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DOCKET NO. KNL-CV17-6030617-S	:	SUPERIOR COURT
JOHN DRABIK AND ANCIENT HIGHWAY TOWERS, LLC	:	J.D. OF NEW LONDON
v.	:	AT NEW LONDON
ELAINE THOMAS	:	MARCH 8, 2022

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendant Elaine Thomas seeks dismissal of Plaintiffs' complaint in its entirety. The complaint should be dismissed for lack of subject matter jurisdiction. The Appellate Court affirmed dismissal of virtually identical claims against the Defendant Thomas, as well as against her supervisor and The Mohegan Tribe of Indians of Connecticut (the "Tribe"), on sovereign immunity grounds. *Drabik v. Thomas*, 184 Conn. App. 238, 240, 194 A.3d 894, 898 (2018), *cert. denied*, 330 Conn. 929, 194 A.3d 778 (2018). The same principles require dismissal of the claims asserted here.

Alternatively, the complaint should be dismissed pursuant to the principles of comity, since the Plaintiffs litigated the same claims in the Mohegan Tribal Courts for more than five years.

A. FACTUAL AND PROCEDURAL BACKGROUND.

Plaintiffs' claims stem from a proposal by AT&T to construct a cell phone tower in East Lyme. AT&T briefly proposed constructing a tower on property owned by the Plaintiff John Drabik and leased to the Plaintiff Ancient Highway Towers, LLC. Notice of the proposed tower location was transmitted by the

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Federal Communications Commission ("FCC") to the Tribal Historic Preservation Office ("THPO") pursuant to the FCC's Tower Construction Notification System ("TCNS"), a program adopted in compliance with the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.* As the Deputy Tribal Historic Preservation Officer, and acting pursuant to the NHPA, Elaine Thomas[1] responded with a recommendation against the proposed site. AT&T chose to pursue alternative locations. The response to the FCC is at the heart of this litigation.

The first round of this litigation began in September 2015. Plaintiff John Drabik filed a Petition for Bill of Discovery against Ms. Thomas, Mr. Quinn, and the Tribe. Drabik claimed that he needed to conduct discovery preparatory to bringing an action against the Tribe and its THPO for tortious interference with contract. The Superior Court, Cole-Chu, J., dismissed on sovereign immunity grounds, and Drabik appealed.

The Appellate Court upheld the dismissal, and the Supreme Court denied certification. *Drabik , supra,* 330 Conn. 929.

In summarizing the factual background, the Appellate Court noted:

> "The response, written by Thomas, indicated that a site walk conducted on June 10, 2015, identified "substantial stone groupings" on the property adjacent to the plaintiff's property. According to the response, the proposed tower would "impact the view shed" of these "cultural stone features" and could "possibly cause impact to the overall integrity of the landscape." The

[1] Ms. Thomas has since retired from her position as Deputy THPO.

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> response concluded that, in the opinion of the Mohegan Tribal Historic Preservation Office, the proposed tower would cause an adverse effect to "properties of traditional religious and cultural significance to the [tribe]." After receiving this response from the tribe, AT & T stopped considering the plaintiff's property as a potential site for the tower.

Id., 184 Conn. App. at 240.

In May 2016, after the Superior Court's dismissal of the Petition and while the appeal from the dismissal was pending, Plaintiffs brought claims in the Mohegan Tribal Court ("MTC") of tortious interference with a business relationship and negligence against Ms. Thomas, Mr. Quinn, and the Tribe, and claims against Ms. Thomas and Mr. Quinn individually for negligence and trespass.

Litigation of those claims continued for a span of five years and four months, until October 7, 2021.

During the pendency of the MTC litigation, the Appellate Court affirmed dismissal of the Petition for Bill of Discovery in 2018, and the Supreme Court denied certification that same year. *Drabik,* 330 Conn. 929.

The MTC Trial Court asserted subject matter jurisdiction over all of Plaintiffs' claims, which were amended and revised several times. The MTC Trial Court held that three counts of Plaintiffs' claims were barred because the THPO's response, the communication upon which the claims in those three counts were predicated, was covered by the quasi-judicial privilege. That decision left only a fourth claim, sounding in trespass, to be tried. The MTC Court of Appeals heard Plaintiffs' appeal and affirmed the trial court's decision. Plaintiffs then appealed to the Council of Elders, the Tribe's supreme judicial authority. The

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Council of Elders affirmed the lower courts' decisions and remanded the case to the trial court to adjudicate the remaining trespass count. *Drabik v. Mohegan Tribe of Indians of Connecticut*, No. SC-2020-01, 2020 WL 6219553 (Mohegan Elders Council Aug. 11, 2020). Copies of the MTC and Council of Elders Decisions are attached to Defendant's Motion to Dismiss as **Exhibits A-C**.

Plaintiffs took the depositions of Ms. Thomas and Mr. Quinn. Both testified that they never set foot on any Drabik property except the leased cell tower site, to which they were invited by AT&T's consultants for purposes of performing official and statutory functions pursuant to federal law, and that they observed stone groupings on property adjacent to Drabik's land.[2] They testified that they were invited onto that adjacent property by the property owner. At an MTC trial management conference preparatory to a trial on the trespass count, the Plaintiffs voluntarily withdrew the final trespass count, thereby terminating the MTC proceedings.

