UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO: 1:23-CV-10786-WGY

CALAMAR CONSTRUCTION SERVICES, INC.,	)
Plaintiff,	)
v.	)
THE MASHPEE WAMPANOAG VILLAGE LIMITED PARTNERSHIP; and RAYMOND JAMES AFFORDABLE HOUSING INVESTMENTS, INC.,	)
Defendants.	)

DEFENDANT THE MASHPEE WAMPANOAG VILLAGE LIMITED PARTNERSHIP'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

LEAVE TO FILE GRANTED ON AUGUST 14, 2024

The Mashpee Wampanoag Village, Limited Partnership (the "MWV"), submits this brief reply in further support of its Motion to Dismiss the Amended Complaint.

I. The Express Language of the Contract Dictates that Suit Must be Filed in Suffolk Superior Court

There is "the hoary adage that a contract must be read as a whole." *Okmyansky v. Herbalife Intern. of America, Inc.*, 415 F. 3d 154, 160 (1st Cir. 2005). Words of contract are interpreted in light of their plain meaning, giving full effect to the document as a whole. *Id.*

The Contract in this case, as amended, provides a very specific process by which the parties have to follow should they wish to file suit.

The Contract originally read:

§ 15.3 Mediation

§ 15.3.1 Claims, disputes, or other matters in controversy arising out of or related to the Contract, except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1.6, shall be subject to mediation as a condition precedent to dispute resolution as provided in Section 15.4.1.

§ 15.4 Arbitration & District Court Proceedings

§ 15.4.1 If the parties do not resolve their dispute(s) by mediation, either may commence action in the United Sates District Court having jurisdiction over the dispute(s). If there is no United States District Court that has jurisdiction over the subject matter or a party in accordance with this Section 15.4.1, the dispute(s) shall be resolved by binding arbitration administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules then in effect.

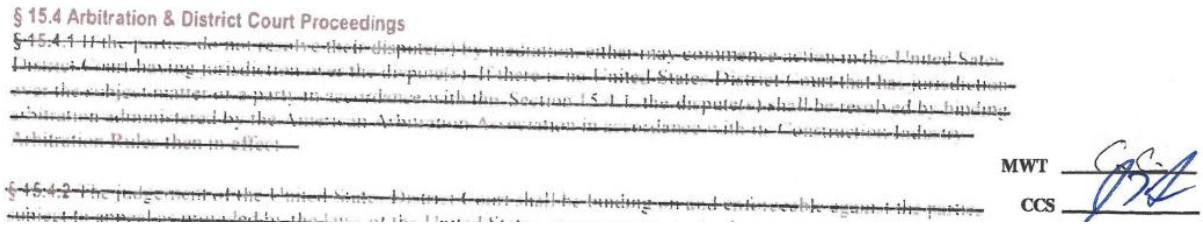
The Contract, as amended, now reads:

§ 15.4.1 If the parties do not resolve their dispute(s) by mediation, either, or their sureties, may commence action in the Superior Court, Suffolk County and all parties submit to that court's jurisdiction. If that court declines jurisdiction based on subject matter or lack of jurisdiction over a party, the parties and their sureties agree the dispute(s) shall be resolved by binding arbitration administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules then in effect.

Tellingly, the express language from the Contract that mandates where suit must be brought is absent from Calamar's Opposition. While Calamar's Opposition certainly provides a thorough analysis of the differences between mandatory and permissive forum selection clauses, it altogether fails to cite to or quote the actual language of the Contract and the Amendment.

Reading the two applicable provisions of the Contract and the Amendment together, it is clear that the venue provision is mandatory. If mediation fails, the parties may then file suit, but that suit must be brought in Suffolk County Superior Court. See, Exhibits A and D to MWV's Motion to Dismiss. The manifest intent of contracting parties must be gleaned, in the first instance, from the plain meaning of the contractual language. *Smart v. Gillette Co. Long-Term Disability Plan*, 70 F. 3d 173, 178 (1st Cir. 1995); citing *Burnham v. Guardian Life Ins. Co.*, 873 F.2d 486, 489 (1st Cir.1989). Clearly, the parties intended for any disputes that could not be

resolved by mandatory mediation to proceed only in Suffolk County Superior Court. The Contract originally and explicitly provided that if the parties were unable to resolve their dispute via mandatory mediation, then the proper forum to bring suit is this Court. See Exhibits A and D to the MWV's Motion to Dismiss. In the Amendment, the parties then struck this provision to insert the language that any suit could be brought only in Suffolk County Superior Court. See below.


§ 15.4 Arbitration & District Court Proceedings

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It is axiomatic that the parties would strike the forum selection clause mandating litigating in this Court, replace it with the forum selection clause requiring any suit be filed in Suffolk Superior Court and then attempt to skirt the obligation to bring suit in state court by claiming the forum selection clause is permissive. If the parties, namely Plaintiff, wanted to preserve their right to litigate in this Court, there was no need to specifically and explicitly strike and replace that language from the original Contract.

