UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CURTIS EDWARDS and VICTORIA EDWARDS,

Plaintiffs

-against- Docket No. 2:17-cv-05869-JMA-SIL

FOXWOODS RESORT CASINO; MASHANTUCKET PEQUOT TRIBAL NATION; MASHANTUCKET PEQUOT TRIBAL POLICE DEPARTMENT; JOHN DOE, being the Security Agent employed by Foxwoods Resort Casino and the individual who detained Plaintiff Curtis Edwards and POLICE OFFICERS JOHN DOES 1-10 and JANE DOES 1-10, MASHANTUCKET PEQUOT TRIBAL POLICE DEPARTMENT, being the individuals who detained and arrested Plaintiff, Curtis Edwards,

Defendants

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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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This Memorandum of Law is in support of the Defendants' Motion to Dismiss, filed herewith on behalf of all Defendants. Specifically, this Memorandum is filed on behalf of Defendants Foxwoods Resort Casino ("Foxwoods")[1], the Mashantucket Pequot Tribal Nation (the "Tribe" or "Tribal Nation"), the Mashantucket Pequot Tribal Police Department ("Tribal Police Department"), John Doe being the Security Agent employed by Foxwoods Resort Casino, and John Does 1-10 and Jane Does 1-10 of the Mashantucket Pequot Tribal Police Department ("Individual Tribal Defendants") (hereinafter collectively referred to as the "Defendants").

SUMMARY OF ARGUMENT

This Court should dismiss Plaintiffs' Complaint because the Court lacks subject matter jurisdiction based on two independent and dispositive grounds. *First*, Plaintiffs do not—*and cannot*—establish subject matter jurisdiction over this matter because there is no basis for federal question jurisdiction, 28 U.S.C. § 1331, or diversity jurisdiction, 28 U.S.C. § 1332. Nor does Plaintiffs' citation to 28 U.S.C. §1343 provide an independent basis for jurisdiction.

Second, dismissal is mandated because this Court lacks subject matter jurisdiction due to the well-settled doctrine of tribal sovereign immunity from suit. And it is equally settled law that such governmental immunity extends to the Mashantucket Pequot Tribal Nation, Foxwoods Resort Casino (to the extent it is even a proper defendant), the Mashantucket Pequot Tribal Police Department, and their officials, representatives and/or employees. *See, e.g., Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357-358 (2d Cir. 2000); *Bassett v. Museum and Research Ctr., Inc.*, 221 F. Supp. 2d 271, 278

[1] Foxwoods Resort Casino is not an entity capable of being sued; rather it is the name of a gaming facility. *See* Affidavit at 7; *see also* Compl. ¶ 8. The Mashantucket Pequot Tribal Nation, also named as a defendant, owns and operates Foxwoods Resort Casino through an arm of the Tribal Nation called the Mashantucket Pequot Gaming Enterprise. Affidavit at 6; Compl. ¶ 8.

(D. Conn. 2002); *Worrall v. Mashantucket Pequot Gaming Enter. d/b/a Foxwoods Resort Casino*, 131 F. Supp. 2d. 328, 329 (D. Conn. 2001).

In addition, Plaintiffs have the burden to establish that the Court has personal jurisdiction over Defendants. Plaintiffs have utterly failed to make this showing.

BACKGROUND

Plaintiffs allege that, on October 6, 2016, a security agent from the Foxwoods Resort Casino, a tribally-owned gaming facility located on the reservation of the Mashantucket Pequot Tribal Nation, and police officers of the Mashantucket Pequot Tribal Police Department unlawfully detained and arrested Plaintiff Curtis Edward for credit card fraud. *See* Compl. ¶¶ 8, 13-15. Plaintiffs also claim that Plaintiff Victoria Edwards was detained as well. *Id*. ¶ 19. Plaintiffs further contend that prior to being removed from the casino, Plaintiffs were released. *See id*. ¶ 22. Plaintiffs further allege that, after returning to their hotel room at the casino, an "unidentified hotel staff person" opened the door for a brief moment, but "abruptly left." *Id*. ¶ 23.

