STATE OF MAINE
PENOBSCOT, ss

SUPERIOR COURT
Location: BANGOR
DOCKET NO.: CV-19-21

JOHN MOYANT

V.

REGINA PETIT,

And

THE PASSAMAQUODDY TRIBE

DEFENDANTS' MOTION TO DISMISS FOR WANT OF SUBJECT MATTER JURISDICTION OR FOR THE EXHAUSTION OF TRIBAL REMEDIES
(Incorporated Memorandum of Law)

This case involves claims against the Passamaquoddy Tribe, a federally recognized Indian tribe (the "Tribe"), and one of its enrolled citizens, pertaining to lease and property interests within Passamaquoddy Indian Territory.

The named Defendants, the Tribe and Regina Petit, hereby move, pursuant to M.R.Civ.P. 12(b)(1), to dismiss this action for want of subject matter jurisdiction because it involves an internal tribal matter, which, pursuant to Maine's Act to Implement the Indian Land Claims Settlement, 30 M.R.S.A. §§ 6201 *et. seq.* ("MIA"), ratified by and rendered effective by Congress in the Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785 (1980) ("MICSA"),[1] is not subject to adjudication by the Maine courts. If, however, the Court were to conclude it has subject matter jurisdiction to proceed, the Defendants move to dismiss without prejudice, or for a stay of further proceedings, under the established tribal exhaustion doctrine, which requires courts to refrain from proceeding with controversies over which Indian tribes have colorable jurisdiction to allow the exhaustion of tribal remedies.

[1] MICSA was formerly codified at 25 U.S.C. §§ 1721-1735, but it was removed from Title 25 in 2016. This motion cites MICSA using the former Title 25 section numbers.

BACKGROUND

To set the stage for the present controversy, the Defendants initially describe, in historical context, the Passamaquoddy Tribe, its governmental authority, and the land where the Plaintiff's claims arise. They then turn to the facts that are relevant to the dismissal of this action.

THE PASSAMAQUODDY TRIBE AND THE LAND CLAIMS SETTLEMENT

The Passamaquoddy Tribe is a federally recognized Indian tribe. As Congress explained in its identical final committee reports on MISCA, "[t]he aboriginal territory of the Passamaquoddy Tribe is centered on the Saint Croix River and smaller river systems to the west." H.R.REP. 96-1353 at 11; S.REP. 96-957 at 11. Congress further explained that,

> When the Revolutionary War broke out, General George Washington requested assistance of [the Passamaquoddy Tribe] and, on June 23, 1777, Colonel John Allan, of the Massachusetts militia . . . negotiated a treaty with [the Tribe], pursuant to which the Indians were to assist the Revolutionary War in return for protection of their lands by the United States . . . . Allan's journals indicate that the Indians played a crucial role in the Revolutionary War.
>
> Despite requests from the Maine Indians, the federal government did not protect the tribe[] following the Revolutionary War. In 1794, the Passamaquoddy Tribe . . . relinquished all but 23,000 acres of its aboriginal territory [to Massachusetts]. Subsequent sales and leases by the State of Maine reduced this territory to approximately 17,000.

H.R.REP. 96-1353 at 11-12; S.REP. 96-957 at 12.

These lands cessions failed to comply with one of the first acts of Congress, the Indian Nonintercourse Act. H.R.REP. 96-1353 at 12; S.REP. 96-957 at 12. Enacted in 1790, and presently codified at 25 U.S.C. § 177, this Act renders void any land transaction with an Indian tribe without federal approval. *See* 25 U.S.C. § 177. (As described below, the Nonintercourse Act and a variant of it, 25 U.S.C. § 415, which requires federal approval of leases of tribal lands, are implicated in this case.)

In the landmark decision of 1975, *Joint Tribal Council of Passamaquoddy Tribe v. Morton,* 388 F. Supp. 649 (D. Me.), Judge Edward T. Gignoux, held that the United States had a trust responsibility to the Passamaquoddy Tribe to investigate claims against Maine for violations of the Nonintercourse Act. The First Circuit affirmed his decision, *see Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), and the United States commenced a federal court action against Maine, on behalf of the Passamaquoddy Tribe and the Penobscot Nation, which had similarly lost lands without federal approval, to recover the ceded lands. *See* 25 U.S.C. § 1731 (referring to Civil Action Nos. 1966-ND and 1969-ND, hereinafter "*U.S. v. Maine*" or the "land claims"). Together, these claims covered "12.5 million acres, or 60 percent of the State." H.R.REP. 96-1353 at 14; S.REP. 96-957 at 13.