Plaintiffs now seek to litigate their claims all over again.[3]

The case against Elaine Thomas in this court was filed June 30, 2017. It was stayed in November 2017 pending exhaustion of the Tribal Court proceedings, pursuant to *Drumm v. Brown*, 245 Conn. 657, 716 A.2d 50 (1998). The facts and causes of action alleged here against Ms. Thomas are the same as were

[2] Copies of the transcripts are attached to Defendant's Motion as **Exhibits D and E.**
[3] Anticipating that Defendant intended to move for dismissal of the complaint, the Plaintiffs filed a request for leave to amend their complaint on March 7, 2022, immediately after the Court granted their Motion to Terminate Stay. Docket ## 122.0, 122.01..

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alleged in the Tribal Courts. The only difference is that Plaintiffs contend that they are seeking a remedy only against Ms. Thomas in her individual capacity.

B. LAW AND ARGUMENT.

The claims must be dismissed because Ms. Thomas acted exclusively in an official capacity as an official of the Mohegan Tribal government. The only way she could receive the TCNS notice was in her official capacity. The only way she could respond to it was in her official capacity, through the official FCC notification system. The response spoke for and stated the official position of the Tribe. The FCC forwarded that official response to the tower construction applicant, AT&T. Because these actions were necessarily taken in an official capacity, the sovereign immunity of the Tribe bars this action, as determined by the Appellate Court in affirming dismissal of the Petition for Bill of Discovery.

But even if the court finds that the Plaintiffs' claims are not barred by sovereign immunity, comity requires dismissal. A foreign court – the Mohegan Tribal Court – rendered judgment against the Plaintiffs after more than five years of litigation. When a foreign court has adjudicated claims between the parties and rendered judgment after affording the parties due process, the principles of comity require dismissal of an action brought in the Connecticut courts. *Zitkene v. Zitkus*, 140 Conn. App. 856, 60 A.3d 322 (2013) (affirming dismissal on grounds of comity afforded foreign judgment).

1. Standard of Review.

"The trial court's role in considering whether to grant a motion to dismiss is to take the facts to be those alleged ... including those facts necessarily implied from the allegations, construing

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> them in a manner most favorable to the pleader.... A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Citation omitted; internal quotation marks omitted.) *Davidson* v. *Mohegan Tribal Gaming Authority*, 97 Conn. App. 146, 148, 903 A.2d 228, cert. denied, 280 Conn. 941, 912 A.2d 475 (2006), cert. denied, 549 U.S. 1346, 127 S.Ct. 2043, 167 L.Ed. 2d 777 (2007).

Drabik v. Thomas, *supra,* 184 Conn. App. at 241; *see also*, *Beecher v. Mohegan Tribe of Indians,* 282 Conn. 130, 132, 918 A.2d 880 (2007).

2. Both Sovereign Immunity and Comity Provide Grounds for a Motion to Dismiss.

It is well established that the sovereign immunity defense may be raised on a motion to dismiss.

> "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss.... The trial court's role in considering whether to grant a motion to dismiss is to take the facts to be those alleged ... including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader....

Id.

Connecticut courts have recognized that a motion to dismiss is also the appropriate vehicle for raising comity as a defense to the re-litigation of issues between the same parties, where those parties have earlier litigated the issues in a foreign jurisdiction. *Zitkene v. Zitkus*, 140 Conn. App. 856, 60 A.3d 322 (2013); *Litvaitis v. Litvaitis*, 162 Conn. 540, 544–45, 295 A.2d 519, 521–22 (1972); *Bruneau v. Bruneau*, 3 Conn. App. 453, 455, 489 A.2d 1049, 1051 (1985). Dismissal is warranted where the courts of a foreign jurisdiction have fully adjudicated a dispute on the merits and where the parties were afforded due process.

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> Courts of the United States are not required by federal law to give full force and effect to a judgment granted in a foreign nation ... On the other hand, judgments of courts of foreign countries are recognized in the United States because of the comity due to the courts and judgments of one nation from another. Such recognition is granted to foreign judgments with due regard to international duty and convenience, on the one hand, and to rights of citizens of the United States and others under the protection of its laws, on the other hand. This principle is frequently applied in divorce cases; a decree of divorce granted in one country by a court having jurisdiction to do so will be given full force and effect in another country by comity, not only as a decree determining status, but also with respect to an award of alimony and child support." (Citations omitted.) *Litvaitis v. Litvaitis,* 162 Conn. 540, 544–45, 295 A.2d 519 (1972). See also *Bruneau v. Bruneau,* 3 Conn.App. 453, 459, 489 A.2d 1049 (1985) (granting the defendant's motion to dismiss the plaintiff's dissolution of marriage action on the ground that the court lacked subject matter jurisdiction because the parties already were divorced pursuant to a Mexican divorce decree, which the court recognized under the principle of comity).

Zitkene v. Zitkus, No. FSTFA114019900, 2011 WL 4447229, at *3 (Conn. Super. Ct. Sept. 8, 2011), *aff'd,* 140 Conn. App. 856, 60 A.3d 322 (2013). Connecticut courts have recognized tribal court judgments under the principles of comity. *Mashantucket Pequot Gaming Enter. v. DiMasi*, No. CV 990117677 S, 1999 WL 799526, (Conn. Super. Ct. Sept. 23, 1999).

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C. SOVEREIGN IMMUNITY BARS PLAINTIFFS' CLAIMS.