In bringing this suit, Plaintiffs state that the security agent was acting "at all times" within his "scope of employment" for Foxwoods Resort Casino, *id*. ¶ 27, and the tribal police officers were acting "under the direction, supervision and control" of the Tribal Police Department. *Id*. ¶ 44. Most importantly for this Motion to Dismiss, Defendant Mashantucket Pequot Tribal Nation is a federally recognized Indian Tribe with a reservation located within the geographic boundaries of the State of Connecticut. *See* 25 U.S.C. § 1758; *see* Affidavit at 4. The Tribe owns and operates Defendant Foxwoods Resort Casino through Mashantucket Pequot Gaming Enterprise, an arm of tribal government. *See* Affidavit at 6-7. In addition, Defendant Mashantucket Pequot Tribal Police Department is established as the law enforcement agency of the Tribe to have and exercise all of the sovereign law enforcement powers of the Tribal Nation

within the Tribe's Reservation. Title 2 of the Mashantucket Pequot Tribal Laws ("M.P.T.L."), Chapter 2, § 2.[2]

On October 6, 2017, Plaintiffs filed a seven-count complaint, alleging: (1) assault and battery, (2) false arrest and false imprisonment, (3) unlawful detention, (4) false arrest, (5) negligent hiring, (6) discrimination, and (7) trespass. ECF No. 1. On February 20, 2018, Plaintiffs filed a Letter Motion for Extension of Time to serve the summons and complaint. ECF No. 5. The Court granted this motion on March 23, 2018, allowing Plaintiffs to serve the summons and complaint by April 27, 2018. Defendants were served on or about March 7, 2018.

STANDARD OF REVIEW

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Gristede's Foods, Inc. v. Unkechauge Nation*, 660 F. Supp. 2d 442, 464 (E.D.N.Y. 2009) (citing *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). The question of an Indian tribe's amenability to suit and along with its immunity from suit is a jurisdictional inquiry. *Chayoon v. Chao*, 355 F.3d. 141 (2d Cir. 2004); *Garcia v. Akwesasne Hous. Auth.* 268 F.3d 76, 84 (2d Cir. 2001).

This inquiry is one aspect of the federal court's determination of whether it has jurisdiction over a suit asserted against a sovereign. *See Garcia*, 268 F.3d. at 81; *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 28 (1st Cir. 2000). Under this inquiry, the court's authority to exercise jurisdiction over a claim against a sovereign is defined by the sovereign's own consent to be sued, or by a Congressional provision for suit. *See, e.g., F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (finding that the "terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit."); *Kiowa*

[2] Tribal laws are published by West Publishing, accessible on Westlaw, and maintained on the tribal law website at www.mptnlaw.org.

Tribe of Okla. v. Mfg. Technologies, Inc., 523 U.S. 751, 754 (1998) ("an Indian tribe is subject to suit only where Congress has authorized suit or the tribe has waived its immunity."); *U.S. v. U. S. Fidelity & Guar. Co.*, 309 U.S. 506, 514 (1940) (in reference to Indian tribes "[c]onsent alone gives jurisdiction to adjudge against a sovereign"). "On a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists. *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001)." *Chayoon*, 355 F.3d at 143.

Similarly, under a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, "plaintiff has the burden of showing that the court has jurisdiction over the defendant." *In re Magnetic Audiotape Antitrust*, 334 F.3d 204, 206 (2d Cir. 2003). While "pleadings and affidavits are to be construed in the light most favorable to plaintiff," *Allied Dynamics Corp. v. Kennametal, Inc.*, 965 F. Supp. 2d 276, 287 (E.D.N.Y. 2013) (citation omitted), "conclusory statements, without supporting facts, will not suffice." *Alexander v. Porter*, No. 13-CV-6834 SLT JO, 2014 WL 7391683, at *4 (E.D.N.Y. Dec. 29, 2014) (citation and internal quotations omitted).

ARGUMENT

I. This Court Lacks Subject Matter Jurisdiction As There Is No Basis For Federal Question or Diversity Jurisdiction.

"It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978); *see also NASDAQ OMX Group, Inc. v. UBS. Sec., LLC.*, 770 F.3d. 1010, 1018 (2d Cir. 2014). Plaintiffs' Complaint must be dismissed for lack of subject matter jurisdiction because the

Complaint fails to allege a basis for either federal question jurisdiction, 28 U.S.C. § 1331, or diversity jurisdiction, 28 U.S.C. § 1332.

