UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

CALAMAR CONSTRUCTION SERVICES, INC.,	)	
Plaintiff,	)	Civ. 1:23-cv-10786
v.	)	
THE MASHPEE WAMPANOAG VILLAGE LIMITED PARTNERSHIP; and RAYMOND JAMES AFFORDABLE HOUSING INVESTMENTS, INC.,	)	
Defendants.	)	

CALAMAR CONSTRUCTION SERVICES, INC.'S OPPOSITION TO THE MASHPEE WAMPANOAG VILLAGE LIMITED PARTNERSHIP'S MOTION TO DISMISS

REQUEST FOR ORAL ARGUMENT

The Mashpee Wampanoag Village Limited Partnership (the "Village LP") is a corporate entity formed under Massachusetts law to acquire Massachusetts tax credits and provide the benefit of those credits to a private Florida investor entity. While the Village LP's general partner is a federally recognized tribe (the Mashpee Wampanoag Tribe or "Tribe"), the Village LP was intentionally created separate from the Tribe to take advantage of Massachusetts programs and to entice private investors to assist the Tribe. Without eligibility for such programs and offering up some level of control over the project that would generate the tax credits, the Mashpee Wampanoag Village housing development would not exist. Thus, it is not surprising or difficult to demonstrate that the Village LP was a separate, Massachusetts entity that is subject to Massachusetts law and does not enjoy the Tribe's sovereign immunity.

In addition to its jurisdictional attack, the Village LP also seeks to dismiss counts of the Complaint on three bases: that Calamar was limited to bringing suit in Massachusetts state court;

that the project in question is not located in Massachusetts; and that the parties did not mediate pre-suit as required by their contract, but instead mediated only after Calamar won an order from this Court compelling the Village LP to the mediation table. But case law makes plain that an agreement that merely acknowledges that jurisdiction lies in one court does not deprive a party from seeking relief in another court that similarly has jurisdiction. It also makes plain that tribal land is located in the state where it is found (notwithstanding the Tribe's federal recognition), and any alternative argument would make the Village LP ineligible for the credits that are at the heart of the project. Finally, under Massachusetts law, the Village LP cannot frustrate a condition precedent and then seek to use the failure as a defense.

As a result, Calamar Construction Services, Inc. ("Calamar") properly brought its Complaint before this Court to recover the damages owed to it by the Village LP, and the Village LP's motion to dismiss should be denied in its entirety.

I. LEGAL STANDARD

The Village LP raises two distinct challenges to Calamar's amended complaint: a jurisdictional challenge, under Fed. R. Civ. P. 12(b)(1), and a merits-based challenge to the sufficiency of the amended complaint's allegations in stating claims against the Village LP. The First Circuit has explained that this Court "should give Rule 12(b)(1) motions precedence," *Dynamic Image Techs., Inc. v. United States*, 221 F.3d 34, 37 (1st Cir. 2000), because "[d]ifferent consequences flow from dismissals under 12(b)(1) and 12(b)(6)," *Ne. Erectors Ass'n of BTEA v. Sec'y of Lab., Occupational Safety & Health Admin.*, 62 F.3d 37, 39 (1st Cir. 1995).

As a general matter, Tribes, as domestic dependent nations, retain a measure of sovereign immunity as part of their own sovereign authority. *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014). While several Courts of Appeal have held "that tribal immunity shields not only Indian tribes themselves, but also entities deemed 'arms of the tribe,'" *id.* at 825 n.4

(Thomas, J., dissenting), not all entities qualify. The First Circuit has not expressly adopted a standard of review for such claims, but the Tenth Circuit, in *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010), suggested analyzing a claim of tribal sovereign immunity by a corporate entity using several factors: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities." *Id.* at 1187.[1] Several other circuits have adopted the *Breakthrough* factors, including the Fourth, Seventh, and Ninth Circuits.[2]

The Fourth Circuit (and other courts following it) has held that "the parties claiming arm-of-the-tribe immunity . . . b[ear] the burden of proving their entitlement to immunity, . . . even though a plaintiff generally bears the burden to prove subject matter jurisdiction." *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 176 (4th Cir. 2019); *see also, e.g.*, *Hwal'Bay Ba: J Enterprises, Inc. v. Jantzen in & for Cnty. of Mohave*, 248 Ariz. 98, 106 (2020) ("Ordinarily, therefore, an entity must produce more than its plan of organization, bylaws, and the like to prove its entitlement to sovereign immunity. Evidence demonstrating the functional relationship between the tribe and the entity should also be provided to demonstrate that the entity is—in practice and on paper—an arm of the tribe.").