1. The Appellate Court Dismissed Plaintiff Drabik's Claims For Lack of Subject Matter Jurisdiction.

The Appellate Court decision in *Drabik v. Thomas* affirmed the dismissal of Drabik's claims on sovereign immunity grounds, noting:

> "[A]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity ... and the tribe itself has consented to suit in a specific forum.... Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits for damages against a tribe.... Although tribal immunity does not extend to individual members of a tribe ... [t]he doctrine of tribal immunity ... extends to individual tribal officials acting in their representative capacity and within the scope of their authority.... The doctrine does not extend to tribal officials when acting outside their authority in violation of state law.... Tribal immunity also extends to all tribal employees acting within their representative capacity and within the scope of their official authority." (Citations omitted; internal quotation marks omitted.) *Chayoon* v. *Sherlock*, 89 Conn. App. 821, 826–27, 877 A.2d 4, cert. denied, 276 Conn. 913, 888 A.2d 83 (2005), cert. denied, 547 U.S. 1138, 126 S.Ct. 2042, 164 L.Ed. 2d 797 (2006).

Drabik v. Thomas, 184 Conn. App. at 245–46.

The Appellate Court rejected Plaintiff's contention that discovery to determine the existence of claims, as distinct from the tortious interference claims themselves, would evade the sovereign immunity bar. *Drabik* 184 Conn. App. at 245.

The Appellate Court did not stop there, however. It noted that Plaintiff Drabik further argued that

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> "the court improperly determined that Thomas and Quinn were entitled to tribal sovereign immunity. Specifically, he argues that Thomas and Quinn were named, and also acted, in their individual capacities. According to the plaintiff, the bill of discovery alleges an exception to tribal sovereign immunity, namely, that Thomas and Quinn were not acting within the scope of tribal authority."

Id.

Plaintiff Drabik's assertion that he was making an "individual capacity" claim against Thomas and Quinn was undoubtedly prompted by the U.S. Supreme Court decision in *Lewis v. Clarke*, 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017) in which the U.S. Supreme Court overturned the Connecticut Supreme Court and held that claims against a limousine driver employed by the Mohegan Tribal Gaming Authority were not barred by sovereign immunity. The Supreme Court stated:

> "This is a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut. The suit is brought against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment will not operate against the Tribe. This is not a suit against Clarke in his official capacity. It is simply a suit against Clarke to recover for his personal actions, which "will not require action by the sovereign or disturb the sovereign's property." *Larson v. Domestic and Foreign Commerce Corp.,*337 U.S. 682, 687, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). We are cognizant of the Supreme Court of Connecticut's concern that plaintiffs not circumvent tribal sovereign immunity. But here, that immunity is simply not in play. Clarke, not the Gaming Authority, is the real party in interest."

Lewis v. Clarke, 137 S. Ct. 1285, 1291–92, 197 L. Ed. 2d 631 (2017).

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The Appellate Court decision in *Drabik* considered the impact of *Clark:*

> "The distinction between individual- and official-capacity suits is paramount here. In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself.... Personal-capacity suits, on the other hand, seek to impose individual liability .... [O]fficers sued in their personal capacity come to court as individuals ... and the real party in interest is the individual, not the sovereign.
>
> "The identity of the real party in interest dictates what immunities may be available. Defendants in an official-capacity action may assert sovereign immunity...."There is no reason to depart from these general rules in the context of tribal sovereign immunity." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Lewis v. Clark*, —— U.S. ——, 137 S.Ct. 1285, 1291–92, 197 L.Ed. 2d 631 (2017).

Drabik, supra, 184 Conn. App. at 246–47.

After considering the impact of *Lewis v. Clark*, the Appellate Court held that the claims asserted by Drabik against Thomas and Quinn were covered by the "official capacity" doctrine, based in part on Drabik's specific allegations as to the positions held by Thomas and Quinn and the functions they performed.

> The allegations against Thomas and Quinn are inextricably tied to the Tribal Council and, more specifically, to the Mohegan Tribal Historic Preservation Office. Thomas and Quinn were described as officers of the Mohegan Tribal Historic Preservation Office numerous times. The plaintiff alleges that the notice regarding the stone groupings originated from the tribe and that the Mohegan Tribal Historic Preservation Office conducted the site walk. Additionally, Thomas' response specifically conveyed the opinion of the Mohegan Tribal Historic Preservation Office, and she signed the notice

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> with her designation as the tribe's deputy tribal historic preservation officer. The plaintiff requested information from the Mohegan Tribal Historic Preservation Office and the Tribal Council. Furthermore, service of the petition for a bill of discovery was made on Helga Woods, the attorney general of the tribe.
>
> There are no allegations in the bill of discovery that Thomas or Quinn conducted the site walk, identified the stone groupings, failed to respond to the plaintiff's requests while acting outside of their official capacity, or otherwise exceeded the authority given to them by the tribe. As such, the facts as alleged do not support the plaintiff's claim that Thomas and Quinn were named as defendants in their individual capacities or otherwise exceeded the scope of their authority. Thus, the court correctly concluded that the defendants were protected by sovereign immunity and, therefore, properly granted the defendants' motion to dismiss.

Drabik, 245–49.

The Complaint presently pending before this Court, dated June 21, 2017, contains claims substantially similar to the claims summarized by the Appellate Court with respect to the Petition. Although it identifies Ms. Thomas as a "resident of Groton," and avoids directly identifying her as the Tribe's Deputy Historic Preservation Officer, the Complaint alleges at Paragraph 9 that AT&T used the TCNS, and that "the [Federal Communications] Commission . . . provides this information to Indian Tribes and other historical and cultural organization that have expressed an interest in the relevant geographic area." At ¶ 10 it stated that "AT&T received through the TCNS a reply from the Mohegan Indian Tribe in response" to the TCNS notice. At ¶ 27, the Complaint contends that Plaintiff Drabik is harmed "based upon the Mohegan Indian Tribe's claim that there are historically and culturally significant features on a

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nearby parcel." Similar claims are asserted in ¶¶ 31 and 32. Thus, although the Plaintiffs intended to obfuscate the issue of Ms. Thomas's official capacity actions, it is patently obvious that the only way in which Ms. Thomas was ever involved in the TCNS process was in her official capacity as a representative of the Tribe and acting pursuant to the NHPA.