A. No Federal Question Jurisdiction Exists.

Under 28 U.S.C. § 1331, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." Thus, to invoke the Court's federal question jurisdiction, the question of whether the claim arises "under federal law must be determined by reference to the well-pleaded complaint." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (citation and quotations omitted); *See also Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) ("a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law."). If the federal statute cited does not provide a basis for a federal claim, it cannot be relied upon to support a plaintiff's claim for federal question jurisdiction. *See Nowak v. Ironworkers Local 6 Pension Fund,* 81 F.3d. 1182, 1187 (2d Cir. 1996) (finding that the very statute that creates the cause of action also often confers jurisdiction); *O'Toole v. Arlington Trust Co,* 681 F.2d 94, 95-97 (1st Cir. 1982) (finding ERISA statute did not provide a federal claim to the plaintiff, and therefore, court lacked subject matter jurisdiction on the basis of federal question). Because Plaintiffs fail to establish a viable federal question, this Court lacks jurisdiction under 28 U.S.C. § 1331.

Plaintiffs do not cite to any federal law or statute in Claims One (Assault and Battery), Five (Negligent Hiring), Six (Discrimination based on skin color), or Seven (Trespass). Indeed, Plaintiffs' sole reference to any federal law is the "Fourth Amendment" to support Claims Two (false arrest and false imprisonment), Three (unlawful detention) and Four (false arrest).[3] Compl. ¶¶ 34, 42. However, it is settled law that "[a]s separate sovereigns pre-existing the Constitution,

[3] For purposes of this Motion to Dismiss, Defendants assume that Plaintiffs are referring to the Fourth Amendment of the United States Constitution.

tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *see also Talton v. Mayes*, 163 U.S. 376, 384 (1896) (explaining that, because the "powers of local self-government enjoyed by [Indian Nations] existed prior to the constitution," the constitution did not bind them as it did the federal government). This general non-applicability of the Constitution to act as a restraint to tribal action includes, as it must, the Fourth Amendment. Thus, the Fourth Amendment does not apply to Indian tribes or provide a basis for a claim against an Indian tribe or its agencies, employees, and representatives. *See, e.g.*, *United States v. Hunter*, 4 F. App'x 295, 301 (6th Cir. 2001) ("The individual rights provisions of the Bill of Rights are not automatically applied to the conduct of Indian tribes . . . ."); *United States v. Becerra-Garcia*, 397 F.3d 1167, 1171 (9th Cir. 2005) (finding Fourth Amendment does not directly govern the conduct of tribal governments.); *United States v. Manuel*, 706 F.2d 908, 911 n.3 (9th Cir. 1983) (finding Fourth Amendment does not directly apply to Indian tribes). Because the Fourth Amendment does not provide a basis of federal question jurisdiction and Plaintiffs cite no other federal statutes under which their alleged federal claims arise, Plaintiffs have failed to establish any basis for jurisdiction under 28 U.S.C. § 1331.

B. No Diversity Jurisdiction Exists.

Plaintiffs' contention that this Court has jurisdiction pursuant to 28 U.S.C. § 1332 is similarly unavailing. That provision confers jurisdiction in the district courts where the matter is between "citizens of a State and citizens or subjects of a foreign state" and where the amount in controversy exceeds $75,000. 28 U.S.C. § 1332 (a)(2). Because tribes are not generally considered citizens of a state for purposes of diversity jurisdiction, Plaintiffs fail to invoke this Court's jurisdiction under 28 U.S.C. § 1332. *See, e.g., Romanella v. Hayward*, 114 F.3d 15, 16

(2d Cir. 1997); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 27 (1st Cir. 2000); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993).

Romanella v. Hayward is particularly instructive. There, the Second Circuit affirmed the dismissal of a suit against the Mashantucket Pequot Tribe finding an Indian tribe is not a citizen of any state and, therefore, cannot sue or be sued in federal court under the Court's diversity jurisdiction. *Romanella*, 114 F.3d at 16. Similarly, in *Ninigret*, the First Circuit reviewed a suit against the housing authority of the Narragansett Indian Tribe and held that "[a]n Indian tribe [] is not considered to be a citizen of any state", and the presence of an Indian tribe as a party destroys complete diversity. *Ninigret*, 207 F.3d at 27. Further, the *Ninigret* court found that the housing authority, as an arm of the Tribe, should be treated the same as the tribe for jurisdictional purposes. *Ninigret*, 207 F.3d at 27; *see also Worrall v. Mashantucket Pequot Gaming Enter.*, 131 F. Supp. 2d 328, 329-330 (D. Conn. 2001)(finding Mashantucket Pequot Gaming Enterprise was an arm of the Tribe; not a citizen of any state; and therefore could not sue or be sued in diversity jurisdiction).