With regard to the portion of the Village LP's motion that seeks to dismiss Calamar's amended complaint for failure to state a claim, Calamar "need not establish a *prima facie* case or

[1] The *Breakthrough* court also stated a sixth factor, "whether the purposes of tribal sovereign immunity are served by granting immunity to the entities," *id.* at 1181, but that factor has not been adopted by other Courts of Appeal.
[2] *See, e.g.*, *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 176 (4th Cir. 2019); *Mestek v. LAC Courte Oreilles Cmty. Health Ctr.*, 72 F.4th 255, 259 (7th Cir. 2023); *White v. Univ. of California*, 765 F.3d 1010, 1025 (9th Cir. 2014).

allege every fact necessary to prevail at trial." *Haglund v. Estee Lauder Companies, Inc.*, 466 F. Supp. 3d 292, 296 (D. Mass. 2020). Instead, it must simply "'state a facially plausible legal claim' and 'contain enough factual material "to raise a right to relief above the speculative level."'" *Howard v. Bisenius*, No. CV 23-12176-LTS, 2024 WL 2753386, at *2 (D. Mass. May 5, 2024) (citation omitted).

II. THE VILLAGE LP IS A MASSACHUSETTS ENTITY NOT ENTITLED TO TRIBAL SOVEREIGN IMMUNITY

The Village LP is a Massachusetts limited partnership, created to take advantage of a federal and state tax credit program that seeks to incentivize the creation of qualified low income housing projects (the "Federal Low Income Housing Tax Credit Program" or "LIHTC"). In setting up a Massachusetts entity and offering to give away almost all of the income of the partnership, the Tribe sought to form a corporate being that (unlike the Tribe) was eligible for tax credits and thus entice private investors to assist it in building a housing development (the "Project"). But the Village LP cannot have it both ways: in submitting to Massachusetts laws and jurisdiction in order to be eligible for tax credits, it cannot simultaneously claim to be exempt from those laws when facing liability. As a review of the *Breakthrough* factors shows,[3] the Village LP is an investment vehicle, not an arm of the tribe, and thus has no sovereign immunity.

A. The Village LP Is a Massachusetts Corporate Entity Subject to Massachusetts Rules.

Calamar's contract and lawsuit are not against the Mashpee Wampanoag Tribe, but instead are against the Village LP, a limited partnership formed on March 22, 2018 under Mass. Gen. L. c. 109, §8. *See* Declaration of Nicholas A. Dube, Ex. A [hereinafter "Dube Decl."]. The decision

[3] As noted above, the Village LP should bear the burden of establishing its entitlement to immunity. Beyond citation to the Amended Complaint and the contract documents, the Village LP has not presented any evidence supporting its claim that it is an arm of the tribe, which is itself reason enough to deny its motion. *See Barrett v. Lombardi*, 239 F.3d 23, 27 (1st Cir. 2001) ("[A]llegations in a lawyer's brief or legal memorandum are insufficient . . . to establish jurisdictional facts."). Nevertheless, Calamar here below provides evidence in support of its assertion that the Village LP is not an arm of the Tribe.

to incorporate a corporate entity under state law (as opposed to tribal law) tends to show that the entity is not an "arm of the tribe," but is instead a separate business entity subjecting itself to the laws of another sovereign. *See, e.g.*, *Uniband, Inc. v. Comm'r*, 140 T.C. 230, 256 (2013) ("Uniband's incorporation under Delaware law weighs heavily against tribal sovereign immunity."). Indeed, some courts have found incorporation under a state to be dispositive of the question. *See, e.g., State by & through Workforce Safety & Ins. v. Cherokee Servs. Grp., LLC*, 2021 ND 36, ¶ 15 ("When a tribal entity subjects itself to a state by organizing under the state's laws, it waives sovereign immunity.").

