DOCKET NO.: KNL-CV-20-5021343-S	:	**SUPERIOR COURT**
JOHN COLBUT, ET AL	:	**J.D. OF NEW LONDON**
V.	:	**AT NEW LONDON**
RODNEY BUTLER, ET AL	:	**APRIL 17, 2020**

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

The Defendants submit this Memorandum of Law in support of their Motion to Dismiss filed herewith and pursuant to Connecticut Practice Book Sections 10-30, et seq. for lack of subject matter jurisdiction. This Court lacks subject matter jurisdiction over the Plaintiffs' Complaint for two independent reasons. First, the Court lacks jurisdiction based on the doctrine of tribal sovereign immunity from suit. Second, the Court lacks jurisdiction under the U.S. Supreme Court decision of *Williams v. Lee*, 358 U.S. 217 (1959) which provides that State courts lack jurisdiction over claims arising on an Indian Reservation when an exercise of jurisdiction would infringe on the right of an Indian tribe and its members to be self-governing; in other words, would infringe on tribal sovereignty. These defects in the court's jurisdiction are exemplified by the Complaint, itself. The Complaint alleges facts that demonstrate the wholly internal tribal nature of this claim which is, at its core, against the Mashantucket Pequot Tribal Nation ("Pequot Tribe" or

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"Tribal Nation") including that: 1) It arises on the Tribe's Reservation; 2) It is brought against Tribal officials in their official capacities based on their positions with the Tribe; 3) It concerns Tribal law and policy governing Tribal housing for Tribal Members on the Tribe's Reservation; 4) It concerns Reservation property held in trust by the United States on behalf of the Tribe; and 5) It is a direct attack on and request to vacate a decision issued by the Mashantucket Pequot Tribal Court (the "Tribal Court").

I. Factual Background

The Plaintiffs are two individuals: John Colebut who is a member of the Pequot Tribe, and his wife, Karen Colebut. Compl. ¶ 1. The Plaintiffs have filed a one-count Complaint against ten defendants including six individuals who are either current or past members of the Mashantucket Pequot Tribal Council, the governing body of the Tribal Nation[1]; three individuals who are employed by the Tribal Nation in high level positions in the Office of Legal Counsel and the Finance Department; and an individual Tribal Member who is employed by the Tribal Nation as the Director of Public Affairs and allegedly the "high bidder" at an auction ordered by the Tribal Court (hereinafter collectively referred to as "Tribal Defendants").

[1] The Constitution and By-Laws of the Mashantucket (Western) Pequot Tribe, Article VI, Section 1 (www.mptnlaw.com, visited April 17, 2020).

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The Complaint alleges that Tribal Member John Colebut participated in a Tribal Nation housing program on the Mashantucket Pequot Reservation, and under the Tribal program, he was assigned a lot of land on the Reservation where he allegedly built a home funded through a loan from Santander Bank. Compl., ¶¶ 9&10. The Complaint alleges that Tribal Member John Colebut "suffered a decline in income" in and prior to 2014 (¶ 11), and apparently was unable to pay his mortgage loan with Santander Bank. The Bank started collection and/or foreclosure proceedings under Tribal Law in the Tribal Court where John Colebut was represented by legal counsel. Compl., ¶¶ 12, 13 & 17. The Plaintiffs allege that after years of litigation, the Tribal Court ultimately ordered an auction of the property, wherein another Tribal Member allegedly was the successful bidder. Compl., ¶¶ 6, 19, 20-22.

Throughout the Complaint the Plaintiffs allege various things happened pursuant to Tribal Nation programs, policies and laws, making various allegations about the "Tribal Nation." For instance, the Plaintiffs allege that it was the "Tribal Nation" that assisted other Tribal Members in housing matters (¶ 15); the "Tribal Nation" purchased other Elders homes (¶ 16); the Tribal Nation filled in a pool at Plaintiff's property to help him

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qualify for a USDA loan but charged the expense to Plaintiffs (¶ 17[2]); the "Tribal Nation" refused to allow Plaintiff Karen Colebut to be listed on the assignment as she was not a Tribal Member (¶ 18); the "Tribal Nation's Office of Legal Counsel" allegedly failed to inform him about certain matters until the day of closing (¶ 18); the Tribal Nation's court system allegedly allowed the auction to proceed and denied his appeal (¶ 21); and the "Tribal Nation", acting through a Tribal Councilor, who they allege was responsible for tribal housing programs, refused to assist the Plaintiffs (¶ 23). It is clear from the allegations that this is about a Tribal Member complaining that the Tribal Nation did not do enough to help him maintain his home on the Tribal Reservation pursuant to Tribal law, policies and programs.

