SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. 20640

KIRSTEN SOLONIEWICZ
VS.
SUGAR FACTORY, LLC, ET AL

REPLY BRIEF OF THE DEFENDANT-APPELLANT SUGAR FOX 218, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CONNECTICUT AUTHORITIES

CONNECTICUT STATUTES

CONNECTICUT CASES

FEDERAL AUTHORITIES

UNITED STATES CONSTITUTION AND FEDERAL STATUTES

FEDERAL CASES

I. PRELIMINARY STATEMENT

The Defendant/Appellant hereby reasserts and incorporates herein the facts and legal argument set forth in Defendant's Brief ("Def's. Br.") and Defendant's Brief Appendix (Def's. Br. App.) filed April 30, 2021. In this reply, the Defendant addresses certain legal arguments averred by the Plaintiff/Appellee in her Appellee's Brief ("Appellee Br.").

II. STANDARD OF REVIEW

The Defendant reincorporates herein the standard of review summarized in its original brief. *See* Def's. Br., pp. 4-5.

III. SPECIFIC RESPONSES TO APPELLEE'S BRIEF

A. The Plaintiff sufficiently preserved the issue of tribal consent (or lack thereof) to jurisdiction over trade and commerce on the reservation.

"A determination regarding a trial court's subject matter jurisdiction is a question of law. When ... the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. (Internal quotation marks omitted.) *Stones Trail, LLC* v. *Weston*, 174 Conn. App. 715, 735, 166 A.3d 832, cert. denied, 327 Conn. 926, 171 A.3d 59 (2017)." *Chamerda v. Opie*, 185 Conn. App. 627, 637–38, 197 A.3d 982, 990 (2018).

There was certainly no surprise to the Plaintiff that the Defendant vigorously asserted the need for consent for the State of Connecticut to assert jurisdiction over trade and commerce on the reservation. Def's. Br. App., A49-56. That the relationship between the Mashantucket Pequot Tribe and the State of Connecticut should be defined strictly by the federal and state statutes outlining the bounds of jurisdiction was a precept woven through the entirety of the Defendant's argument to the trial court. As stated in the Appellant's brief, an understanding, agreement and/or consent is found within the

legislative history and language of the particular statutes. The only fair reading of the trial court memorandum, in light of the Defendant's arguments (both briefed and stated), is a rejection of this premise. The appropriate remedy was to appeal.

B. *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013) is unavailing as it involves the broad and reserved right of the State of Connecticut to levy taxes as opposed to the right to regulate trade and commerce.

Using federal constitutional guidance, the power of a legislature to levy taxes of general applicability and the power to regulate commerce are radically different in terms of scope and degree. The root of Congressional power is contained within Section 8 of the United States Constitution. "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States..." U.S. Const. art. I, § 8, cl. 1. Separate from taxing powers, "[T]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Section 8, clause 3 is better known as the Commerce Clause and has been the subject of an exorbitant amount of debate and litigation.

The manner in which the taxing power of a legislature operates upon constituents as compared to the power to regulate commerce is far different. "[A]lthough the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who

disobeys may be subjected to criminal sanctions. Those sanctions can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 573, 132 S. Ct. 2566, 2600, 183 L. Ed. 2d 450 (2012). A tax of general applicability, if justified by a legitimate government interest, will readily pass constitutional muster. Quite separately, assertion of control via the commerce clause has the tangible effect of dictating the behavior of the populous. For purposes of this discussion, it is critical to note that the taxing power and commerce power are far different in force and effect.

It is particularly instructive in the present case that Congress passed the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., under the commerce clause. More directly, Congress determined that it would set minimum wages and standards of employment through use of the commerce clause. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550, 105 S. Ct. 1005, 1017, 83 L. Ed. 2d 1016 (1985). In every way, the FLSA was passed by Congress pursuant to its authority under the commerce clause. Notably, other significant legislation governing the conduct of employers has been passed under the commerce clause delegation. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., was passed under the authority provided by the Commerce Clause. "Congressional authority to enact the provisions of Title VII at issue in this case is found in the Commerce Clause, Art. I, s 8, cl. 3, and in s 5 of the Fourteenth Amendment, two of the enumerated powers granted Congress in the Constitution. Cf. *Oregon v. Mitchell*, 400 U.S. 112, 131-

134, 91 S.Ct. 260, 268, 27 L.Ed.2d 272 (1970) (Black, J.)." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 458, 96 S. Ct. 2666, 2672, 49 L. Ed. 2d 614 (1976)(Brennan, concurring).