In Massachusetts, a choice by a tribe to follow Massachusetts corporate law means that it lacks immunity. In *Bldg. Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1, 16 (2004), the Supreme Judicial Court examined the consequences of the decision of the Wampanoag Tribal Council of Gay Head, Inc. (another Massachusetts tribe) to take on the status of a Massachusetts corporation. In its ruling holding that the tribe's sovereign immunity had been waived, the Court noted that "[t]he Tribe cannot now evade its bargained for, agreed to status—namely, . . . the equivalent of a corporation." *Id.* at 16. Because "[t]hat status confers, inter alia, the right to sue and be sued, [it] thus waives the Tribe's sovereign immunity." *Id.* The Village LP has made clear that it is, for all intents and purposes, a Massachusetts limited partnership. *See* Dube Decl. Ex. B, at 3 ("The Partnership is a limited partnership duly organized, validly existing and in good standing under the laws of the Commonwealth of Massachusetts . . . and has the requisite power and lawful authority under the law of the State to own its properties and to carry on its business . . . ." (emphases added)); *id.* Ex. C, at 2. Because a Massachusetts limited partnership "is an entity which may be sued in its own name" under the laws of the Commonwealth, *see Fusco v. Rocky Mountain I Invs. Ltd. P'ship*, 42

Mass. App. Ct. 441, 446 (1997), the partners of the Village LP agreed in creating a Massachusetts partnership that it too may be sued under the laws of Massachusetts.

Moreover, Massachusetts case law has actually answered with the question of whether a corporate entity created to take advantage of the LIHTC program inherits the immunity of its members, rejecting the concept roundly. In *Acevedo v. Musterfield Place, LLC*, 479 Mass. 705 (2018), the Supreme Judicial Court dealt with a suit against a "controlled affiliate" of the Framingham Housing Authority and its managing member. *Id.* at 705. The controlled affiliate and its managing member claimed immunity from suit, as they had been created "in order to obtain Federal tax credits pursuant to the LIHTC program," and were controlled by the housing authority. *Id.* at 707. The controlled affiliate had an investor with a 99.99 percent ownership interest, but was managed by the managing member, which in turn had only one member (the housing authority). *Id.* at 708. In rejecting the affiliate and managing member's claims of immunity, the Court held that "[t]he controlled affiliate and its managing member in this case are not governmental entities; they are private limited liability companies that have never been thought to be entitled to sovereign immunity." *Id.* at 710. The same logic applies here: by creating a private corporate entity (the limited partnership) for LIHTC purposes, the Tribe separated the Village LP from itself and any accompanying claims of sovereign immunity.

B. The Village LP Was Created to Take Advantage of Tax Credits and Attract Private Investors.

As noted above, the Village LP was created for the purpose of eligibility for the LIHTC program. Under LIHTC, a certain amount of federal tax credits are allocated to Massachusetts, which are in turn allocated by the state's housing department to "qualified low-income housing projects"—"residential rental properties that are rent-restricted and have a certain minimum share of rental units set aside for low and moderate income households." *Acevedo*, 479 Mass. at 706.

While "[p]rivate developers of these projects typically use the tax credits allocated to them through the LIHTC program as an incentive to attract capital from private investors to help pay for the construction, acquisition, and rehabilitation of affordable housing," other entities (like the Tribe) "cannot make direct use of these Federal tax credits because they are exempt from Federal tax liability and, therefore, have no Federal tax liability that they can diminish by receiving Federal tax credits under the LIHTC program." *Id.* at 707. As a result, tax exempt entities often create a separate entity that is eligible for the tax credits. *See id.* Because credits under LIHTC "are valuable to large financial institutions with significant federal tax liabilities," like Raymond James and its investors, they often join the project as a limited partner to access the credits. *JER Hudson GP XXI LLC v. DLE Invs., LP*, 275 A.3d 755, 764 (Del. Ch. 2022).

Thus, the Village LP's argument that its purpose is really "to build and ultimately provide housing for tribal members and to promote economic development for tribal members"[4] is belied by the fact that its own Partnership Agreement centers the partnership's purpose on the tax credits: "The purposes of the Partnership are to acquire, finance, own, construct, rehabilitate, maintain, improve, operate, lease and, if appropriate or desirable, sell or otherwise dispose of the Project in a manner consistent with the requirements of Section 42 of the Code and the State Tax Credit Laws." Dube Decl. Ex. C § 1.04 (emphasis added). It may have been a resulting effect of the Village LP's project that it provided housing for tribal members, but the Village LP's reason for existence was to be a vehicle for tax credits and thus an incentive for private investment. The Tribe had its own housing department that could (with sufficient funds) provide tribal housing; the

[4] While the Village LP claims that this assertion is "acknowledged by Calamar," Village LP MtD Mem. at 13, the cited section of the Complaint acknowledges no such thing, *see* Amend. Compl. ¶ 6 ("[T]he Village LP was created for the purpose of holding and operating a housing development . . . ."); *id.* ¶ 7 ("[A] further purpose of the Village LP was the acquisition of Low-Income Housing Tax Credits ('LIHTCs') for the partnership.").