In the meantime, in 1979, after two hundred years of neglect by the federal government, the Bureau of Indian Affairs ("BIA") formally recognized the Passamaquoddy Tribe as an Indian tribe with a government-to-government relationship with the United States. 44 Fed.Reg. 7,235, 7,236 (Jan. 31, 1979).[2] That same year, the First Circuit held "in *Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061 (1st Cir. 1979) that [the Passamaquoddy Tribe] still possess[ed] inherent sovereign authority to the same extent as other tribes in the United States [and] [t]he Maine Supreme Judicial Court . . . adopted the same view in *State v. Dana,* 404 A.2d 551 (Me. 1979)." H.R.REP. 96-1353 at 14; S.REP. at 14. *See Bottomly*, 599 F.2d at 1066; *Dana*, 404 A.2d at 560-563.

The final Senate Committee Report on MISCA refers to *Bottomly* as "holding that [the Passamaquoddy Tribe is] entitled to protection under federal Indian common law doctrines."

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[2]This federal recognition confirmed the Tribe's preexisting sovereign governmental status; its "retained sovereignty predates federal recognition—indeed, it predates the birth of the Republic . . . and it may be altered only by an act of Congress." *State of Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 694 (1st Cir. 1994) (case citations omitted).

S.REP. at 13. Under those doctrines, civil actions arising within a tribe's reservation or lands held by the United States in trust and brought by a non-tribal member against a member of the tribe cannot be brought in state court; tribal courts have exclusive jurisdiction over such actions. *See, e.g., Williams v. Lee*, 358 U.S. 217 (1959); *Risse v. Meeks*, 585 N.W.2d 875, 877-79 (S.D. 1998).

Federal recognition of the governmental powers of the Passamaquoddy Tribe and the Penobscot Nation within their respective territories and the decisions of *Bottomly* and *Dana,* establishing that they enjoyed the "protection" of their inherent sovereign authorities within those territories without state interference, drove Maine to seek to settle the land claims and attempt to assert powers over the Tribe and its lands that it had presumed to exercise prior to 1979. *See Transcript of March 28, 1980 Public Hearing before the Joint Select Committee of the Maine Legislature on Indian Land Claims,* (1980) at 2-7 (testimony of Maine Attorney General Richard Cohen).

In 1980, Congress settled *U.S. v. Maine* with the enactment of MISCA. *See* 25 U.S.C. § 1721(a)(7), § 1731. In so doing, Congress established a "land acquisition fund" for the Passamaquoddy Tribe to purchase designated lands to restore its land base, as "Passamaquoddy Indian Territory," *see* 30 M.R.S.A. § 6205(1)(B), with those lands to be held in trust for the Tribe by the United States. *See* 25 U.S.C. § 1724(d). (As set forth below, the alleged lease at issue in this case is on Passamaquoddy Indian Territory.) At the same time, compromising some of the protections that the Tribe had won in 1979, Congress rendered the Tribe and its lands and natural resources "subject to the jurisdiction of the State of Maine to the extent and in the manner provided by the Maine Implementing Act." *Id.* § 1725(b)(1). Congress's enactment of MISCA ratified and rendered effective MIA. *See* 25 U.S.C. § 1721(b)(3); 30 M.R.S.A. § 6201

(Historical and Statutory Notes, referencing Sec. 31, "Effective date" as that of MICSA). The MIA generally subjects the Passamaquoddy Tribe, its members, and its lands and natural resources to state law, but it prohibits state jurisdiction over "internal tribal matters, including . . . the right to reside within" Passamaquoddy Indian Territory. 30 M.R.S.A. §§ 6204, 6206(1).

FEDERAL AND PASSAMAQUODDY LAWS GOVERNING LEASING OF PASSAMAQUODDY INDIAN TERRITORY

With respect to the leasing of Passamaquoddy Indian Territory, Congress provided, in pertinent part, that, absent federal or tribal approval in accord with 25 U.S.C. § 415, any lease other than those involving "individual Indian use assignments from one member of the Passamaquoddy Tribe . . . to another member of the [Passamaquoddy] Tribe . . . shall be void ab initio and without any validity in law or equity." 25 U.S.C. § 1724(g)(2). Section 415 provides, in pertinent part, that "[a]ny restricted Indian lands . . . may be leased by the Indian owners, with the approval of the Secretary of the Interior . . . , [but] [a]ll leases so granted shall be for a term of not to exceed twenty-five years." 25 U.S.C. § 415(a). This federal approval is not required, however, "if the lease is executed under . . . tribal regulations approved by the Secretary." *Id.* § 415(d). The Passamaquoddy Tribe has not promulgated regulations to govern leasing for approval by the Secretary of the Interior. Exhibit A, Affidavit of Jackie Lola ("Lola Aff.") ¶11. On September 13, 1985, however, the Tribe passed a resolution prohibiting the leasing of its tribal lands to non-Indians. Lola Aff. ¶4 & Exhibit 1.