Plaintiffs' attempts to allege here that Ms. Thomas was acting in her individual capacity should be rejected because Plaintiffs are directly contradicting their prior assertions. Such assertions should be barred by the doctrine of judicial estoppel.

> The Supreme Court has explained that "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formula or principle." *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (quoting *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982)). However, the purpose of the doctrine is to "preserve the integrity of the judicial process by preventing a litigant from playing fast and loose with the courts." *Helfand*, 105 F.3d at 534. Because the doctrine was created to prevent a party from deliberately manipulating the courts, courts may not apply the doctrine when a party's change in position is based on a mistake, or inadvertence. *See id.* At 536. However, when a party takes a contrary position to its former position on a particular issue in order to gain an unfair advantage in the litigation, or to impose an unfair detriment on the opposing party, application of judicial estoppel is appropriate. *See New Hampshire v. Maine*, 532 U.S. at 751, 121 S.Ct. 1808.

Grondal v. Mill Bay Members Ass'n, Inc., 471 F. Supp. 3d 1095, 1110 (E.D. Wash. 2020), *order clarified,* No. 2:09-CV-18-RMP, 2020 WL 4590527 (E.D. Wash. July 28, 2020), and *aff'd sub nom. Grondal v. United States*, 21 F.4th 1140 (9th Cir. 2021).

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Plaintiffs' "individual capacity" claims are obviously intended to manipulate the court in order to impose an unfair detriment on the Defendant.

It is noteworthy in this context that the plaintiff in *Lewis v. Clark* originally sued both the MTGA and the individual limousine driver but withdrew his claims against the MTGA – which was inarguably covered by sovereign immunity – and elected to pursue only the driver. Drabik, by contrast, persisted in pursuing his claims all the way to the Connecticut Supreme Court and (as discussed below) through five years of litigation in tribal court. Having consistently asserted that Ms. Thomas was acting in her official capacity as the Deputy Tribal Historic Preservation Officer, Plaintiff should not be heard to contend that she was *not* acting in an official capacity. Moreover, having taken her deposition in tribal court proceedings, Plaintiff ascertained that all Ms. Thomas's conduct relevant to this case was undertaken in the company of, and under the supervision of, James Quinn, the Tribal Historic Preservation Officer.[4]

Plaintiffs may claim that they are not contradicting themselves since they made "individual capacity" claims in the Petition, as reflected in the Appellate Court decision. But that would serve only to show that those issues were already heard and decided by the Appellate Court, and Plaintiffs are collaterally estopped from pursuing the same claims here.[5]

[4] Defendant attaches copies of deposition transcripts taken in the tribal court litigation.

[5] Although Drabik was the sole plaintiff in the Petition, his co-plaintiff Ancient Highway Towers, LLC ("AHT") has no separate factual or legal claims. AHT's sole interest is as a lessee of a portion of Drabik's property, and its interests cannot be distinguished, factually or legally, from Drabik's.

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Notwithstanding any of the Plaintiffs' attempted obfuscations, it is beyond question that the only basis upon which Ms. Thomas became engaged in the TCNS process was in her official capacity as Deputy Tribal Historic Preservation Officer. There is no allegation that she received a TCNS notice in her individual capacity as a private citizen, or that in her private capacity she was invited by an AT&T representative to conduct a site walk on the site of a proposed cell tower. It is only by pretending the non-existence of undisputed facts that the Plaintiffs here can contend that the Defendant was acting in an individual capacity. [6]

Ms. Thomas acted as a governmental *official*. Unlike the limousine driver in *Clark*, she was not simply an employee involved in a motor vehicle accident while driving along a state highway. She responded in her official capacity to an official notice issued by an official federal agency pursuant to the NHPA. She responded from her tribal offices on behalf of the government of the Tribe and she was accompanied and supervised on the site inspection by her supervisor, the Tribal Historic Preservation Officer. *Drabik v. Mohegan Tribe of Indians of Connecticut*, No. SC-2020-01, 2020 WL 6219553 (Mohegan Elders Council Aug. 11, 2020).

Moreover, as set forth below in connection with the Defendant's comity argument, Plaintiffs have ascertained these facts in discovery in the Mohegan Tribal Court. Although the primary claims of tortious interference, negligent supervision, and negligence were dismissed on the basis that the TCNS response

[6] The Plaintiffs continue on their path of disavowing their prior claims in the proposed amendment of their complaint, filed March 7, 2022.

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was subject to the litigation privilege, Plaintiffs' trespass claims were remanded to the MTC Trial Court and Plaintiffs conducted discovery into the trespass claims. As affirmative defenses, Defendants Elaine Thomas and her supervisor James Quinn asserted that they had been invited onto the cell tower site and that they had observed stone groupings on property located at 10 Seebeck Road, East Lyme, which abuts Drabik's property. Both Thomas and Quinn testified that they visited the cell tower site together, as representatives of the THPO, in the company of Ms. Nicole Castro, an AT&T consultant. They both testified that they also visited the 10 Seebeck Road property together. James Fleming, the owner of that property in 2015, invited them as representatives of the Tribe in their official capacities because he wanted their opinions on the stone groupings located on his property. Both Thomas and Quinn testified that they both observed stone groupings on Mr. Fleming's property, which, as stated in the TCNS response, is adjacent to the Drabik property. Plaintiffs' allegations that Ms. Thomas fabricated the existence of stone groupings on property adjacent to his are directly refuted by the sworn testimony that Drabik elicited. Furthermore, Plaintiff Drabik acknowledged in discovery that he has no independent evidence to support his "trespass" and "fabrication" allegations or to contradict the testimony of Thomas and Quinn.[7]

Defendant Elaine Thomas acted in her official capacity. Plaintiffs' claims are therefore barred by the doctrine of sovereign immunity. *Drabik v. Thomas*, *supra*.