Village LP's purpose differed because it was subject to federal and state tax laws and thus eligible for LIHTC.

That purpose, to collect tax credits and provide them to private investors, is more in line with activity by a private entity than that of a sovereign; indeed, it is precisely to avoid being a sovereign that the Village LP was formed.

C. The Village LP Is Subject to Control by Its Limited Partner, a Private Investor.

The Village LP's structure and operation reveal that the limited partner holds a number of powers that control the activities of the partnership, such as a requirement of consent from the limited partner with regard to management and operation of contracts over $25,000 or before "making any material change order or material increase or reduction in the Budget" and the ability to remove and replace the Mashpee Wampanoag Tribe as general partner for "hav[ing] violated, and not cured within thirty (30) days after written notice from the Investor Limited Partner, any provision of" the Limited Partnership Agreement. Dube Decl. Ex. C, §§ 6.02(a), 6.11(o), 8.04(a).

Evidence demonstrates that the limited partner regularly exercises that veto right. The limited partner instructed the Tribe not to sign the construction contract for the Project without its approval, Dube Decl. Ex. D, and even asserted control over this litigation, Dube Decl. Ex. E ("The LPA requires that our consent be provided for any settlement agreement or to initiate litigation on behalf of the Partnership."). Thus, while the Tribe is nominally the controlling entity of the partnership as its general partner, it at best shares that role with the limited partner, which has taken an active role in the activities of the partnership.

D. The Village LP Never Shared Sovereign Immunity with the Tribe.

Outside of litigation posture, the Tribe does not appear to have ever unequivocally stated that the Village LP has sovereign immunity. In the Village LP's agreements with other parties (other than where requested by another party), it appears to have always been *the Tribe* that waived

its sovereign immunity, but not the Village LP. Indeed, in discussions with Massachusetts's housing department and the Tribe regarding documents necessary for eligibility for the tax credits, counsel for the Village LP's limited partner expressly stated that "[t]he Partnership doesn't have sovereign immunity." Dube Decl. Ex. F. While the Massachusetts housing department later hedged, stating that it would seek broad waiver language just in case, *see* Dube Decl. Ex. G, at 2, that hardly constitutes a clear or unequivocal assertion of immunity. Accordingly, this factor too weighs against a finding of sovereign immunity.

E. The Village LP Directs Its Profits and Tax Credits to Its Limited Partner, a Private Investor.

With regard to financial arrangements between the Mashpee Wampanoag Tribe and the limited partner, the Mashpee Wampanoag Tribe receives only 0.01% of the revenues of the partnership. *See* Dube Decl. Ex. C, § 4.01(a). Courts have found that even greater percentages of revenue were sufficiently *de minimis* to demonstrate that the Tribe did not have a close financial relationship with the corporate entity. *See People v. Miami Nation Enterprises*, 386 P.3d 357, 378 (Cal. 2016) (finding that where the tribes received 1% of revenue, it did not show "a close financial relationship between either tribe and the . . . businesses"). As discussed above, the purpose of the Village LP was to earn tax credits and provide them to its limited partner, not to provide profits or income to the Tribe.

For this factor, a reviewing court "consider[s] the extent to which a tribe 'depends . . . on the [entity] for revenue to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities.'" *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 184 (4th Cir. 2019) (citation omitted). As the revenue to the Tribe is miniscule, this factor weighs heavily against a finding of sovereign immunity.

* * *

In short, the Village LP is an investment vehicle, not a tribal department. It was created subject to Massachusetts law in order to acquire tax credits for its limited partner and is subject to effective control by its limited partner through that partner's exercise of its right to require consent to actions of the partnership. It was never formally granted sovereign immunity by the Tribe, nor does it seem to have claimed it outside of litigation posture. Finally, the Tribe receives only 0.01% of the Village LP's revenue, showing that the partnership's revenues are directed away from the Tribe and toward the limited partner. Each of these factors point toward a finding that the Village LP lacks sovereign immunity; combined, they compel it.