The laws of the Tribe allow the assignment of up to two acres of land within Passamaquoddy Indian Territory to enrolled members of the Tribe for "house lots" and up to one acre of land within Passamaquoddy Territory to tribal members for "camp lots." Lola Aff. ¶6 & Exhibit 2 at 1. The Tribe's laws prohibit the transfer of such lots to persons who are not enrolled members of the Tribe. Lola Aff. ¶7 & Exhibit 2 at 3. The Tribe's Campground Protection

Ordinances "govern all jointly held land and all structures within the Trust land of the Passamaquoddy Tribe, including . . . Township 5R1," Lola Aff., Exhibit 4 at 2, the location of the property that is the subject of the lease implicated in this case, *see* Exhibit B, Affidavit of Regina Petit ("Petit Aff."), Exhibit 1 at 1 (lease at issue describing camp lot at "T5, R1"). A goal of this Passamaquoddy law is to "[m]anage all the resources of the Trust Lands based on the principles of sound planning . . . to enhance the spiritual, living, working and recreational condition of Tribal members." Lola Aff., Exhibit 4 at 1.

THE CONTROVERSY

The Plaintiff's complaint raises allegations of breach of contract, unjust enrichment, fraud, and conversion that are primarily derived from the terms of a lease between the Defendant, the Passamaquoddy Tribe and the Defendant, Regina Petit, who succeeded, with the Tribe's formal approval, to the original lease with the Tribe, Harry Fry. Petit Aff. ¶¶ 8-9 & Exhibits 2 & 3; *see also* Complaint. The lease does not name the Plaintiff as a party, *see* Exhibit 1 to Petit Aff.; he claims to be an "intended beneficiary," *see* Complaint, Count I. Neither the Passamaquoddy Tribe nor the Secretary of the Interior ever approved the Plaintiff as a lessee of Passamaquoddy Indian Territory under the lease. Petit Aff. ¶6.

The Plaintiff is not an enrolled member of the Passamaquoddy Tribe or any other Indian tribe, and, as set forth above, in 1985, the Passamaquoddy Tribe passed a referendum, prohibiting the leasing of lands to non-Indians. The original "Campsite Lease" went into effect on November 1, 1987 for a one year period and was set to renew each year unless terminated under the terms of the lease. Petit Aff., Exhibit 1 ¶1. Harry Fry is the named "Lessee," and there are no other named beneficiaries referenced in the lease. Petit Aff., Exhibit 1. The lease pertains to property located on lands held by the United States in trust for the Tribe ("trust lands"), which

are part of Passamaquoddy Indian Territory, the Tribe's restored land base, as described above. Petit Aff. ¶¶3-4. It provides that "[l]essee shall not sublet, assign or transfer this Lease or give or surrender possession of the leased premises without the prior written consent of Lessor." Petit Aff., Exhibit 1 at ¶10.

In 2011, Mr. Fry transferred all of his interests in the Campsite Lease to the Defendant, Regina Petit, who is an enrolled member of the Tribe. Petit Aff. ¶1, 8 & Exhibit 2. In 2012, the Tribe formally approved those transfers. Petit Aff. ¶9 & Exhibit 3. As legal successor to the lease, Regina Petit regularly uses and maintains the lease property. Petit Aff. ¶10. In 2015, Mr. Fry passed away. *Id.* ¶11.