[7] Indeed, if Plaintiffs arguably had a probable cause basis to assert their claims in the Mohegan Tribal Court, they have now ascertained that there is no probable cause basis for pursuing individual liability and trespass claims here.

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D. THE PRINCIPLES OF COMITY REQUIRE DISMISSAL

1. Drumm Requires Dismissal Without Further Review.

Even if Plaintiffs' claims are not barred by sovereign immunity, the continuation of this litigation is barred by the comity principles enunciated in *Drumm v. Brown* (federal court application of tribal court exhaustion doctrine found to be binding on Connecticut courts). Although *Drumm* primarily addressed the issue whether Connecticut courts are required to abstain from a case when the same parties are litigating in a tribal court, it would defy logic to require exhaustion of tribal remedies if such exhaustion meant only that the state court case could resume upon completion of tribal court proceedings. That is not the law. Indeed, the *Drumm* court specifically addressed the procedure applicable upon exhaustion of tribal court adjudication. Reviewing federal case law, the *Drumm* court stated:

> "Certain aspects of post exhaustion procedure are also evident in light of these cases. After the tribal court system, including any tribal appellate courts, has adjudicated the issue of its jurisdiction, a nontribal court can review the jurisdictional issue as a federal question. Whether the tribal court system adjudicates the merits of the dispute before the jurisdictional question can be reviewed in a nontribal court depends on the tribal court procedural rules pertaining to the relative timing of adjudication of jurisdictional and substantive questions, at both the trial and appellate levels. If, subsequent to the tribal court system's adjudication of the jurisdictional question, a nontribal court determines that the tribal court exceeded its jurisdiction, the abstaining nontribal court's obligation to abstain dissolves. The merits of the controversy then potentially can be litigated in that court; if the tribal court already has adjudicated those merits, but was subsequently determined to have exceeded its jurisdiction in doing so, the merits can be *re* litigated in the nontribal court. **On the other hand, if it is determined that the tribal court did not exceed its jurisdiction, the tribal court's determinations on the merits will receive no review**."

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Drumm v. Brown, supra, 245 Conn. at 675–76 (emphasis supplied).

Here, the Plaintiffs voluntarily submitted to the MTC jurisdiction. The MTC exercised personal and subject matter jurisdiction over the parties. The MTC made its determinations on the merits. There is no basis to contend that the tribal court exceeded its jurisdiction. Therefore, this Court cannot review the MTC's decision. It should recognize the MTC decision and dismiss this case.

2. **Foreign Judgments Are Afforded Comity by Connecticut Courts.**

Apart from the explicit barrier articulated in *Drumm,* Plaintiff's claims must be dismissed because foreign judgments are given effect in the courts of Connecticut so long as the foreign court had jurisdiction over the parties and afforded the litigants due process. *Litvaitis v. Litvaitis*, supra, 162 Conn. 544–45.

> "[J]udgments of courts of foreign countries are recognized in the United States because of the comity due to the courts and judgments of one nation from another. Such recognition is granted to foreign judgments with due regard to international duty and convenience, on the one hand, and to rights of citizens of the United States and others under the protection of its laws, on the other hand. This principle is frequently applied in divorce cases; a decree of divorce granted in one country by a court having jurisdiction to do so will be given full force and effect in another country by comity, not only as a decree determining status, but also with respect to an award of alimony and child support. The principle of comity, however, has several important exceptions and qualifications. A decree of divorce will not be recognized by comity where it was obtained by a procedure which denies due process of law in the real sense of the term, or was obtained by fraud, or where the divorce offends the public policy of the state in which recognition is sought, or where the foreign court lacked jurisdiction. 24 Am.Jur.2d, Divorce and Separation, § 964."

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Id. Accord, *Bruneau v. Bruneau*, *supra*, 3 Conn. App. at 455.

Tribal courts, while not the courts of "foreign countries," are similar in that they are sovereign courts and, like the courts of foreign countries, are not entitled to the full faith and credit afforded the courts of other states pursuant to the U.S. Constitution. Instead of full faith and credit, tribal court judgments are afforded comity. The judgments of tribal courts have been recognized and enforced in Connecticut under these comity principles, despite challenges on public policy and due process grounds.

> "Tribal court judgments are treated with the same deference shown decisions of foreign nations as a matter of comity. *Hilton v. Guyot* (1895), 159 U.S. 113, 163-64, 16 S.Ct. 139, 143, 40 L.Ed. 95, 108; *In remarriage of Limpy* (1981), Mont., 636 P.2d 266, 38 St.Rep. 1885; *State ex rel. Stewart v. District Court* (1980), Mont., 609 P.2d 290, 37St.Rep. 635; *Red Fox and Red Fox* (1975), 23 Or.App. 393, 542 P.2d 918; *Wakefield v. Little Light* (1975), 276 Md. 333, 347 A.2d 228; *In re Lynch's Estate* (1962), 92 Ariz. 354, 377 P.2d 199; *Begay v. Miller* (1950), 70 Ariz. 380, 222 P.2d 624." *Wippert v. Blackfeet Tribe,* 201 Mont. 299, 654 P.2d 512, 515 (Mont.1982)."