III. IN ANY EVENT, THE VILLAGE LP HAS WAIVED ANY IMMUNITY

Even were the Village LP entitled to immunity on its own right, its actions have made clear that it has generally waived its immunity with regard to the Project. In particular, the Village LP subjected its lease to Massachusetts law and thereby provided Calamar (and others) rights of recovery via the lease and signed an agreement with the Commonwealth to comply "with all applicable state laws and regulations including but not limited to the applicable Massachusetts General Laws." Dube Decl. Ex. H, at 4. Because the Village LP has repeatedly subjected itself to Massachusetts law, it cannot now disclaim any obligations thereunder.

As part of its necessary assurances to qualify for the Massachusetts state tax credits, the Village LP filed notice of its lease of the property with the Barnstable County Registry of Deeds on December 17, 2018. *See* Dube Decl. Ex. I. This Notice of Ground Lease stated that both the Village LP and the Tribe "desire[d] to execute this Notice of Ground Lease in order to give record notice of the Lease and rights created thereby pursuant to Massachusetts General Laws Chapter 183, Section 4." *Id.* That law provides that leases are "not . . . valid as against any person, except the grantor or lessor, his heirs and devisees and persons having actual notice of it," unless the

notice be recorded in the registry of deeds. Mass Gen. L. c. 183, § 4. As a result, the Village LP (and Tribe) made clear that the lease under which the Village LP had rights over the property was subject to Massachusetts law.

Furthermore, the Village LP appears to have agreed with the Commonwealth of Massachusetts that it would "comply with all applicable state laws and regulations including but not limited to the applicable Massachusetts General Laws" in order to be eligible for Non-Federal Investment Trust funds. Dube Decl. Ex. H, at 4.[5] Under the Standard Contract Form provided to the Village LP, it was compelled to "make all certifications required under the attached Contractor Certifications," including the requirement to "comply with all applicable state laws and regulations including but not limited to the applicable Massachusetts General Laws." Dube Decl. Ex. H, at 1, 4. While Calamar anticipates that the Village LP will claim that the word "applicable" limited its certification to only those state laws and regulations consistent with sovereign immunity, that would render the certification meaningless. *See James B. Nutter & Co. v. Est. of Murphy*, 478 Mass. 664, 673 (2018) ("It is neither reasonable nor practical to interpret [a] clause as being meaningless." (citation omitted) (alteration in original)). Instead, the practical result of the Village LP's agreement with the Commonwealth is that the Village LP certified that it would abide by the laws of Massachusetts (consistent in any event with its status as a Massachusetts limited partnership). The Village LP cannot therefore claim that it is exempt from those laws that it agreed to follow to qualify for the tax credits.

[5] Calamar cannot say for certain, because although the e-mail stating that the document had been signed was produced in jurisdictional discovery, the signed underlying agreement was not. *See* Dube Decl. Ex. J, at 1 ("NFIT Standard Contract form . . . [was] signed by Gordon Harris and Jessie Little Doe Baird."). Calamar thus provides this Court with the unsigned version that was provided to the Village LP, but cannot confirm that the exact terms applied. *See* Dube Decl. Ex. I.

IV. THE CONTRACT'S VENUE CLAUSE IS PERMISSIVE AND CALAMAR IS ENTITLED TO SUE IN FEDERAL COURT

Village LP's first argument on the merits is that the contract requires that disputes be resolved in Suffolk County Superior Court. What the contract actually provides is that the parties "*may* commence action in the Superior Court, Suffolk County and all parties submit to that court's jurisdiction." ECF No. 38, Ex. D, § 15.4.1. It does not *require* that actions be filed there.

"A forum selection clause may make the designated forum merely available for resolution of disputes or it may make it 'exclusive,' at least in the sense that either side can insist upon it as the venue." *Rivera v. Kress Stores of Puerto Rico, Inc*., 30 F.4th 98, 103 (1st Cir. 2022) (quotation marks omitted). "The former type of forum-selection clause is deemed 'permissive' and is often described as [a] consent to jurisdiction clause[ ]." *Id*. (quotation marks omitted). Permissive forum-selection clauses "authorize[ ] personal jurisdiction in a designated forum but do[ ] not prohibit litigation [of covered claims] elsewhere." *Id*. (quotation marks omitted, alterations in original). To determine whether a forum-selection clause is mandatory, courts look to "whether the provision's terms reflect *clear language* indicating that jurisdiction and venue are appropriate *exclusively* in a designated forum. *Id*. at 104 (citation omitted) (emphasis added).