As to the actual legal claim or cause of action alleged, the Complaint fails to state a recognizable claim against the Tribal Defendants. Rather, in the only paragraph that even attempts to allege legal claims, the final paragraph says that all of the "acts and/or omissions" stated in the Complaint "were known to and acquiesced in by the *defendant Tribal Council members*" (emphasis added) and violate "the Tribal Nation Mission Statement, laws, resolutions, policies and programs with the result of singling out Plaintiffs and their minor child for unequal treatment, denying them due process, intentionally

[2] Plaintiffs' Complaint is mis-numbered, having two paragraphs designated as paragraph 17; the cite references the second paragraph 17.

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inflicting emotional distress and damage." Compl., ¶ 26. The Plaintiffs don't even attempt to make legal claims against the non-Tribal Council member defendants. And, as to the Tribal Council Defendants, it appears that they are being named as a way of suing the Tribal Nation for unspecified "violations" of the Tribal Nation's Mission statement, tribal laws, policies and programs, all of which resulted in "unequal treatment"; unidentified "due process"[3] violations; and intentional infliction of emotional distress.[4] Further supporting that the Complaint is, in essence, against the Tribal Nation, the Plaintiffs seek "an order vacating the auction," referring to an auction ordered by the Tribal Court.

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[3] The Plaintiffs do not identify a legal basis (statutory or otherwise) for the claims of unequal treatment and lack of due process. It is well established, however, that neither state nor federal constitutional provisions regarding equal protection or due process are applicable to Indian tribes. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *see also Talton v. Mayes*, 163 U.S. 376, 384 (1896). The only possible basis for such a claim would be the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 ("ICRA"), which applies to Indian tribes in exercising powers of self-government, but which cannot be brought without an express waiver of tribal sovereign immunity. *See Santa Clara Pueblo v. Martinez*, 326 U.S. 49. ICRA does not provide a congressional abrogation of sovereign immunity, except for claims for a writ of *habeas corpus* in the federal courts. *Santa Clara Pueblo*, *supra*, 326 U.S. at 70; 25 U.S.C. § 1303.

[4] Plaintiffs fail to properly allege such a claim against the Tribal Defendants, which requires allegations demonstrating Defendants intended to inflict emotional distress or they knew or should have known that emotional distress was the likely result of their conduct; defendants' conduct was extreme and outrageous; defendants' conduct was the cause of the Plaintiffs' distress; and that the distress was severe. *Appleton v Board of Educ. Town of Stonington*, 254 Conn. 205, 210 (2000).

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Finally, the Plaintiffs attempted to serve all Tribal Defendants by leaving a single copy of the summons and Complaint at the Tribal Nation's Government office where the Tribal Council offices and Tribal Legal department are located on the Reservation. *See* Summons and Return of Service.

II. Legal Arguments

A. Standard of Review

"A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court ... A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." *Beecher v. Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 134 (2007). "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Internal quotation marks omitted.) *Kizis v. Morse Diesel International, Inc.*, 260 Conn. 46, 51, 794 A.2d 498 (2002).

"Depending on the record before it, a trial court ruling on a motion to dismiss for lack of subject matter jurisdiction pursuant to Practice Book § 10–31(a)(1) may decide that motion on the basis of: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed

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facts plus the court's resolution of disputed facts.... Different rules and procedures will apply, depending on the state of the record at the time the motion is filed." (Citation omitted; internal quotation marks omitted.) *Conboy v. State,* 292 Conn. 642, 651, 974 A.2d 669 (2009)." *Lewis v. Clarke*, 320 Conn. 706, 711 (2016).

B. This Court Lacks Subject Matter Jurisdiction due to Tribal Sovereign Immunity From Suit.

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.*, 572 U.S. 782, 788-789 (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). Most recently, the Supreme Court 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.*, 572 U.S. at 788-89. 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.

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> 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 788-89.