In the present case, Plaintiffs have brought action against a federally recognized Indian tribe, a tribally-run police department, and a tribal entity. *See* Compl., at ¶¶ 8-12. The Tribal Police Department is a subdivision or department of the Tribe which, for purposes of diversity, should be treated the same as the Tribe. *See* 2 M.P.T.L. Ch. 2, Section 2 (establishing the police department as the law enforcement agency of the Tribe). Although Foxwoods Resort Casino is not an entity capable of being sued, to the extent the Court reads the Complaint broadly to properly name the Mashantucket Pequot Gaming Enterprise (which does business as Foxwoods

Resort Casino), *Worrall* establishes that the Gaming Enterprise, as an arm of the Tribe, is treated the same as the Tribe for diversity purposes.

As in *Ninigret*, *Romanella* and *Worrall*, there is simply no basis for diversity jurisdiction in this matter. Accordingly, this Court lacks subject matter jurisdiction requiring dismissal of this suit.

C. No Jurisdiction Exists Under 28 U.S.C. § 1343.

Plaintiffs also reference 28 U.S.C. § 1343, which simply is not supported by the allegations in Plaintiffs' Complaint and does not support jurisdiction. *See* Compl. ¶ 5 (citing 28 U.S.C. § 1343).

Section 1343 provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (1) [t]o recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in 1985 of Title 42; (2) [t]o recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent; (3) [t]o redress the deprivation, under color of State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. 28 U.S.C. § 1343(a)(1), (2), (3), (4).

As courts have uniformly found, 28 U.S.C. § 1343 must be "tethered to either a substantive statute or the federal constitution." *Falzarano v. U. S.*, 607 F.2d 506, 508-509 (1st Cir. 1979); *see also Olson v. Bd. of Educ. of Union Free Sch. Dist. No. 12, Malverne, New York*, 250 F. Supp. 1000, 1004 (E.D.N.Y. 1966) (noting that, under 28 U.S.C. § 1343, a court's jurisdiction is tied to "infringement of [] Federal civil rights by any State law or regulation").

As previously demonstrated in Section I.A., *infra*, Plaintiffs fail to establish a viable federal claim applicable to Indian tribes. Indeed, other than an inapplicable reference to the Fourth Amendment, Plaintiffs do not cite to any substantive federal laws. Since Section 1343, as with Section 1331 does not create any substantive rights by itself under which a plaintiff can claim relief it cannot serve as the basis of jurisdiction here. Because Plaintiffs have not alleged a viable basis for federal question jurisdiction, Plaintiffs' attempt to invoke the court's jurisdiction under 28 U.S.C. § 1343 fails.

II. Even if This Court Establishes Federal Question Jurisdiction or Diversity Jurisdiction, Tribal Sovereign Immunity Precludes This Court from Exercising Jurisdiction Over Plaintiffs' Complaint.

The United States Supreme Court has repeatedly held that Indian tribes are immune from suit absent an unequivocally expressed abrogation by the U.S. Congress or a clear waiver by the tribe. *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2030-31 (2014); *C&L Enter., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411 (2001); *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The Supreme Court most recently re-affirmed this doctrine in a case brought by the State of Michigan against the Bay Mills Indian Community in an effort to stop gaming that the State believed was outside Indian country and violated the federal Indian Gaming Regulatory Act. *See Bay Mills Indian Cmty.*, 134 S.Ct. at 2030-31. In ruling that tribal sovereign immunity barred the suit, the Court explained:

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

> waiver). *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

Id. at 2030-31.

The Court of Appeals for the Second Circuit and District Court for the District of Connecticut have followed this clear Supreme Court precedent in finding that the Mashantucket Pequot Tribe is a federally recognized Indian tribe, 25 U.S.C. § 1758, and is immune from unconsented suit. *See, e.g.*, *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357-358 (2d Cir. 2000); *Sun v. Mashantucket Pequot Gaming Enter.*, 309 F.R.D. 157, 162 (D. Conn. 2015); *Worrall v. Mashantucket Pequot Gaming Enter.*, 131 F. Supp. 2d 328, 331 (D. Conn. 2001); *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), *aff'd on other grounds*, *Romanella v. Hayward*, 114 F.3d 15 (2d Cir. 1997). Therefore, because there is no indication that Congress abrogated tribal immunity or that the tribe waived its immunity, this Court lacks subject matter jurisdiction to adjudicate Plaintiffs' claims.