"[W]hen words such as 'will' or 'shall' are used in a forum selection clause, they typically demonstrate [the] parties' exclusive commitment to the named forum." *OsComp Sys., Inc. v. Bakken Exp*., LLC, 930 F. Supp. 2d 261, 270 (D. Mass. 2013) (quotation marks omitted). On the other hand, "the First Circuit has determined that a forum selection clause under which the parties 'agree to submit to the jurisdiction of the courts' of a given forum is permissive in that it does not exclude jurisdiction in other courts." *Scamp Sys., Inc. v. Bakken Exp., LLC*, 930 F. Supp. 2d 261, 271 (D. Mass. 2013) (citing *Autoridad de Energia Electrica de Puerto Rico v. Ericsson Inc*., 201 F.3d 15 (1st Cir. 2000)). Village LP does not explain why the word "may" in the provision that

the parties "may commence action in the Superior Court, Suffolk County and all parties submit to that court's jurisdiction" should somehow be read to mean "will" or "shall," offering instead the conclusory assertion that "[i]t is clear" from the contract "that this is a mandatory forum selection clause," and that "[t]o suggest that this forum selection clause is merely permissive ignores the clear language and intent of the contract." ECF No. 38 at 8. The actual language of the contract does not support Village LP's position. The Court should give the word "may" its ordinary meaning and rule that the provision is permissive, not mandatory. *See Redondo Const. Corp. v. Banco Exterior de Espana, S.A.*, 11 F.3d 3, 6 (1st Cir. 1993) ("Affirmatively conferring . . . jurisdiction by consent does not negatively exclude any other proper jurisdiction.").

Courts have consistently found forum-selection clauses to be permissive in the absence of "clear language indicating that jurisdiction and venue are appropriate exclusively in a designated forum." *Rivera*, 30 F.4th at 104 (provision that "the parties agree to voluntarily submit to the jurisdiction of the Court of First Instance, Superior Court of San Juan" was permissive because "it merely authorizes litigation of covered claims in a designated forum, but does not compel resort to that forum."); *see also BASF Corp. v. Brian's Auto Body, Inc.*, No. 4:18-CV-40183-DHH, 2019 WL 13234373, at **2–3 (D. Mass. Dec. 9, 2019) (provision that "[e]ach party hereto submits to the jurisdiction of the courts located in Oakland County, Michigan in connection with any dispute arising under this Agreement" held to be permissive not mandatory); *OsComp Sys.*, 930 F. Supp. 2d at 271 ("The defendant's agreement to 'accept venue in the courts of Middlesex County, Massachusetts' is insufficient to demonstrate an intent to waive removal."); *Boland v. George S. May Int'l Co.*, 81 Mass. App. Ct. 817, 825, 969 N.E.2d 166, 173 (2012) ("[T]he forum selection clause declares that 'jurisdiction shall vest in the State of Illinois.' There is no plain statement that this jurisdiction should be exclusive."). If in fact the parties had intended to require that litigation

be conducted in a particular court, they could easily have so provided. *See, e.g.*, *Grice v. VIM Holdings Grp., LLC*, 280 F. Supp. 3d 258, 281 (D. Mass. 2017) ("[T]he Agreement contained a forum selection clause, which stated that 'any suit or proceeding arising from or relating in any way to this Agreement shall be brought only in a federal or state court located in the County of Dupage and State of Illinois; and you consent to the exclusive jurisdiction and venue of such courts.' The word shall" 'evidenced the mandatory character of the forum selection clause.").

Village LP cites cases in support of the uncontroversial proposition that "[v]alid forum selection clauses are to be enforced through a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6)." ECF #38 at 7. But a review demonstrates that the forum-selection clause unmistakably required actions to be filed in the designated forum. *See Kebb Mgmt., Inc. v. Home Depot U.S.A., Inc.*, 59 F. Supp. 3d 283, 285 (D. Mass. 2014) ("'The parties agree that the courts in . . . Georgia shall have *exclusive* jurisdiction over any disputes under or relating to this agreement.'" (emphasis added)); *Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385, 386 (1st Cir. 2001) ("[A]ll actions involving this agreement *must* be brought in the State of Illinois." (emphasis added)); *Lambert v. Kysar*, 983 F.2d 1110, 1112 (1st Cir. 1993) ("In the event any action is brought to enforce such terms and conditions, venue *shall lie exclusively* in Clark County, Washington." (emphasis added)). The same goes for the other cases Village LP cites. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2 (1972) ("*Any* dispute arising *must* be treated before the London Court of Justice." (emphasis added)); *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 53 (2013) ("all disputes between the parties '*shall* be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division.'" (emphasis added)). Because the forum-selection clause here is permissive rather than mandatory, Calamar was not required to bring this action in Suffolk County Superior