II. The Project Did Not Occur in Massachusetts

Calamar again misses the fact that the Project did not occur in Massachusetts. The Project occurred on sovereign land. There is no dispute that the land on which the Project lies is held in trust by the federal government for the benefit of the Tribe. Simply because the Tribe leased the land to the MWV does not take the land out of trust and the mere fact that the land is leased does not alone subject the land to Massachusetts law. See, *Humble Pipe Lin Co. v. Waggonner*, 376 U.S. 369, 372-73 (1964) ("exclusive federal jurisdiction was not lost either by lease of property for commercial purposes within an enclave"); citing generally *Arlington Hotel Co. v. Fant*, 278 U.S. 439 (1929).

Contrary to as asserted by Calamar the street address of the Project is not dispositive of anything. The description in the Record of Decision, Trust Acquisition and Reservation Proclamation for 151 Acres in the City of Taunton, Massachusetts, and 170 Acres in the Town of Mashpee, Massachusetts, for the Mashpee Wampanoag Tribe (Sept. 18, 2015) (the "2015 ROD") is the same description as in the Lease. The 2015 ROD explicitly references that "Trust Acquisition and Reservation Proclamation for… 170 Acres *in the Town of Mashpee, Massachusetts* for the Mashpee Wampanoag Tribe, just as the Lease identifies the land as being *in Mashpee, Massachusetts* (emphasis added). There is simply not another way to identify the land without identifying a street address. For example, this is how first responders would locate the property in an emergency.

While it is true that the Project sits geographically within the borders of Massachusetts, the Project sits on sovereign land. An analogy can be drawn to federal land which sits within the borders of any state within the United States. U.S. Cont., Art. I, s. 8, cl. 17; *Humble Pipe Lin Co. v. Waggonner*, 376 U.S. 369, 372-73 (1964) (holding that the federal government has exclusive jurisdiction over places purchased by, condemned by, ceded to it or donated to the United States) When the federal government owns land, such as national parks, military bases, or federal buildings, the land is subject to federal law, and federal agencies have the primary responsibility for its management. For example. the Otis Air Force Base, mere miles away from the Project, is located geographically within the boundaries of Massachusetts and has a Massachusetts mailing address, but when it was an active military base it was not otherwise a part of Massachusetts. U.S. Cont., Art. I, s. 8, cl. 17; *Paul v. U.S.*, 83 S. Ct. 426, 438 (1963) ("Thus if the United States acquires with the 'consent' of the state legislature land within the borders of that State by purchase or condemnation for any of the purposes mentioned in Art. I, s 8, cl. 17, or if the land is acquired

without such consent and later the State gives its 'consent,' the jurisdiction of the Federal Government becomes 'exclusive.'").

Calamar's reliance upon *Oklahoma v. Castro-Huerto*, 142 S.Ct. 2486, 213 L.Ed.2d 847, 597 U.S. 629 (2022) is misplaced. First and foremost, Castro-Huerto is a criminal case, not a civil case and the law is clear that the applicability of state criminal statutes on Indian lands is different from the applicability of state civil statutes. *California v. Cabazon Band of Mission Indians*, 480 US 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). The issue in that case is whether non-Indians can be prosecuted under state and federal law for crimes committed on reservations. There is nothing in *Castro-Huerto* that addresses the issue of (a) whether or not the reservation is part of Massachusetts and (b) whether or not the Tribe (and arms thereof) are subject to Massachusetts civil as opposed to criminal law.

It has long been the law that lands are held in trust by the federal government for the benefit of a tribe are exempt from state control. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). That means that the Project is not in the Commonwealth of Massachusetts. The fact that the deeds transferring the property to the Tribe and then from the Tribe to the Federal Government are recorded at the Barnstable County Registry of Deeds is not dispositive of anything. Rather the law is clear that Indian land is not part of the state and therefore is not subject to state law. See, for example, *California v. Cabazon Band of Mission Indians*, 480 US 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987); *Michigan v. Bay Mills Indian Community*, 572 US 782, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014).

III. The Mashpee Wampanoag Village Limited Partnership is an Arm of the Tribe

There is no question that tribal sovereign immunity may extend to subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe

and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity. *Breakthrough*, 629 F. 3d at 1183; citing *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046–47 (9th Cir.2006). "Immunity for subordinate economic entities 'directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general.'" *Id.*

The MWV is an arm of the tribe. The tribal purpose for which the MWV was created was to build and ultimately provide housing for tribal members and to promote economic development for tribal members. The MWV needed funds to do this. Calamar's analysis is backwards and Calamar acknowledges the flaw in their argument, stating: "[t]he Tribe had its own housing department that could *(with sufficient funds)* provide tribal housing." (emphasis added). Calamar Opp. at pp. 7-8. The fact that the Tribe may not have had sufficient funds to construct the Project on its own does not mean that the MWV is not an arm of the Tribe. The *Breakthrough* factors are clear and there is no question that the MWV is an arm-of-the-tribe. The five-factor test considers: (1) the entity's method of creation, (2) whether the tribe intended the entity to share in its immunity, (3) the entity's purpose, (4) the tribe's control over the entity, and (5) the financial relationship between the tribe and the entity. *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F. 3d 1173, 1187 (2010) (*Breakthrough*). As fully briefed in the MWV's Motion to Dismiss, the purpose of the MWV is to promote the social and economic development of the Tribe's most vulnerable population and that argument is not restated here. See, Motion to Dismiss, Section V(C)(2).