While Harry Fry was alive, the Plaintiff was a periodic guest at the subject property of the Campsite Lease. *Id.* ¶12. At some point, he adopted the view that he could build a structure there, regularly reside in the structure there, and seek compensation from the Tribe for the value of the structure. Petit Aff. ¶16 & Exhibit 5 (letter from Plaintiff's counsel to Petit). In May, 2017, the Plaintiff wrote to Regina Petit, stating that if he were unable to get into the camp, he would break in, and that he planned to use the camp with his friends over the Memorial Day weekend. Petit Aff. ¶13. Thereafter, on June 11, 2017, Alexander A. Nicholas, the Chief of Police for the Tribe, served the Plaintiff with a "No Trespass Notice," stating, in pertinent part:

> You are hereby forbidden from entering or remaining in or on the premises described below in defiance of this lawful order personally communicated to you by virtue of this notice.
> Premises: Regina Petit Camp – Lakeville, Junior Lake T5 R1 NBPP – Passamaquoddy Tribal Territory

Exhibit 1 to Affidavit of Matthew Dana II (attached hereto as Exhibit C). Notwithstanding this Notice, the Plaintiff and his son entered the trust lands of the Passamaquoddy Tribe and entered the dwelling that Defendant Petit maintained and occupied pursuant to the Campsite Lease. Petit

Aff. ¶15 & Exhibit 4. The following day, Regina Petit filed a Statement, under penalty of perjury, with Passamaquoddy Game Warden, Joseph Socobasin, to complain of criminal trespassing by the Plaintiff and his son for entering the camp notwithstanding the Tribe's "No Trespass Notice." *Id.*

ARGUMENT

I. THIS CASE MUST BE DISMISSED FOR WANT OF SUBJECT MATTER JURISDICTION BECAUSE IT INVOLVES AN INTERNAL TRIBAL MATTER.

Pursuant to MIA, the Courts of the State of Maine lack subject matter jurisdiction over controversies that involve "internal tribal matters." *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999); *Francis v. Dana-Cummings*, 2008 ME 184, ¶ 13, 962 A.2d 944, 947. MIA provides that the State of Maine "shall not" have jurisdiction over "internal tribal matters." 30 M.R.S.A. § 6206(1).

> Section 6206(1) does not define "internal tribal matters" over which state courts have no subject matter jurisdiction, instead stating that internal tribal matters include, in a non-exhaustive list: "membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections, tribal organization, and the use or disposition of settlement fund income."

Francis, 2008 ME 184, ¶ 13, 962 A.2d 944 (quoting § 6206(1)). The action at bar implicates one of the expressly enumerated "internal tribal matters": the right to reside within Passamaquoddy Indian Territory. The gravamen of the Plaintiff's action is that he has a right to enter Passamaquoddy Indian Territory, reside at the subject property in accord with terms of a tribal Campsite Lease, or, at the very least, construct his own living structure there and be compensated by the Tribe for doing so. Everything about this action, therefore, connotes an asserted right to reside (or something tantamount to it); Moyant could not claim the right to build a residence that he would own and live in absent a claim of right to reside in the structure on the land. Thus, it

falls within one of the expressly enumerated examples of an "internal tribal matter," and must be dismissed for want of subject matter jurisdiction.

In situations where an action does not squarely invoke one of the enumerated exemplars of "internal tribal matters," courts apply a multi-factor test to determine whether a particular case involves an "internal tribal matter." Even if this case did not readily invoke the "right to reside" as an "internal tribal matter" warranting dismissal, application of the courts' multi-factor test does so.

As the First Circuit has explained, because the "internal tribal matters" provision was adopted by Congress under MICSA and only Congress can diminish a tribe's pre-existing "retain[ed] . . . sovereign powers," construction of the provision "raises a question of federal law." *Fellencer*, 164 F.3d 706, 708 (citations and quotations omitted). Further,

> special rules of statutory construction obligate [courts] to construe acts diminishing the sovereign rights of Indian tribes strictly, with ambiguous provisions interpreted to the Indians' benefit. These special cannons of construction are employed in order to comport with the traditional notions of sovereignty and with the federal policy of encouraging tribal independence.

Id. (citations and quotations omitted). As set forth above, as of 1979, after federal recognition and the *Bottomly* and *Dana* decisions, the Passamaquoddy Tribe was in full possession of its inherent sovereignty and protected from assertions of state power that would undermine it. Thus, in ratifying extensions of state authority and law over the Tribe in MIA, with the exception of "internal tribal matters," Congress diminished the sovereign rights of the Passamaquoddy Tribe. Moreover, the "limited guidance" in MIA and MICSA as to what is or is not an "internal tribal matter" renders the phrase ambiguous. *See id.* Thus, as instructed by the *Fellencer* Court, the phrase must be construed in favor of preserving, not diminishing, the sovereign authority of the Passamaquoddy Tribe. *Id.*