Court. And because Calamar's suit met the requirements of diversity jurisdiction, it was entitled to bring it in this Court.

V. THE PROJECT IS LOCATED IN THE COMMONWEALTH OF MASSACHUSETTS

The Project occurred in Massachusetts because the property is in Massachusetts. The Contract says as much. *See* ECF# 38-1, at 2 ("Project: (*Name, location and detailed description)* . . . Mashpee, MA 02649"). The deed recorded in the Barnstable County Registry of Deeds providing the property to the United States says as much. Dube Decl. Ex. K (granting "All That Certain Plot, Piece, or Parcel of Land, lying, situate, and being in Mashpee, Barnstable County, Commonwealth of Massachusetts" to the United States as trustee). And the lease providing the property to the Village LP says as much. Dube Decl., Ex. L ("Lessor hereby leases to the Lessee the following real property located in Barnstable County, Commonwealth of Massachusetts . . . ."). Because the Project and the acts alleged "occurred primarily and substantially within the commonwealth," Mass. Gen. L. c. 93A, § 11, Calamar's claim against the Village LP seeking damages for the Village LP's unfair and deceptive acts satisfies the necessary elements to state a claim.

The Village LP's theory relies on an incorrect assertion of how sovereignty applies with regard to tribal land. Since the "latter half of the 1800s, the [Supreme] Court has consistently and explicitly held that Indian reservations are 'part of the surrounding State' and subject to the State's jurisdiction 'except as forbidden by federal law.'" *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493 (2022) (citation omitted); *see also id.* ("[T]he Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State."). A tribe's reservation is not like Vatican City, surrounded by a separate sovereign state but not included in it. Instead, tribal land exists within the surrounding state, subject to certain special

restrictions on state authority considerations in light of its owner. *Cf. Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624, 627 (1953) ("The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government.").

Indeed, the Commonwealth of Massachusetts makes clear that the entirety of Mashpee is subject to its jurisdiction. *See* Gen. L. c. 1, § 2 ("The sovereignty and jurisdiction of the commonwealth shall extend to all places within its boundaries subject to the concurrent jurisdiction granted over places ceded to or acquired by the United States."). And the Village LP's qualification for LIHTC depends upon the property being "located in the Commonwealth." *See* 760 Mass. Code Regs. 54.05 (providing that LIHTC is available only to a "person or entity (of whatever type) with an ownership interest in a qualified Massachusetts project" (emphasis added)); 760 Mass. Code Regs. 54.02 ("Qualified Massachusetts Project. A low-income project located in the Commonwealth . . . ."). Thus, to whatever extent the Village LP claims that it is not within the Commonwealth or subject to its jurisdiction, it simultaneously admits to willfully acting in breach of its own partnership agreement, which requires it to "operate the Project . . . in such a manner that the Project will qualify as a 'qualified low-income housing project' under . . . the State Tax Credit Laws" and satisfy "any other requirement necessary for the Project to qualify for Credits or State Tax Credits," and renders any representations by the Village LP on this issue to have been falsely made. Dube Decl., Ex. C, §§ 6.02(b), 6.13(a).

The Village LP has repeatedly represented to Massachusetts that the Project and property were in the Commonwealth. Its own partnership documents describe its business as to "deal exclusively with certain property in Barnstable County, Massachusetts," Dube Decl., Ex. A;

Village LP MtD Mem. at 13, and the Village LP admitted as much in its submissions seeking a share of Massachusetts's state tax credits. The Village LP should not be allowed to claim the benefits of a property located within the Commonwealth and then deny the same when it is faced with liability. Because, as demonstrated above, the property is located within the Commonwealth (as the Village LP itself has repeatedly stated), Calamar's claim under c. 93A properly states a claim.

