissing plaintiff's claims against defendants Anne Chen, Jeff DeClerck, Edward Gasser, George Henningsen, Frank Leone, Mashantucket Pequot Gaming Enterprise, Michael Santagata, and Chester Sicard.

Therefore, it is ORDERED, ADJUDGED and DECREED that judgment is entered for the defendants, against the plaintiff and the case is closed.

Entered on Docket 6/1/2015

SPA-2

Dated at New Haven, Connecticut, this 1ST Day of June, 2015.

Robin D. Tabora, Clerk

By /s/ Diahann Lewis
Deputy Clerk