Against this backdrop, the First Circuit has had two occasions to address whether asserted claims against the Penobscot Nation, which retains exclusive jurisdiction over "internal tribal matters" on a par with the Passamaquoddy Tribe, must be dismissed because they involve "internal tribal matters." In *Fellencer*, the Court addressed whether a non-tribal member's claims of employment discrimination against the Nation, arising out of her employment as a health care nurse on the Penobscot Reservation (part of the Nation's "Indian Territory") involved internal tribal matters to bar state jurisdiction. The Court applied factors that it had previously developed in *Akins v. Penobscot Nation*, 130 F.3d 482 (1st Cir. 1997): (1) whether the matter at issue could be considered "within the Tribe"; that is whether it had an appreciable impact upon non-tribal members relative to tribal members; (2) whether it involved the use of the Tribe's land or natural resources; (3) the extent to which the State of Maine would have an interest in the matter; and (4) whether, under "prior legal understandings" of federal Indian law, the matter would be within the exclusive jurisdiction of Indian tribes to address, not subject to state court jurisdiction. *See id.* at 710-712.

Applying those factors, the *Fellencer* Court held that the employment dispute at issue implicated "internal tribal matters": the case involved only a single non-member, and her position as a community health nurse on the reservation affected many tribal members; the case did not involve use of the tribe's land or natural resources, but it did involve human resources within the tribal community; the State of Maine had no particular interest in the case; and, under established federal Indian law cases, such employment disputes would not be subject to state jurisdiction. *See id.* at 710-712.

In *Akins*, the First Circuit had earlier applied the same factors to conclude that a member of the Penobscot Nation could not proceed with state law claims to challenge the Nation's timber

harvesting permit policy, which prohibited the issuance of permits to tribal members who resided outside of Maine. *See Akins*, 130 F.3d at 486-87. The controversy involved only tribal members; it involved use of "the very land that defines the territory of the Nation" and the use of tribal resources; the timber policy, on its face, did not implicate or impair the interests of the State of Maine; and under established federal Indian case law, the harvesting of timber within Indian territory was not subject to state jurisdiction. *See id.*

In *Francis v. Dana-Cummings*, the Law Court had occasion to apply these factors to conclude that a Passamaquoddy Tribal member's claims against the Passamaquoddy Tribe's Housing Authority and its officers for trespass and wrongful eviction arising on the Passamaquoddy Reservation (part of "Passamaquoddy Indian Territory") were internal tribal matters. *See Francis*, 2008 ME 184, ¶¶ 12–23, 962 A.2d 944. The Law Court observed, consistent with *Fellencer*, that "not all actions affecting non-Indians . . . necessarily fall outside of the definition of 'internal tribal matters.'" *Id.* ¶ 17.

Application of these factors to the case at bar establishes that it involves an internal tribal matter. *First*, the controversy is essentially "within the tribe" in the same manner as *Fellencer.* Although the plaintiff is a not a member or the Passamaquoddy Tribe, his actions and the controversy at issue affect the Passamaquoddy community, its communal property, and camp lots on its restored land base. This controversy implicates no other non-tribal member. On the contrary, it is an action against a tribal member, Regina Petit and the Passamaquoddy Tribe, itself. *Second,* the controversy involves asserted rights involving use of "the very land that defines the territory of the [Tribe]," *Akins,* 130 F.3d at 487. *Third,* the State of Maine has no interest in this case. *Fourth,* under well-established principles of federal Indian law, lawsuits for personal or property interests brought by non-tribal members arising on Indian reservations or

lands held by the United States in trust for tribes are not subject to state court jurisdiction; they are within the exclusive jurisdiction of Indian tribes to resolve. The case law in this regard is plentiful and unequivocal. *See, e.g., Williams v. Lee*, 358 U.S. 217 (non-tribal member contract claim against tribal member arising on Navajo reservation not subject to adjudication in state court); *Risse v. Meeks*, 585 N.W.2d 875, 877–79 (S.D. 1998) (non-tribal member tort claim against tribal member arising on trust lands held for tribe by United States not subject to adjudication in state court); *id.* at 879-880 (Konekamp, J., concurring); *Sage v. Sicangu Ouate Ho., Inc.*, 473 N.W.2d 480, 481-84 (1991) (non-tribal member's breach of contract action against tribal school arising on tribe's reservation not subject to adjudication in state court). *See also Fellencer*, 164 F.3d 711–12 ("Tribal courts have repeatedly been recognized as appropriate forums for the *exclusive* adjudication of disputes affecting important personal and property interests of both Indians and non-Indians") (citation and quotations omitted; emphasis added). Thus, dismissal for want of subject matter jurisdiction is warranted by the application of these factors.