VI. MEDIATION HAS OCCURRED AND DID NOT OCCUR EARLIER ONLY BECAUSE OF THE VILLAGE LP'S REFUSAL TO COOPERATE

Village LP's final argument is that the contract provides for "mediation as a condition precedent to dispute resolution" (ECF No. 38, Ex. D, § 15.3.1), and "Calamar failed to initiate mediation **prior to** initiating the instant suit." ECF No. 38 at 19. As documented in the materials filed in support of Calamar's Motion to Compel Mediation (ECF No. 8), which the Court granted (ECF No. 16), Calamar made repeated unsuccessful efforts to get Village LP to engage in mediation. *See* ECF No. 10-4 (Affidavit of Kenneth E. Rubinstein) Ex. D (counsel for Village LP tells counsel for Calamar on July 15, 2022, "I will have an answer for you regarding mediation" on August 3); *id.* Ex. E (counsel for Village LP tells counsel for Calamar on August 10, 2022, "I would like to be able to review [an invoice] with my client before responding to your request to mediate."); *id.* Ex. F (counsel for Calamar tells counsel for Village LP on August 22, 2022, "We look forward to hearing back from the Tribe regarding its interest in mediation," and counsel for Village LP responds, "I'll get back to you later this week regarding mediation."); *id.* Ex. G (counsel for Calamar tells counsel for Village LP on December 10, 2022, "Another week has passed and we still don't have an answer from the Tribe regarding mediation . . . . I hope you will get back to me shortly; otherwise, I anticipate that we will have to proceed assuming that the Tribe is unwilling to mediate . . . ."); *id.* (counsel for Calamar tells counsel for Village LP on December 21, 2022,

"Calamar has been asking the Tribe to engage in mediation for several months now, with the usual response being that we will bear back in a week. Calamar is not willing to wait any longer. Please get back to me by year end confirming that the Tribe is willing to mediate during the week of February 6 . . . ."). All of these attempts to mediate happened before Calamar filed this lawsuit. Village LP cannot plausibly contend that it is entitled to postpone Calamar's lawsuit against it indefinitely simply by refusing to engage in mediation.

Indeed, Massachusetts law is clear that "a party that prevents the other from satisfying a condition precedent cannot rely on the failure of the condition to avoid its own obligations under a contract." *In re Access Cardiosystems, Inc.*, 361 B.R. 626, 646 (Bankr. D. Mass. 2007); *see also Ne. Drilling, Inc. v. Inner Space Servs., Inc.*, 243 F.3d 25, 40 (1st Cir. 2001) (citing 13 Richard A. Lord, *Williston on Contracts* § 39:4, for the proposition that "[w]here one improperly prevents the performance or the happening of a condition of his or her own promissory duty, the offending party thereby eliminates it as a condition . . . .").

In any event, a mediation was conducted on February 6, 2024 (*see* ECF No. 29), and subsequent to the mediation Calamar filed an amended complaint (ECF No. 33). Calamar's Amended Complaint thus complies with the requirement of mediation as a condition precedent to dispute resolution even if the initial complaint did not.

VII. CONCLUSION

The Village LP was created to attract private investment via the LIHTC program, which it did successfully. In order to do so, the Village LP subjected itself to Massachusetts law and made various assertions to become eligible for the tax credits. It is only now that the Village LP faces significant liability that it attempts to shield itself by claiming to be an alter ego of the Tribe. All available evidence suggests otherwise. The Village LP should not be permitted to collect Massachusetts tax credits as a non-sovereign entity subject to Massachusetts law and yet claim at

the same time to be a sovereign entity. The Tribe chose to join a private entity to gain funds for its Project; it must accept the consequences that come with that decision.

Respectfully submitted,

CALAMAR CONSTRUCTION SERVICES, INC.

By its Attorneys,

PRETI FLAHERTY BELIVEAU & PACHIOS, LLP

Dated: August 8, 2024

/s/ Kenneth E. Rubinstein

Kenneth E. Rubinstein (BBO# 641226)
Nicholas A. Dube (BBO #697429)
60 State Street, Suite 1100
Boston, MA 02109
617-226-3857
krubinstein@preti.com
ndube@preti.com

CERTIFICATE OF SERVICE

I hereby certify this 8th day of August 2024 that this document is being served on all parties hereto.

Dated: August 8, 2024

/s/ Kenneth E. Rubinstein
Kenneth E. Rubinstein (BBO# 641226)