Mashantucket Pequot Gaming Enter. v. DiMasi, *supra*, 1999 WL 799526.

New York and other states have similarly recognized tribal court judgments under the principles of comity. *Mashantucket Pequot Gaming Enter. v. Renzulli*, 188 Misc. 2d 710, 713, 728 N.Y.S.2d 901, 903 (Sup. Ct. 2001)(citing *DiMasi* in enforcing judgment on gaming debt); *Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc.,* 462 N.W.2d 164, (N.D. 1990). In *Fredericks,* the court wrote:

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> "We recognize that there is a difference between a "foreign nation" and an "Indian nation," whose citizens are citizens of both the tribe and of our state. Indian tribes "hold a unique legal status as 'quasi-sovereign entities' " (*Lohnes v. Cloud, supra,* 254 N.W.2d at 433) with attributes of sovereignty "to the extent that sovereignty has not been withdrawn by federal statute or treaty, *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 14, 107 S.Ct. 971, 976, 94 L.Ed.2d 10, 18 (1987). "One of the attributes of tribal sovereignty is the power to adjudicate private civil disputes." M*exican v. Circle Bear,* 370 N.W.2d 737, 741 (S.D.1985). "Tribal courts play a vital role in tribal self-government ... and the Federal Government has consistently encouraged their development." *Iowa Mut. Ins. Co. v. LaPlante, supra,* 480 U.S. at 14–15, 107 S.Ct. at 976, 94 L.Ed.2d at 19. Although there is a difference between a "foreign nation" and an "Indian nation," the doctrine of comity, as set forth in *Hilton v. Guyot, supra,* with regard to the recognition of foreign judgements in suits between citizens of different nations, has been applied to the enforcement of tribal court judgments. *See, e.g., Mexican v. Circle Bear, supra,* and decisions cited therein. We consider an "Indian nation" as equivalent to a "foreign nation" to encourage reciprocal action by the Indian tribes in this state and, ultimately, to better relations between the tribes and the State of North Dakota.

Id. 462 N.W.2d at 167–68.

The Connecticut Superior Court in *DiMasi* recognized and enforced the Mashantucket Pequot tribal court's judgment against a patron who incurred a debt to that tribe's Foxwoods casino. That case involved the affirmative enforcement in the Superior Court of a default judgment entered in tribal court on a gambling debt. The Superior Court ascertained that the tribal court had acquired personal jurisdiction over the defendant; that the defendant had adequate notice and opportunity to defend the claim; and that enforcement of a debt incurred at the Foxwoods casino did not violate Connecticut public policy. The

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DiMasi court found that all these factors were satisfied, finding that the defendant had voluntarily agreed to submit to the jurisdiction of the Mashantucket Pequot tribal courts for the enforcement of gaming obligations; that he was properly served with notice of the proceeding and had the opportunity to defend the complaint in the tribal court; and that a gaming debt did not offend public policy in light of the Gaming Compact between the Mashantucket Pequot Tribe and the State. The *DiMasi* court stated:

> "This court concludes, from a review of the Ordinance and the judgment of March 12, 1999, that the Tribal Court had jurisdiction of the cause, that the defendant was duly notified of the institution of the action in the Tribal Court and that he had the opportunity to fully and fairly contest the allegations before the Tribal Court."

Id. at *2–3.

While the *DiMasi* court deemed it necessary to address and resolve the jurisdictional and due process issues in order to apply comity to the tribal court judgment, such issues are not present where the plaintiffs initiated the tribal court case and voluntarily availed themselves of tribal court jurisdiction. In *Drumm,* the Supreme Court addressed this issue in considering the tribal court exhaustion doctrine.

> "Where the state court plaintiffs are also the initiator of the action before the tribal court, however, it simply makes no sense to consider continuing adjudication of the state court action on the basis that "assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith ... or ... the action is patently violative of express jurisdictional prohibitions, or ... exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." . . . None of these exceptions is consistent with the same plaintiffs' having invoked

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> the tribal court's jurisdiction. We conclude, therefore, that under such circumstances the exceptions are simply inapplicable."

Drumm v. Brown, 245 Conn. at 697.

There is no basis to decline recognition of the tribal court judgment here since Plaintiffs voluntarily submitted to the MTC's jurisdiction.

3. **Plaintiffs Were Afforded Ample Due Process.**

There can be no doubt that Plaintiffs were afforded due process in the Mohegan Tribal Courts. Defendant attaches the Docket Sheets compiled by the Clerk of the Mohegan Tribal Trial and Appellate Courts**. Exhibits F and G.** Plaintiffs filed a Complaint dated May 26, 2016; an Amended Complaint dated January 31, 2017; a Revised Complaint dated July 24, 2017; and a Second Amended Complaint dated August 16, 2017. Besides the multiple amendments of their pleadings, they were heard at oral argument at the Trial Court on the Defendants' Motion to Dismiss and/or Strike and were heard again on a Motion to Reargue and Reconsider. Plaintiffs appealed from the Trial Court's decision in September 2018, and the issues on appeal were fully briefed and heard by the Tribal Court of Appeals. After the Court of Appeals decision was issued in January 2020, the Plaintiffs appealed to the Council of Elders, and again fully briefed their claims. After the Council of Elders issued its opinion (as corrected), the case was remanded to the Trial Court solely with respect to the remaining count of trespass. Plaintiffs then filed a Revised Complaint dated October 16, 2020, and subsequently further amended their complaint March 31, 2021.