But these factors are not exhaustive. *See Fellencer*, 164 F.3d at 710-11, 713 (considering the nature of the non-tribal member's health care position and related federal goals of promoting tribal self-government to conclude that employee's employment discrimination claims implicated internal tribal matters); *Francis*, 962 A.2d at 949 (considering fact that dispute implicated application of Passamaquoddy tribal laws and policies to conclude that reservation trespass action implicated internal tribal matters). Here, the very nature of the lease at issue, and the special federal and tribal interests surrounding it, reinforce the conclusion that this controversy involves an internal tribal matter.

Even before the creation of the United States, Indian nations in America were protected by the British Crown from attempts by non-Indian to gain access to their lands. The Royal Proclamation of 1763 prohibited land transactions between non-Indians and Indians without the express approval of the Crown. *See* Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 21 (1979). After the Revolution, as set forth above, Congress enacted the Indian Nonintercourse Act of 1790 for the same purpose, substituting the federal government for the Crown. That Act provides, in pertinent part:

> No purchase, grant, *lease*, or other conveyance of lands . . . from any Indian nation or tribe of Indians shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly . . . for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000.

25 U.S.C. § 177 (emphasis added). In MISCA, Congress made Passamaquoddy Indian Territory subject to similar restrictions pursuant to 25 U.S.C. § 1724(g), which is intended to be "comparable to the Indian Nonintercourse Act." S. REP. 96-957 at 15, 25. Congress thereby required federal approval of all leases within Passamaquoddy Indian Territory pursuant to 25 U.S.C. § 415, outlined above. Along the same lines as the Royal Proclamation, the Indian Nonintercourse Act and the leasing restrictions of section 415, in 1834, Congress enacted the following law, which remains part of Title 25 today: "Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of $1,000." 25 U.S.C. § 180. Further, as set out above, the Passamaquoddy Tribe prohibits the leasing of Passamaquoddy Indian Territory to non-Indians, its camp lot regulations prohibit the transfer of such lot to persons who are not enrolled members

of the Tribe, and the lease itself forbids any assignment of interests in the lease property without the written consent of the Tribe.

All of these federal laws and tribal restrictions are designed to protect the peaceful use and enjoyment of tribal lands by tribal peoples, to protect the integrity of unique tribal communities. *See, e.g., Brown v. United States*, 86 F.3d 1554, 1562 (Fed. Cir. 1996) (federal leasing restrictions of Indian lands "must . . . be understood against the backdrop created by 25 U.S.C. § 177, the most general prohibition on conveyances of interests in Indian lands"); *U.S. for & on Behalf of Santa Ana Indian Pueblo v. Univ. of New Mexico*, 731 F.2d 703, 706 (10th Cir. 1984) (the purpose of the Indian Nonintercourse Act is "to prevent unfair, improvident, or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress"). Thus, special federal laws and tribal provisions protective of the integrity of the Passamaquoddy Tribe's use and enjoyment of its lands frame this controversy and fully reinforce that it involves the Tribe's internal tribal matters.

In short, the controversy at issue involves express and implied assertions invoking the right to reside within Passamaquoddy Indian Territory, an internal tribal matter over which this court lacks subject matter jurisdiction under the plain language of MIA. Even if not falling squarely within the "right to reside" exemplar of an internal tribal matter, the controversy falls within the four factor test employed by the courts: it involves asserted express or implied rights and remedies arising out of use of "the very land that defines the territory of the [Tribe]," there are no appreciable non-tribal interests at stake other those asserted by the Plaintiff, the State has no interest in the case, and under well-established federal Indian case law, the controversy is subject to the exclusive jurisdiction of the Tribe. Finally, the Plaintiff's asserted rights and

remedies implicate special federal and tribal protections of internal tribal affairs, which reinforce the conclusion that this controversy involves internal tribal matters.

II. THE CASE SHOULD BE DISMISSED WITHOUT PREJUDICE (OR STAYED) FOR THE EXHAUSTION OF TRIBAL REMEDIES.

If the Court were to conclude that an internal tribal matter is not at stake, it should dismiss without prejudice (or stay) under the tribal exhaustion doctrine because the Passamaquoddy Tribe has, at the very least, "colorable" concurrent jurisdiction to address the controversy.