The Court of Appeals for the Second Circuit, the District Court for the District of Connecticut, the Connecticut Appellate Court and the Connecticut Superior Courts have all followed this clear U.S. 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); *Chayoon v. Sherlock*, 89 Conn. App. 821, 826 (2005); *Sevastian v Sevastian*, 73 Conn. App. 605, 606, 607 n.3 (2002). The Connecticut Supreme Court also has recognized and applied this clear precedent in the context of cases against the Mohegan Tribe of Indians of Connecticut ("Mohegan Tribe"), the only other federally

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recognized Indian tribe in Connecticut. *Beecher v. Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 134 (2007); *Kizis v. Morse Diesel International, Inc.*, 260 Conn. 46, 51 (2002).

The Second Circuit, District of Connecticut, and the Connecticut Supreme and the Appellate Courts have also held that plaintiffs cannot avoid the jurisdictional bar of tribal sovereign immunity by simply naming individuals as defendants instead of the Tribe, itself. *See Kizis v. Morse Diesel*, *supra*, 260 Conn. at 54; *Drabik v. Thomas*, 184 Conn. App. 894, 903 (2018); *Chayoon v. Sherlock*, 73 Conn. App. at 826-831; *Chayoon v. Chao*, 355 F.3d at 143; *Bassett v. Mashantucket Pequot Museum and Research Center, Inc.*, 221 F.Supp.2d 271, 276-281 (D. Conn. 2002).

Here, the Plaintiffs name individual tribal officials as defendants instead of naming the Tribe in an apparent attempt to avoid tribal immunity. However, the Plaintiffs cannot avoid tribal immunity in this manner. They describe the Defendants in relation to their official capacities and attempted to serve process through the Tribe's legal office by leaving a single copy of the summons and Complaint at the Tribal governmental center. *See* Return of Service. The allegations concern actions that the Plaintiffs claim the "Tribal Nation" took or did not take, and which the Tribal Council Defendants allegedly knew about based on their positions. Further, the relief sought includes "an order vacating the

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auction,"[5] which refers to an order issued by the Mashantucket Pequot Tribal Court and concerns Tribal law and Tribal trust property located within the Reservation. The allegations concern a Tribal Member housing program for property located within the Tribal Reservation, with the Plaintiffs' complaints directed to the application of the Tribal housing law and policy to Tribal Member John Colebut by the Tribal Nation. The Requested Relief, among other things, asks for a reversal of a Tribal Court decision that ordered an auction of Tribal Member John Colebut's home pursuant to a foreclosure action brought by Santander Bank under Tribal Law.

Given the fact that: the allegations of the Complaint focus on what the "Tribal Nation" did or did not do; the description of the Defendants relate to their official capacities; the allegations concerning individual Defendants relate to the Defendants' official duties on behalf of the Tribal Nation; service of the Complaint as to all Defendants was attempted by leaving a single copy of the summons and Complaint with the Tribe's Legal Office at the government center of the Tribe; and the relief sought includes an order

[5] There is absolutely no authority for a state court to "vacate" a decision of a separate sovereign such as the Tribe, and the Superior Court has found that a judgment of the Mashantucket Pequot Tribal Court should be afforded res judicata and/or collateral estoppel effect by the state courts in the context of a tort claim that was brought in state court after a claim was brought in and decided by the Tribal Court. *See Cooper v. Discount Scooters, LLC*, 54 Conn. L. Rptr. 725, 2012 WL 4902694 (2012)(Superior Court, District of New London) (Parker, J.).

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to vacate a Tribal Court order, there can be no doubt that the Plaintiffs name Defendants in their official capacities in an attempt to sue the Tribal Nation and obtain relief against the Tribal Nation for alleged actions or inaction of the Nation under its Reservation housing program.[6]

Precedent from the U.S. Supreme Court, the Connecticut Supreme and Appellate Courts, the Court of Appeals for the Second Circuit and the District Court for the District of Connecticut, all provide that a Plaintiff cannot avoid the jurisdictional bar of tribal sovereign immunity from suit by suing individual officials in their official capacities. *See, e.g., Lewis v. Clarke,* 581 U.S. ___, 137 S.Ct. 1285, 1291, 197 L.Ed.2d 631 (2017)(explaining that "lawsuits brought against employees in their official capacity 'represent only another way of pleading an action against an entity of which an officer is an agent' and they may also be barred by sovereign immunity"); *Kizis v. Morse Diesel Int'l,* 260 Conn. at 54 (quoting *Romanella v. Hayward*: "doctrine of tribal sovereign immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority" and finding that the Mohegan Court is the exclusive forum for tort claims against the tribe and its employees because that is where the