A parallel must be drawn between the Congress and State legislature with regard to the broad and reserved authority to tax and that power which relates to regulating commerce (business intercourse) of the public. The State of Connecticut's ability to levy a tax of general applicability and for the purpose of raising revenue is near ubiquitous and it is most certainly not a power that the State yielded under C.G.S. § 47-59a(b). "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized.... [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies...." (Citations omitted.) *Cir.-Wise, Inc. v. Comm'r of Revenue Servs.*, 215 Conn. 292, 305–06, 576 A.2d 1259, 1265–66 (1990). *See also MERSCORP Holdings, Inc. v. Malloy*, 320 Conn. 448, 462, 131 A.3d 220, 229 (2016)("legislative choice to impose higher recording fee on mortgage nominee was justified by rational basis of raising revenue").

With respect to *Mashantucket Pequot Tribe v. Town of Ledyard*, the statute at issue was a straightforward tax levy. C.G.S. § 12-40 requires a declaration for purposes of tax assessment of personal property. The State of Connecticut has broad authority under its reserved taxing power and has never ceded such authority to the tribe via statute. More particularly, C.G.S. § 47-59a makes no delegation of exclusive taxing authority to the Mashantucket Pequot Reservation. This statute, does however, in plain language yield the commerce power of the State to the tribe to govern commercial intercourse on the reservation. While reservation business must readily comply with personal property tax,

use and sales taxes, adherence to state laws dictating the behavior of employers and employees is not required. It is abundantly clear that the Connecticut Minimum Wage Act, C.G.S. 31-58 et seq. ("CMWA") is a law governing commercial intercourse between employers and employees and not a tax of general applicability. Because the taxing power challenged in *Mashantucket Pequot Tribe* is starkly different than the power to control commerce, this decision maintains no precedential value as to the present case. Had the State of Connecticut reserved its commerce power within C.G.S. § 47-59a, perhaps this matter would follow the aforementioned decision.

C. The Plaintiff's overwhelming reliance upon non-statutory balancing factors simply cannot overcome the legislative history and plain statutory language which evidences a clear intent to permit the Mashantucket Pequot Tribe to govern commercial intercourse on the reservation.

The Plaintiff spends a large portion of her brief on the ebb and flow of balancing the interests of the Federal Government, State of Connecticut and Mashantucket Pequot Tribe. While the Defendant avers that such balancing overwhelmingly favors the Tribe in terms of permitting self-governance over commerce on the reservation, the result dictated by careful analysis of the legislative history and plain statutory language is unescapable.

As set forth more fully in Section II(B) of the Defendant's Brief, proper analysis must begin and end with careful dissection of the legislative history, chronology of statutory enactments and of course, the plain language of the statutes. It is not surprising that the Plaintiff evades statutory analysis for much of her brief because adherence to strict statutory interpretation is fatal to her claim. Quite plainly, both the federal government and the several states have almost always codified the interrelationship between the self-governing fields of the tribe(s) and that which the State reserves. Whether identified as consent and/or an agreement codified within a particular statute, the expectations of both

the tribe and the particular State are found within the legislative enactment. Once again, via C.G.S. § 47-59(a), the State of Connecticut and the Mashantucket Pequot Tribe defined the fields over which the tribe obtained exclusive control. Commercial intercourse upon the reservation was reserved for the Tribe to the exclusion of the State. The State did not, of course, yield its legislative taxing power and continues to collect revenue from operations of businesses within the geographical area of the reservation.

IV. CONCLUSION AND STATEMENT OF RELIEF REQUESTED

For the reasons set forth in the Defendant-Appellant's brief and those set forth above, the trial court's denial of the Defendant's motion to dismiss should be reversed with instruction to dismiss the pending matter for lack of subject matter jurisdiction.

RESPECTFULLY SUBMITTED,
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CERTIFICATION OF SERVICE

This is to certify that on June 18, 2021, a copy of the foregoing brief has been: (1) delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and (2) sent via first-class United States mail to each counsel of record, pursuant to Practice Book §§ 62-7 and 67-2.

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Bryan P. Fiengo
Commissioner of the Superior Court

CERTIFICATION PURSUANT TO PRACTICE BOOK §§ 62-7 AND 67-2

The undersigned hereby certifies that the foregoing Reply Brief and has been prepared, served and field in compliance with Practice Book § 67-2, to wit:

- Ten copies have been delivered to the appellate clerk;
- Copies have been delivered electronically to the last known email address of each counsel of record for whom an email address has been provided;
- The font is double spaced and 12-point Arial, with the exception of footnotes or block quotes which are single spaced 12-point Arial;
- The margins are at least left 1.25", right 0.5", top and bottom 1.0";
- The Reply Brief being filed with the appellate clerk are true copies of the Reply Brief that were submitted electronically;
- The electronically submitted Reply Brief and the filed paper Reply Brief have been redacted or do not contain any names or personal identifying information that is prohibited from disclosure by rule, statute, court order or case law;
- The Reply Brief complies with all provisions of this rule.

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