A. Introduction: The Tribal Exhaustion Doctrine.

"Indian tribes are 'domestic dependent nations,' that exercise sovereign authority over their territories and their members." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (quotations and citation omitted). The governmental authority that tribes possess "predates . . . the birth of the republic," *Narragansett Indian Tribe*, 19 F.3d at 694, and remains intact absent express Congressional abrogation, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); *Wheeler*, 435 U.S. at 323, 326. *See generally* Felix Cohen, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 4.01-4.02 (5th ed.2005).

While Congress compromised the sovereignty of the Passamaquoddy Tribe in MICSA by ratifying the application of state law to the Tribe and its members in certain respects, it otherwise confirmed that federal law governing Indian affairs applies to the Tribe. *See Fellencer*, 164 F.3d at 712 ("Congress explicitly made existing general federal Indian law applicable to the Penobscot Nation[, which has the same status as the Passamaquoddy Tribe,] in the Settlement Act.") (quotations and citation omitted). The First Circuit has recognized that one of the "important sovereignty rights retained by the [Tribes], includ[es] the establishment of tribal courts...with powers similar to those exercised by Indian courts in other parts of the country."

Id. at 712 (quotations and citation omitted). "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty . . . [and] [c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mut. Ins. Co*, 480 U.S. at 18. Congress did not so limit the Passamaquoddy Tribal Court in the Settlement Act. *See Fellencer*, 164 F.3d at 712.

In recognition of the importance of tribal courts for building strong tribal governments and to further Indian self-determination, courts must dismiss without prejudice (or stay) cases that arise within Indian reservations or trust lands over which tribes have colorable jurisdiction. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 32 (1st Cir. 2000); *Rassi v. Federal Program Integrators, LLC.*, 69 F. Supp.2d 288, 293–94 (D. Me. 2014). As the First Circuit has made clear in apt language for the case at bar, "[c]ivil disputes arising out of the activities of non-Indians on reservation lands almost always require exhaustion if they involve the tribe." *Ninigret*, 207 F.3d at 32.

This tribal exhaustion requirement is grounded in comity principles. As the Supreme Court has explained:

> Tribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development. . . . If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law.

Iowa Mut. Ins. Co, 480 U.S. at 14-15 (citations omitted). The doctrine is not, strictly speaking, jurisdictional in nature; rather it "is a product of comity and related considerations." *Ninigret*, 207 F.3d at 31. When applicable, however, "this prudential doctrine has force whether or not an action actually is pending in a tribal court." *Id.*

The First Circuit has restated the operation of the doctrine as follows: "when a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should)

give the tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction over a particular claim or set of claims." *Id.* If that determination is made in the affirmative, litigation over the merits of the controversy proceeds apace through the tribal court, but the matter may later be reviewed by the original state or federal court with concurrent jurisdiction after the exhaustion of tribal court proceedings. *See Iowa Mut. Ins. Co.*, 480 U.S. at 19.

The doctrine applies in the state courts in the same manner as in the federal courts: where a state court is able to assert jurisdiction over a controversy that a tribal court has colorable jurisdiction to resolve, it must dismiss without prejudice or stay in deference to the exhaustion of tribal remedies. *See Harvey v. Ute Indian Tribe of Uintah & Ouray Reservation*, 2017 UT 75, ¶¶ 41-52, 416 P.3d 401, 417–21; *Klammer v. Lower Sioux Convenience Store*, 535 N.W.2d 379 (Minn. 1995). Thus, if this Court were to conclude that dismissal is not warranted for lack of subject matter jurisdiction over an internal tribal matter, it should dismiss without prejudice or stay to allow the exhaustion of tribal court remedies if the Passamaquoddy Tribal Court has colorable jurisdiction.

B. The Passamaquoddy Tribal Court Has Colorable Jurisdiction Over This Controversy.

As set forth above, the retained sovereignty of the Passamaquoddy Tribe predates its formal federal recognition in 1979 and Congress's 1980 settlement of *U.S. v. Maine* in MISCA with the ratification of MIA. *See supra* at 3–4 & n.1. As such, those preexisting sovereign authorities remain intact absent clear abrogation by Congress. *Narragansett Indian Tribe*, 19 F.3d at 694.

Congress did not abrogate the adjudicatory authority of the Passamaquoddy Tribe in MISCA; on the contrary, as set forth above, Congress intended the Tribe to exercise powers

"similar to those exercised in other parts of the country." *Fellencer*, 164 F.3d at 712 (quoting the final Senate Committee report on MICSA).[3] While, with the exception of "internal tribal matters," Congress generally granted Maine adjudicatory authority over the Tribe, it lands, and its members, it did thereby deprive the Tribe of its *concurrent* jurisdiction over claims arising within its territory. Congress's grant of exclusive adjudicatory authority to Maine is strictly limited to certain criminal matters. *See* 30 M.R.S.A. § 6209(1), ratified by 25 U.S.C. § 1721. As a result, the Tribe retains concurrent civil jurisdiction over all civil matters that it may exercise under principle of federal Indian law.