[6] The Tribe has waived its immunity in Tribal Court for claims including tort and civil rights claims against the Tribe, itself. *See* Title 12 M.P.T.L. ch. 1, § 2; Title 20 M.P.T.L. ch. 1. The Tribal Forum is the exclusive forum to hear a claim such as the ones brought here. *See, generally, Kizis v. Morse Diesel Intl, supra.*

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sovereign has consented to be sued); *Drabik v Thomas,* 184 Conn. App. 238 (2018)(citing to *Lewis v. Clarke* for the conclusion that individual tribal officials sued in their official capacities may assert tribal sovereign immunity from suit, and finding that two Mohegan tribal officials sued related to their official duties were immune from suit); *Chayoon v. Sherlock,* 89 Conn. App. 821 (2005)(applying sovereign immunity to individual officials and employees of the Mashantucket Pequot Tribe and its enterprise when sued in their representative capacities and seeking relief from a wrongful termination claim); *Chayoon v. Chao,* 355 F.3d 141 (2d Cir. 2004)(holding that a plaintiff "cannot circumvent tribal immunity by merely naming officers or employees of the Tribe" when the complaint concerns actions taken in defendants' official or representative capacities within scope of authority); *Bassett v. Mashantucket Pequot Museum & Research Center*, 221 F.Supp.2d 271, 277 (D. Conn. 2002)(dismissing claims against two tribal employees and officials of the Tribe's museum for claims made against them in their representative capacity and within scope of their official authority).

The most recent case of the Connecticut Appellate Court finding the Connecticut courts lack jurisdiction due to tribal sovereign immunity and its application to claims naming individual tribal officials is the decision in *Drabik v. Thomas, supra,* 184 Conn. App. 238. In that case, the plaintiff brought a bill of discovery against Mohegan tribal

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officials, including the deputy tribal historic preservation officer and the tribal historic preservation officer, challenging actions that they took in their official capacities on behalf of the tribe. After determining that sovereign immunity applied to a Bill of Discovery in the same manner as it applies to other claims or lawsuits, the Court explained that tribal sovereign immunity applied to the individual tribal officers. 184 Conn. App. 245-249. In coming to this conclusion, the Appellate Court relied on the fact that the allegations of the complaint described the individuals as officers of the tribe, and that all the actions they took were pursuant to their authority as tribal historic preservation officers. Further, the Court noted that service of the petition for the bill of discovery was made on the Tribe's attorney general. *Id.* at 248-49. Based on these facts the court determined that the suit was against the officials in their official capacities and affirmed the dismissal of the suit on the basis of sovereign immunity.

Similarly, here, the Plaintiffs have sued the tribal officials in their official capacity. The allegations of the Complaint demonstrate a wholly internal Tribal matter – concerning a Tribal housing program, Tribal laws and policies, a Tribal court decision and allegations addressed to the actions or inactions of the Tribal Nation. Further, the individuals are all named and described in relation to their official positions for the Tribe and related to their

official duties.[7] Moreover, the Return of Service demonstrates that the Plaintiffs attempted service of process by leaving a single copy of the summons and Complaint with the Tribe's legal office at the Tribe's government center. All of these facts, as in the *Drabik* case, support a determination that the suit is against the named individuals acting in their official capacities[8] and that sovereign immunity bars jurisdiction.

The Plaintiffs do not allege, nor could they, that the Tribe has waived its immunity for this suit in state court. And, the Plaintiffs fail to point to any applicable abrogation of

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[7] While the Complaint is unclear as to Defendant Potter who allegedly was the Tribal Member who successfully bid on the house at the auction being challenged by this suit, she is also a Tribal official and the Plaintiffs attempted to serve her in the same manner they attempted to serve all of the other Defendants – through a single summons and Complaint left for the Tribe's Legal Department at the Tribal Community Center which is the location of the offices of the Tribal Government.