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The parties engaged in written discovery and Plaintiffs took the depositions of Elaine Thomas and James Quinn. (*See* **Exhibits D and E**).

With trial scheduled for November 15, 2021, counsel prepared for and attended a Trial Management Conference October 7, 2021. The deposition of the Plaintiff John Drabik was scheduled for that day. Only then did Plaintiffs withdraw their trespass count, thereby concluding the Tribal Court litigation.

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice ... the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact." (Citation omitted; internal quotation marks omitted.) *Zitkene* v. *Zitkus*, 140 Conn. App. 856, 865–66, 60 A.3d 322 (2013).

St. Denis-Lima v. St. Denis, 190 Conn. App. 296, 310–11, 212 A.3d 242, 252, *cert. denied,* 333 Conn. 910, 215 A.3d 734 (2019).

Those principles, applied here, require the dismissal of the complaint.

4. **The Tribal Court Applies Connecticut Law.**

The principles of comity are especially applicable here, inasmuch as the Tribe applies Connecticut law in most respects; and the Rules of Procedure are substantially identical to the Connecticut Practice Book. The Mohegan Code of Laws provides that "The Mohegan Tribal Court shall apply the substantive law of the Mohegan Tribe as set forth in this Article, other Mohegan Tribal Ordinances, the Mohegan

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Constitution, and in the absence of applicable Tribal law, the Mohegan Tribal Court may apply relevant provisions of federal and/or Connecticut common law, except as such law may be in conflict with Mohegan Tribal law." Mohegan Tribal Code Chapter 1, Article 1, Section 1-54.[8]

The MTC relied on Connecticut common law to hold that the TCNS response was covered by the litigation privilege. As stated by the Council of Elders:

> Both the Trial Court and Court of Appeals found that Counts I, II and III should be dismissed because the litigation privilege, ***a common-law privilege recognized in Connecticut***, conferred absolute immunity as to the Response and divested the Tribal Court of subject matter jurisdiction. We agree with the Court of Appeals regarding its adoption of the Trial Court's analysis of the litigation privilege. Specifically, we find that in Mohegan jurisprudence:
>
> 1. Responses prepared by the Mohegan Tribal Historic Preservation Office in the context of the Section 106 review process pursuant to the National Historic Preservation Act fall within the scope of the litigation privilege and as such, receive absolute immunity.
>
> 2. The Federal Communication Commission's TCNS is part of the federal government's fulfillment of its obligations under the National Historic Preservation Act, and as such, when a response to a notice is filed by the Mohegan Tribe, the response is prepared in anticipation of quasi-judicial proceedings. Such quasi-judicial proceedings include, but are not limited to, Connecticut Siting Council proceedings or other activities pursuant to Section 106.

[8] The Laws of the Mohegan Tribe are available at https://library.municode.com/tribes_and_tribal_nations/mohegan_tribe/codes/code_of_laws

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Drabik v. Mohegan Tribe of Indians of Connecticut, No. SC-2020-01, 2020 WL 6219553 (Mohegan Elders Council Aug. 11, 2020) (emphasis added). Thus, the Council of Elders adopted the Connecticut common law with respect to the litigation privilege. The MTC Trial Court, Guernsey, J.[9], relied exclusively on Connecticut law decisions in holding that the TCNS response was covered by the litigation privilege.

> The Court holds that the Response to the TCNS notification issued by the Mohegan Tribal Historic Preservation Officer was generated to express the opinion of the Mohegan Tribal Historic Preservation Office as to the absence or presence of properties of traditional religious and cultural importance to the Tribe on a proposed telecommunications site. As such, it was expected to play a part in, and did influence, an anticipated quasi-judicial proceeding. Therefore, it falls within the category of "preparatory communications that may be directed to the goal of the proceeding." Hopkins v. O'Connor, 282 Conn. 821, 832, 925 A.2d 1030 (2007). "The test for relevancy is generous, and 'judicial proceeding' has been defined liberally to encompass much more than civil litigation or criminal trials." *Gallo v. Barile*, 284 Conn. 459, 466, 935 A.2d 103 (2007), *citing* Hopkins v. O'Connor, supra, at 839, 925 A.2d 1030. Further, the Court discerns a strong public policy behind allowing Tribal Historic Preservation Officers freely to express opinions on issues of religious and cultural significance. As such, the Response filed by Officer Thomas is held to be absolutely privileged. "... [A]bsolute immunity does bar the Plaintiff's claim of intentional interference with contractual or beneficial relations." *Rioux v. Barry*, 283 Conn. 338, 350, 927 A.2d 304 (2007). Counts One and Two are subject to dismissal in that they are

[9] Paul Guernsey, Esq., is the Chief Judge of the MTC. He also practices law in Connecticut with the firm of Stevens, Harris & Guernsey, P.C. in Niantic.

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> based on Officer Thomas' Response to the TCNS notification, which is held to be absolutely privileged. The preponderance of Count Three, alleging injury related to this Response, is subject to dismissal for the same reason.

Drabik v. Mohegan Tribe of Indians of Connecticut, No. CV-16-0105, 2018 WL 3600023 (Mohegan Trial Ct. Apr. 19, 2018).