Unequivocal federal Indian case law establishes that tribal courts have jurisdiction over contract and tort disputes brought by non-tribal members against Indian tribes or their tribal members arising within tribal reservations or trust lands, the very situation of the case at bar. *E.g., Williams v. Lee*, 358 U.S. at 223 (Navajo Tribal Court has exclusive jurisdiction over contract claim by non-tribal member against tribal member arising on Navajo Reservation); *Ninigret*, 207 F.3d at 32-33 (applying exhaustion doctrine to contract dispute brought by non-tribal member against tribal housing authority); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 812–13 (9th Cir. 2011) (tribal court has jurisdiction over reservation

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[3] The First Circuit has separately made clear that Congress intended to confirm the Passamaquoddy Tribe's inherent sovereign authority in MISCA; it was not a "grant" of such authority to the Tribe. *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 57 (1st Cir. 2007).

> Congress understood Maine tribes to be able to invoke sovereign powers even without recognition: our court had decided as much in *Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061, 1064–66 (1st Cir.1979), and Congress was plainly aware of our holding, *see* H.R.Rep. No. 96–1353, at 14 (1980), reprinted in 1980 U.S.C.C.A.N. 3786, 3790 (noting *Bottomly*'s holding regarding inherent sovereignty); S.Rep. No. 96–957, at 14 (1980) (same).

Id.

lease dispute between non-tribal member and tribe); *Brown v. Washoe Housing Authority*, 835 F.2d 1327, 1328 (10th Cir. 1988) (breach of contract claims by non-tribal construction company against tribal housing authority subject to the doctrine); *Rassi*, 69 F. Supp.2d at 293–94 (applying doctrine to non-tribal member's employment claims against entity affiliated with the Penobscot Nation arising on the Penobscot Reservation); *Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe of Kansas*, 987 F. Supp. 1321, 1324 (D. Kan. 1997) (claims of breach of contract by non-tribal consulting group arising on reservation subject to the doctrine). Thus, pursuant to its inherent sovereign authority, which has not been divested by Congress, the Passamaquoddy Tribe clearly has, at the very least, "colorable" jurisdiction over the controversy at bar.

C. Exceptions To The Doctrine Are Inapposite.

In a case such as this, where tribal authority is plausible and, therefore, "the tribal exhaustion doctrine normally would apply, the Supreme Court has not demanded exhaustion where [a] an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, [b] where the action is patently violative of express jurisdictional prohibitions, or [c] where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Ninigret*, 207 F.3d at 33–34 (citation and quotations omitted). None of these exceptions is relevant in this case. While non-Indians often perceive assertions of tribal court authority to be in bad faith because they think tribal court judges are biased or unfair, these "unfounded stereotypes" hold no weight. *Ninigret*, 207 F.3d at 34.[4] Harassment or bad faith is nowhere present. Nor is there any express jurisdictional bar to the Passamaquoddy Tribal

[4] Indeed, prominent members of the Maine Judiciary have served the tribal courts: Maine District Court Judge David J. Mitchell served as prosecutor for the Passamaquoddy Tribal Court and Maine Supreme Court Justice Andrew Mead served as Tribal Court Judge for the Penobscot Nation.

Court's jurisdiction in this case. To the contrary, its authority is firmly grounded in the federal Indian law principles and myriad case law set forth above.

CONCLUSION

For all of the above reasons, this case should be dismissed for want of subject matter jurisdiction because it involves the internal tribal matters of the Passamaquoddy Tribe, matters over which the Passamaquoddy Tribal Court has exclusive jurisdiction to resolve. If, however, the Court were to conclude that the case does not implicate internal tribal matters, dismissal without prejudice (or a stay of proceeding) would be warranted, to allow the exhaustion of tribal remedies.

Dated at Portland, Maine this 25th day of October, 2019.

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NOTICE

Any opposition to this Motion must be filed not later than twenty-one (21) days after the filing of this Motion unless another time is provided by the Maine Rules of Civil Procedure or is set by the Court. Failure to file timely opposition will be deemed a waiver of all objections to the Motion, which may be granted without further hearing or notice.