[8] Any potential arguments that Plaintiffs might make to the contrary are futile since, among other things, service of process is wholly insufficient for personal capacity claims and any such claims must then be dismissed for insufficient service of process. *See, e.g., Davis v. Mara*, 587 F.Supp.2d 422, 425-26 (D.Conn. 2008)(holding that state officials sued in their personal capacities must be served pursuant to Connecticut General Statutes § 52-57(a) and not by serving the State Attorney General's Office, which is only appropriate for official capacity claims); *Nelson v. Stop & Shop Cos.*, 25 Conn. App. 637, 641, cert denied, 220 Conn. 924 (1991)("When a person upon whom service is to be made is designated by statute, service upon any other person as a purported representative is inadequate"). Service was made by leaving one summons and Complaint for the Tribe's legal department at the Tribe's government offices. While it is unclear that a state marshal has authority to make any service on the Reservation in a case such as this, even if we assume for purposes of argument that a state marshal could make service under state law, the service of one single Complaint by leaving a copy with the legal department is insufficient to serve an individual for personal liability. *See* Connecticut General Statutes § 52-57.

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tribal immunity by Congress. Without a waiver or abrogation, this Court cannot proceed. While this Court lacks jurisdiction over the Plaintiffs' Complaint, the Tribal Nation has waived its immunity from suit in the Tribal Court for certain claims. *See* Titles 12 (Civil Actions including tort claims) and 20 (Civil Rights Code) of the Mashantucket Pequot Tribal Laws. Accordingly, it is the Plaintiffs' choice to attempt to pursue relief in a court without jurisdiction.

C. In Addition to and Separate from Sovereign Immunity, U.S. Supreme Court Precedent Prohibits this Court from Exercising Jurisdiction over this Complaint brought by a Tribal Member against Tribal Officials and Tribal Members concerning a Tribal Housing Program, Tribal Law and Policy, a Tribal Court decision, all related to Tribal Trust Property on the Tribe's Reservation.

In 1959, the United States Supreme Court held that State courts do not have jurisdiction over claims arising within Indian country when the exercise of jurisdiction would infringe on the Tribe's right to be self-governing – infringe on tribal sovereignty. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). In explaining its reasoning for the lack of state court jurisdiction, the Court stated: "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent [i.e., plaintiff] is not an Indian.... If this power [of Indian governments over their territory] is to be taken away from them, it is

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for Congress to do it." *Id.* at 223; *see also Navajo Nation v. Dalley*, 896 F.3d 1196, 1204 (10th Cir. 2018)("It is axiomatic that absent clear congressional authorization, state courts lack jurisdiction to hear cases against Native Americans arising from conduct in Indian country.")

In *Williams v. Lee*, the Supreme Court reviewed a case brought by a federally licensed non-Indian operator of a store on the Navajo Reservation against Navajo tribal members to collect a debt owed for the sale of goods at the store. In coming to its conclusion that the Arizona state court lacked jurisdiction over the matter, the Supreme Court reviewed the history in this country of Tribal Nations being separate governments and the holding in *Worcester v. Georgia*, 6 Pet. 515, 8 L.Ed. 483 (1832), that the state laws of Georgia had no force or effect within the Cherokee Reservation. The court found that absent an express authorization from Congress, states lacked authority to regulate and hear matters arising on the Reservation. *Id.* at 219-221 ("Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. State of Georgia* had denied.").

The Supreme Court then looked to the Navajo Nation and its court system and noted that:

> Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants. No Federal

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> Act has given state courts jurisdiction over such controversies. In a general statute Congress did express its willingness to have any State assume jurisdiction over reservation Indians if the State Legislature or the people vote affirmatively to accept such responsibility. . . .
>
> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. Cf. Donnelly v. United States, supra; Williams v. United States, supra. The cases in this Court have consistently guarded the authority of Indian governments over their reservations ....

Williams v. Lee, 358 U.S. at 221-223.

The Connecticut Supreme Court has recognized these federal Indian law principles in a case concerning a claim against officials of the Mohegan Tribe of Indians of Connecticut ("Mohegan Tribe"). *Kizis v Morse Diesel International, Inc.*, 260 Conn. 46, 52-53 (2002); *see also Golden Hill Paugussett Tribe of Indians v. Southbury*, 231 Conn. 563, 574-575 (in a case concerning a state recognized tribe, the Court cited *Williams v Lee*, among other Supreme Court decisions, in recognizing the prohibition against state courts "unlawfully infring[ing] on the right of reservation Indians to make their own laws and be ruled by them."). The *Kizis* court explained:

> We begin with the premise that "Indian tribes are 'domestic dependent nations' which exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe,* supra, at 509, 111 S.Ct. 905, citing *Cherokee Nation v. Georgia* 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831). Because Indian tribes possess this inherent sovereignty they are

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> allowed to form "their own laws and be ruled by them." (Internal quotation marks omitted.). *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). "Tribal powers of self-government ... are observed and protected ... to insure continued viability of Indian self-government insofar as governing powers have not been limited or extinguished.... The exercise of tribal governing power may ... preempt state law in areas where, absent tribal legislation, state law might otherwise apply." (Internal quotation marks omitted.) *Schaghticoke Indians of Kent, Connecticut Inc. v. Potter*, 217 Conn. 612, 628, 587 A.2d 139 (1991).