Tribal immunity also applies to wholly owned entities and agencies or subdivisions of the Tribe, such as the Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino and the Mashantucket Pequot Police Department. *See Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004); *Bassett*, 204 F.3d at 357-58; *Worrall*, 131 F. Supp. 2d at 331. In *Worrall*, the District Court for the District of Connecticut found that the Tribal Gaming Enterprise is an arm of the Mashantucket Pequot Tribe and, therefore, immune from suit to the same extent as the Tribe. *See Worrall*, 131 F. Supp. 2d at 330-331; *see also Bassett*, 204 F.3d at 358 (noting that if tribal museum was determined to be agency of the tribe, it would be immune from suit); *see also Ninigret*, 207 F.3d at 29 (finding that the housing authority, as an arm of the Tribe, enjoys sovereign immunity from suit to same extent as Tribe). And to the extent that Plaintiffs have

properly named Foxwoods as a defendant, that entity—the Mashantucket Pequot Gaming Enterprise— also shares the Tribe's immunity from suit. Affidavit at 6.

The Mashantucket Pequot Tribal Police Department is also a subdivision or agency of the Mashantucket Pequot Tribal government. Indeed, it was established to conduct the Tribe's law enforcement functions on the Reservation. *See* 2 M.P.T.L. Chapter 2, Section 2. As such, under *Worrall*, the Tribal Police Department shares the Tribe's immunity. *Worrall*, 131 F. Supp. 2d at 330-331; s*ee also Phillips v. Salt River Police Dept*, No. CV-13-798-PHX-LOA, 2013 WL 1797340, at *8 (D. Ariz. Apr. 29, 2013) (recognizing that tribal police departments and tribal police officers, acting in their official capacity, enjoy sovereign immunity); *Lewis v. Propher*, No. 08-2403-JWL, 2008 WL 5381854, at *1 (D. Kan. Dec. 22, 2008) ("[A]ny claim by plaintiff against the defendant tribal police officers in their official capacities is subject to dismissal on the basis of sovereign immunity.").

Finally, in an obvious attempt to avoid the jurisdictional bar of tribal sovereign immunity from suit, Plaintiffs also name Individual Tribal Defendants who were employed or acted on behalf of the Foxwoods Resort Casino and the Mashantucket Pequot Tribal Police Department. Compl. at ¶¶ 9 & 12. However, in *Chayoon*, the Second Circuit reviewed a complaint against "several individuals who either [held] positions on the Mashantucket Pequot Tribal Council or are officers and/or employees of Mashantucket Pequot Gaming Enterprise, which operates the gaming facility known as Foxwoods Resort Casino." 355 F.3d at 143. The court upheld the dismissal of the case on sovereign immunity grounds because the individuals were acting in their official capacity. *Chayoon*, 355 F.3d at 143. Indeed, the court held that a plaintiff could not "circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the

complaint does not allege they acted outside the scope of their authority." *Id.*; s*ee also Sun*, 309 F.R.D. at 162 (Sovereign immunity "extends to all tribal employees acting within their representative capacity and within the scope of their official authority."); *Bassett*, 221 F. Supp. 2d at 280-281; *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 308-310 (N.D.N.Y. 2003) (following *Bassett*'s reasoning to dismiss claims against individual tribal defendants allegedly sued in their individual capacities).[4]

Here, Plaintiffs do not even allege that the Individual Tribal Defendants acted outside the scope of their authority on behalf of Foxwoods, the Tribal Nation, or the Tribal Police Department. Rather, Plaintiffs allege specifically that the tribal security agent and tribal police officers acted within the scope of their employment and under the direction and supervision of their employers. Compl. ¶ 27 ("John Doe Security Agent . . . *at all times* . . . was acting in the scope of his employment.") (emphasis added); *id.* ¶ 39 ("the security agent, Defendant John Doe, *under the authority of defendants Casino and Tribal Council* unlawfully detained plaintiffs without cause.") (emphasis added); *id*. ¶ 44 ("Defendant police officers were *at all times* employees or agents of the defendant Police department and were operating under the direction, supervision and control of the defendant police department.") (emphasis added). In short, based on Plaintiffs' Complaint in light of Second Circuit precedent, the Individual Tribal Defendants share the Tribe's immunity from suit and accordingly, this Court lacks jurisdiction to adjudicate these claims.