In short, the law that is followed and applied by the Mohegan Tribal Court is hardly "foreign;" it is the same law that would be applied in this Court. Accordingly, although the principles of comity do not require that the tribal or foreign country law be identical with or even similar to the law of Connecticut, the concerns that might arise in recognizing foreign judgments are simply not present here.

5. **The Claims Alleged Here Are Virtually Identical to Those In Tribal Court.**

When Defendant moved in September 2017 to dismiss or alternatively stay this case pursuant to the tribal exhaustion doctrine, the late Hon. Judge Harry Calmar compared the MTC and Superior Court complaints and found them substantially identical. Docket # 102.01. In comparing the MTC complaint and the complaint filed here, the Court wrote:

> "Although the defendants in the two actions are not identical, the claims made in both actions arise out of the same fact pattern and the operative complaints contain virtually identical allegations. The defendant moves to dismiss, or alternatively, to stay this action based upon the plaintiffs' failure to exhaust tribal court remedies pursuant to *Drumm v. Brown*, 245 Conn. 657, 716 A.2d 50 (1998) (tribal exhaustion doctrine requires, absent several exceptions, that trial court abstain from adjudicating action when there is a parallel proceeding in the tribal court). Based upon

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Drumm and the similarity of both actions, the court stays this action pending termination of the tribal court proceedings."

Docket # 102.01.

Plaintiffs amended, revised and further amended their claims in the MTC, but all versions alleged essentially the same fact pattern and sounded in counts of tortious interference and negligence arising from the response to the TCNS. The same claims are made here. Although the Mohegan Tribal Council and James Quinn are not identified as party-defendants here, and were included in the Tribal Court Complaint, the Plaintiffs are the same and Elaine Thomas is identified as a defendant in both courts. The allegations against Ms. Thomas are essentially the same in all of the Plaintiffs' pleadings. In the Tribal Court Complaint, Plaintiffs claimed at Paragraph 9 that "No view shed of substantial stone groupings or cultural landscapes exist that would be impacted by the proposed cellular telecommunications tower because ***no such stone features, cultural features or landscapes exist in the area***." Compare with Paragraph 14 of the Complaint: "No view shed of cultural stone features or cultural landscapes exists that would be impacted by the proposed cellular telecommunications tower because **no such stone features, cultural features or landscapes exist in the area**." (emphasis added).[10]

[10] Plaintiffs' proposed Amended Complaint, filed March 7, 2022, also contains these same false allegations. See Proposed Amended Complaint Paragraphs 9, 10.

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This assertion is material to Plaintiffs' contention that Ms. Thomas acted outside the scope of her employment in preparing the TCNS response. They argue that Ms. Thomas fabricated the existence of stone features for purposes of defeating the Plaintiffs' cell-tower plans.

As a factual matter, the assertion is completely false. Having taken the depositions of Ms. Thomas and Mr. Quinn in the Tribal Court proceedings and having heard them both testify that they were invited to, and did, observe stone groupings on private property adjacent to Drabik's, property, Plaintiffs are aware that the evidence is contrary to their assertions. Indeed, in light of the testimony in those depositions, Plaintiffs voluntarily withdrew their remaining claims in the MTC.

It is beyond the scope of a motion to dismiss to resolve credibility issues. But the salient point is that Plaintiffs made these same allegations in the tribal courts. If credited, Plaintiffs' allegations would have exposed Ms. Thomas to individual liability in the MTC. She was named individually in that court. Such a fabrication would have been clearly outside the scope of her employment. Plaintiffs had every opportunity to press individual liability type claims in the tribal courts. That they failed there provides no rationale for allowing re-litigation here.

6. **Comity Precludes Relitigation of All Claims that Were or Could Have Been Litigated.**

Comity precludes Plaintiffs from relitigating here the same issues that were litigated in Tribal Court. This principle was enunciated by the United States Supreme Court in *Hilton v. Guyot*, *supra,* 159 U.S. 113.

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> "[W]e are satisfied that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendants, therefore, cannot be permitted, upon that general ground, to contest the validity or the effect of the judgment sued on.

Hilton v. Guyot, *supra,* 159 U.S. at 202–03.

All of the factors considered by the U.S. Supreme Court in *Hilton* have been satisfied here. Plaintiffs had ample opportunity in the MTC to pursue not only the claims that they identified but any other claim arising in connection with the Defendant's visit to the Drabik property and the response that was submitted to the FCC. The principles of comity require that preclusive effect be given to all such claims. Plaintiffs' claims in this Court should be dismissed.

E. CONCLUSION.

Plaintiffs' claims are barred by the Tribe's sovereign immunity. Plaintiffs' attempt to disguise their claims as based on unofficial conduct should be rejected. The suit against Ms. Thomas for actions that she undertook as Deputy Tribal Historic Preservation Officer under the supervision of the Tribal Historic

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Preservation Officer is barred because she is an "individual tribal official . . acting in [her] representative capacity and within the scope of [her] authority" *Chayoon* v. *Sherlock*, supra, 89 Conn. App. at 826–27.

Even if not barred by sovereign immunity, the Plaintiffs' claims should be dismissed under comity principles. Five years and four months of tribal court litigation led to judgment against the Plaintiffs on three tort claims, and rather than go to trial on a spurious trespass claim, Plaintiffs withdrew. The judgment of the Mohegan Tribal Courts should be recognized, and Plaintiffs claims should be dismissed.

Respectfully submitted
DEFENDANT,
ELAINE THOMAS

By: */s/ Andrew L. Houlding, Esq.*

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CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing has been sent via electronic mail and/or mailed via first-class, postage prepaid, U.S. mail, this 8th day of March 2020 to the following counsel of record:

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