Kizis, 260 Conn. at 52-53.

In the Complaint before this Court, the Plaintiffs have brought suit against Tribal officials and Tribal Members concerning a Tribal Government housing program related to Tribal Trust Land located on the Tribe's federal Reservation, involving Tribal laws and policies, and a Tribal Court decision. This is a Complaint by a Tribal Member against his Tribal Government concerning a Tribal Housing Program – it is hard to imagine a more internal tribal matter where an exercise of state jurisdiction would infringe on the right of the Tribe to govern itself and its territory under tribal law. The Plaintiffs are essentially seeking a reversal of the foreclosure decision and auction order by the Tribal Court under Tribal Law. Although they name individual Tribal Officials as defendants, the allegations, the relief sought and the way they served process all confirm that they are essentially seeking relief from the Tribe and from a Tribal Court order. *See Santander Bank v. Colebut*, 6 Mash. Rep. 409 (2017)(decision by Tribal Court Judge Londregan ordering an

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auction in the foreclosure case against John Colebut); *see also Drabik v. Thomas*, 184 Conn. App. 894, 903 (2018) (Appellate Court reviewed a bill of discovery filed against Mohegan tribal officials and found that the Superior Court had correctly dismissed based on sovereign immunity because the officials were sued in official capacity given the nature of the allegations and the fact that the petition for the bill of discovery was served on the Attorney General for the Mohegan Tribe). The allegations present a case that concerns an internal Tribal matter, which not only wholly arises on the Reservation but actually concerns the use and occupancy of Reservation land and a Tribal governmental housing program for its Tribal Members. This case presents a perfect example of when the U.S. Supreme Court prohibits an exercise of state jurisdiction because such an exercise would infringe on tribal self-governance.

As noted in *Williams v. Lee*, the only time a state court could exercise jurisdiction is if Congress expressly granted such authority. In *Williams v. Lee*, the Court discussed the federal statute commonly known as Public Law 280, which granted five, and later six, states (not including Connecticut) "jurisdiction over offenses" and "civil causes of action". *See generally,* 18 U.S. C. §1162(a); 25 U.S.C. §§ 1321(a), 1322(a); 28 U.S.C. § 1360(a). In 1968 Congress repealed, in part, and amended Public Law 280 to require any further

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assumptions of state jurisdiction be subject to consent by the affected Indian tribe through a tribal election. *See* 25 U.S.C. §§ 1321(a), 1322(a), 1326.

The Supreme Court has interpreted the impact and scope of this legislation, and found that on the civil side, the legislation does not grant authority over Indian tribes or grant states regulatory authority over Indian reservations; rather, the legislation grants the affected states jurisdiction over private civil causes of action between Indians or to which an Indian is a party. *See Bryan v. Itasca County*, 426 U.S. 373, 379-393 (1976)(court found Public Law 280 did not grant states authority to tax Indians on reservations). More particularly, the Supreme Court explained that Public Law 280 was enacted to address "the problem of lawlessness on certain Indian reservations and the absence of adequate tribal institutions for law enforcement. See Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservations Indians, 22 U.C.L.A L.Rev. 535, 541-42 (1975)." *Bryan v. Itasca*, 426 U.S. at 379. Therefore, the Court explained that the main focus of Public Law 280 was the criminal provisions providing states with "criminal jurisdiction over offenses committed by or against Indians on the reservations". *Id.* at 380. On the civil side, there is an absence of legislative history including a complete absence of any mention of a grant of authority to states generally over civil matters. Rather, as the Court concluded: "Piecing together as best we can the sparse legislative history of § 4, subsection (a) seems to have

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been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes" and "authorizes application by the state courts of their rules of decision to decide such disputes" involving private persons or private property. *Id.* 383-384.

Finally, the Supreme Court explained that "nothing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private voluntary organizations' . . . a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments. The Act itself refutes such an inference: **there is notably absent any conferral of state jurisdiction over the tribes themselves, ...**" *Id.* at 388-389 (emphasis added).