[4] The Supreme Court's decision in *Lewis v. Clarke*, 137 S.Ct. 1285 (2017) does not compel a different conclusion. There, a limousine driver employed by the Mohegan Tribe who was involved in an accident outside of the Tribal reservation was the real party in interest rather than the Tribe, itself. Lewis, 137 S.Ct. at 1288.
That case does not change the analysis of the Second Circuit in *Chayoon*, which concerned employees and representatives of a Tribe being sued, as here, in their official capacities for actions allegedly taken on behalf of the sovereign *within* the Reservation.

III. Plaintiffs Have Failed to Carry Their Burden of Establishing that This Court Has Personal Jurisdiction Over Defendants.

It is well-settled that a plaintiff has the burden of showing personal jurisdiction to defeat a Rule 12(b)(2) motion to dismiss. *See, e.g., Sea Tow Servs. Int'l, Inc. v. St. Paul Fire & Marine Ins. Co.*, 779 F. Supp. 2d 319, 322 (E.D.N.Y. 2011) (citing *DiStefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001)). Plaintiffs have failed to carry their burden.

Rule 4 of the Federal Rules of Civil Procedure limit the personal jurisdictional reach of a federal court to those subject to the jurisdiction of the state court where the federal court is located. *See Spiegel v. Schulmann*, 604 F.3d, 72, 76 (2d Cir. 2010) (A district court's personal jurisdiction is determined by the law of the state in which the court is located."). *See also Fed. R. Civ. P*. 4(k)(1)(A) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: … who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . . .").

To establish personal jurisdiction, Plaintiffs must demonstrate, *inter alia*, that the exercise of personal jurisdiction in a particular case "comport[s] with constitutional due process principles." *Waldman v. Palestine Liberation Org*., 835 F.3d 317, 327 (2d Cir. 2016) (citations and quotation omitted). This means that a State – as well as a federal court within that State may "exercise personal jurisdiction over an out-of-state defendant if the defendant has certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011) (citations and quotations omitted). Plaintiffs have not and cannot carry this burden.

Plaintiffs have utterly failed to allege facts which can be the basis of personal jurisdiction that comport with constitutional due process principles. Except for a mere conclusory statement

that the Tribe "conducts business within the District of this Honorable Court," Compl. ¶¶ 8, 10, Plaintiffs fail to allege any facts to support such an allegation and, thus, fail to establish personal jurisdiction. *Alexander v. Porter*, No. 13-CV-6834 SLT JO, 2014 WL 7391683, at *4 (E.D.N.Y. Dec. 29, 2014) (granting motion to dismiss because conclusory statements, such as "[defendant] does business in New York," does not satisfy plaintiff's burden of showing that personal jurisdiction exists); *Mirman v. Feiner*, 900 F. Supp. 2d 305, 309 (E.D.N.Y. 2012) ("[T]he Court is not bound by conclusory statements, without supporting facts.") (citing *Jazini v. Nissan Motor Co. Ltd.*, 148 F.3d 181, 185 (2d Cir. 1998)). Plaintiffs do not sufficiently contend—*or let alone establish*—that any of the defendants have any contacts with New York and certainly not the constitutionally required minimum contacts. Even based on the most favorable reading of the Complaint, there is simply no showing here that Defendants have "sufficient minimum contacts with the forum to justify the court's exercise of personal jurisdiction over the [D]efendant[s]." *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 331 (2d Cir. 2016). Accordingly, this case should be dismissed on the independent ground that this Court lacks personal jurisdiction over Defendants.

CONCLUSION

For the foregoing reasons, the Court should grant Defendant's Motion to Dismiss for lack of subject matter jurisdiction or, alternatively, on the grounds of tribal sovereign immunity. This case should also be dismissed for want of personal jurisdiction over Defendants.

Dated: April 27, 2018

Respectfully submitted,

/s/ Keith M. Harper
Keith M. Harper (KH7432)

Kilpatrick Townsend & Stockton LLP
607 14th Street, N.W., Suite 900
Washington, D.C. 20005
(202) 508-5800
kharper@kilpatricktownsend.com

Attorney for Defendants