As to the Pequot Tribe, Congress enacted the Settlement Act in 1983, which, among other things, resolved certain land claims and provided that "Notwithstanding the provision relating to a special election in section 406 of the Act of April 11, 1968 (82 Stat. 80; 25 U.S.C. 1326), the reservation of the Tribe is declared to be Indian country subject to

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State jurisdiction to the maximum extent provided in title IV of such Act." *See* Public Act 98-134, 97 Stat. 851, Sec. 6, previously codified at 25 U.S.C. § 1755 (Mashantucket Pequot Indian Claims Settlement Act, hereinafter called "Settlement Act"). The reference to "title IV of such Act" refers to the 1968 Civil Rights Act that repealed, in part, and amended Public Law 280 to require Indian tribes to consent to assumptions by States of criminal and civil jurisdiction. *See* 25 U.S.C. §§ 1321, 1322, 1326.

In *Charles v. Charles*, 243 Conn. 255 (1997), the Connecticut Supreme Court held that the language in the Settlement Act allowed the state court to exercise jurisdiction over a divorce cause of action involving a tribal member who lived on the Mashantucket Pequot Reservation and a Rhode Island resident. The Court followed an earlier decision involving criminal jurisdiction in finding that the language of the Settlement Act eliminated the Indian tribe's consent requirement when it eliminated the method of consent. *Id.* at 262, citing, *State v. Spears*, 234 Conn. 78, 662 A.2d 80, *cert denied*, 516 U.S. 1009 (1995). Ultimately, the State Supreme Court held that because the Settlement Act conferred the jurisdiction allowed under 25 U.S.C. § 1322, the tribal member defendant was subject to the provisions of Connecticut's divorce statute and the Superior Court had jurisdiction to hear and determine that private cause of action between the tribal member and his non-resident spouse to the same extent as it would over a Connecticut resident. *Id.* at 266.

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The Complaint before this Court is wholly distinguishable from the claim in *Charles v. Charles* as it is not a private civil dispute between Indians or to which an Indian is a party. Rather, this is a matter that not only arises wholly on the Reservation of the Tribe[9] but involves Tribal Trust land, Tribal law and policy, a Tribal Court decision and is brought against Tribal Officials as an attempt to bring a complaint against the Tribe, itself. This is an internal complaint by a Tribal Member against his Tribal Government and seeking a reversal of a Tribal Court order concerning a Tribal house on the Reservation. Nothing in the Settlement Act or the provisions of federal law referenced therein give state courts jurisdiction over a matter such as this. *See Bryan v. Itasca County*, *supra.* at 389 ("there is notably absent any conferral of state jurisdiction over the tribes themselves"); *see also Greenidge v. Volvo Car Finance, Inc.*, 28 Conn. L. Rptr., 701 A.2d 650, 2000 WL 1281541 (1997)(explaining that the holding in *Charles v. Charles* only concerns state jurisdiction in criminal or civil cases involving individual members of the Tribe; **not "state jurisdiction over civil causes of action against the Tribe itself, or against the agents of the Tribe acting in their representative capacity.")**

[9] It is unclear where the divorce action in *Charles v Charles* arose. While the tribal member involved allegedly lived on the Reservation, the other party was a Rhode Island resident, and it is not clear that while married they ever lived on the Reservation or even in the State of Connecticut.

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Here, the Plaintiffs are suing individuals in their official capacities and complain about actions taken by the "Tribal Nation" or by a Tribal Council Member in his or her capacity as a member of the governing body of the Tribe. *See* Section I of this Brief outlining factual allegations. The fact that the Plaintiffs' claims are against these Tribal Officials in their official capacities is further demonstrated by the paragraph that attempts to state their legal claims and the fact that service was attempted through serving one complaint at the Tribal Nation's government headquarters. *See* Compl., § 26; Sheriff's Return of Service. The Plaintiffs claim that all the actions alleged by the Tribal Nation "were known to and acquiesced in" by the Tribal Council Defendants, not any other Defendants, and then claim "unequal treatment" and lack of "due process." Compl. § 26. Claims such as equal protection and due process are brought against governments. For tribal governments, the only way to bring such claims is pursuant to the Indian Civil Rights Act, and those claims are only as to Tribes when acting in a self-governing capacity. 25 U.S.C. §§ 1301-1302. While the Pequot Tribe has adopted its own civil rights code and waived its immunity from suit in the Tribal Court for claims, *see* Title 20 M.P.T.L. ch. 1, such that the Plaintiffs could have brought such claims there, the State court has no jurisdiction over claims against the Tribe and/or its Tribal Officials in their official capacities.

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The State Superior Courts have, on a few occasions, applied a test to determine whether an exercise of jurisdiction would infringe on the Tribe's sovereignty and right to be self-governing. *See Cuprak v. Sun Int'l Hotels Ltd.,* 20 Conn. L. Rptr. 625, 1997 WL 663299 (1997) (in case by non-Indian employee against Connecticut corporations for wrongful discharge, among other claims, court adopted a test that other state courts had adopted to determine whether an exercise of jurisdiction would infringe on tribal sovereignty); *Conroy v. Foxwoods Dealers' Toke Committee*, 24 Conn. L. Rptr. 169 (1999)(applied three-part infringement test in case brought by non-member Connecticut residents against other residents and a voluntary association whose members all live in Connecticut); *Drumm v. Brown*, 26 Conn. L. Rptr. 185, 2000 WL 73277 (2000)(applying three-part test to determine whether state court had jurisdiction over claim by non-members against non-member individuals including one tribal member); *Fournier Irrigation, LLC v. Jay's Landscaping, LLC*, 32 Conn. L. Rptr. 551, 2002 WL 19492167 (2002)(applying the three-part test to determine whether court's exercise of jurisdiction would infringe on the Mohegan Tribe's sovereignty in a case brought by a state LLC against another state LLC related to the installation of an irrigation system on the Tribe's reservation). In these cases, the Superior Court borrowed a test used by other state courts in reviewing three factors: "(1) whether the parties involved are Indians or non-Indians; (2)

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whether the cause of action arose within the Indian reservation; and (3) the nature of the interest to be protected." *Cuprak*, *supra,* (citing cases from New Mexico, Iowa, North Carolina, and Minnesota). Unlike the previous Connecticut cases that have applied this test and found no infringement, here all factors support a finding of lack of jurisdiction. The parties involved are mostly Tribal Members, and the three defendants who are not members of the Tribe are Tribal Officials who work for the Tribe and are being sued in their official capacities. Also, while one of the Plaintiffs is not a Pequot Tribal Member, she is a Tribal Member spouse who lived on the Reservation in Tribal housing. Importantly, the cause of action (if there is a recognizable claim, which is doubtful) not only arose on the Reservation but concerns a Tribal housing program for Tribal Members regarding Tribal Reservation land and the application of Tribal laws by the Tribal Court. All of this leads to the inescapable conclusion that Tribal self-governance is at the heart of this lawsuit, and for the state court to exercise jurisdiction and even entertain a request to vacate an auction ordered by the Tribal Court under Tribal Law, is the definition of infringement on tribal sovereignty. The Court, therefore, lacks subject matter jurisdiction under controlling federal law and should dismiss the Complaint.

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III. Conclusion

For two independent reasons, this Court lacks subject matter jurisdiction over the Plaintiffs' claims based on well-established Indian law consistently applied by the U.S. Supreme Court, as well as the Connecticut courts. It is hard to imagine a more compelling case for dismissal under either tribal sovereign immunity or the prohibition against state courts hearing cases when an exercise of jurisdiction would infringe tribal sovereignty. Here, a Tribal Member and his spouse complain about a Tribal housing program, Tribal law, a Tribal court decision, all concerning the use, occupancy and governance of Tribal trust land within the Mashantucket Pequot Reservation. The Tribe has enacted laws, policies and procedures addressing housing programs for Tribal Members on its Reservation and provides extensive opportunities for Tribal Members to participate in such programs, as well as avenues for dispute resolution. An exercise of jurisdiction by a state court here would necessarily infringe on the Pequot Tribe's sovereign authority to make its own law and be governed by it. Moreover, the naming of Tribal officials in an attempt to avoid the doctrine of tribal immunity from suit has long been rejected and should be rejected here.

Based upon the arguments and authorities cited herein, and the motion filed herewith, the Defendants respectfully urge the court to dismiss the Plaintiffs' Complaint as to all Defendants for lack of subject matter jurisdiction.

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CERTIFICATION

I hereby certify that a copy of the foregoing was mailed, postage prepaid this 17th day of April, 2020, to all counsel and pro se parties of record as follows:

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