However, in analyzing the other *Breakthrough* factors and specifically in analyzing "the financial relationship between the tribe and the entity," Calamar wholly ignores that under the terms of the Amended and Restated Agreement of Limited Partnership Agreement (the "Partnership Agreement") the Project would yield a large financial benefit in the form of a

Developer's Fee. See Affidavit of Ashley Berger (hereinafter "Berger Affidavit"), Exhibit 1, Partnership Agreement, Section 7.02 and Exhibit H.[1] Upon the completion of the Project, the Tribe was entitled to be paid $1,200,000.00 as a Developer's Fee by the MWV. *Id.*

Calamar focuses on the fact that the MWV is organized as a Massachusetts entity and then it incorrectly asserts that as such the MWV is not entitled to the protections of tribal sovereign immunity. Merely because the MWV is structured as a Massachusetts limited partnership does not waive its enjoyment of tribal sovereign immunity. "The fact that the [tribe] was engaged in an enterprise private or commercial in character, rather than governmental, is not material [to the availability of sovereign immunity]. It is in such enterprises and transactions that the Indian tribes and the Indians need protection." *Gavle v. Little Six, Inc.*, 555 N.W. 2d 284, 295 (1996); citing *Maryland Cas. Co. v. Citizens Nat. Bank of West Hollywood,* 361 F.2d 517, 521 (5th Cir.), cert. denied, *Maryland Cas. Co. v. Seminole Tribe of Florida, Inc.*, 385 U.S. 918, 87 S.Ct. 227, 17 L.Ed.2d 143 (1966).

As made clear by the Developer's Fee Agreement (Exhibit H to the Partnership Agreement), it was intended that the Tribe as the MWV's General Partner and as the Developer was to maintain significant control over the MWV. *Breakthrough*, 629 F. 3d at 1187.

As outlined by Exhibit H to the Partnership Agreement, the Tribe "provided and will continue to provide certain services with respect to the Project during the acquisition, development, construction and rent-up phases thereof." Berger Affidavit, Exhibit 1, Partnership Agreement, Exhibit H, Recital C. Further, the Tribe would "oversee the development and construction of the

[1] Calamar conveniently does not attach the entirety of the Partnership Agreement to its Opposition, but it is necessary to understand the full scope of all that the Tribe would be getting as a result of Calamar completing the Project within the time and budget as contracted. The Partnership Agreement is attached as Exhibit 1 to the Berger Affidavit, filed herewith.

Project and shall perform the services and carry out the responsibilities with respect to the Project…" Berger Affidavit, Exhibit 1, Partnership Agreement, Exhibit H, Section 1(b).

The Partnership Agreement clearly delineated the roles of the Tribe and of Raymond James in terms of what rights the Tribe, as the General Partner maintained versus the rights of Raymond James as the Limited Partner. Specifically, the Partnership Agreement provides:

> Section 6.01 Exercise of Management
>
> 6.01(a): The overall management and control of the business, assets and affairs of the Partnership shall be vested in the General Partner and, subject to the specific limitation and restrictions set forth in this Article 6 and Article 7 hereof, the General Partner, in extension of and not in limitation of the powers given it by law, shall have full, exclusive and complete charge of the management of the business of the Partnership in accordance with its purposes stated in Section 1.04. No Limited Partner shall take part in the management or control of the business of the Partnership of have authority to bind the Partnership except as expressly set forth herein.
>
> Berger Affidavit, Exhibit 1, Partnership Agreement, Section 6.01.

The Tribe, as General Partner, maintained "all authority, rights and powers" deemed necessary to effect the purposes of the Partnership, including (without limitation): to employ, contract and deal with any persons in connection with the management and operation of the Partnership business; to acquire and deal with personal property; to bring or defend or otherwise resort to legal action on behalf of the Partnership; to pay any expense or costs associated with operating the Partnership' to deposit, withdraw, invest and distribute the Partnership's funds; to borrow money; and to enter into contracts on behalf of and for the accomplishment of the purposes of the Partnership. Berger Affidavit, Exhibit 1, Partnership Agreement, Section 6.02.

Calamar grossly (and incorrectly) overstates the amount of control over that Raymond James had under the Partnership Agreement. It is true under the Partnership Agreement, the Tribe ceded limited control over the Project to Raymond James in exchange for the necessary funding

and that Raymond James needed to consent to certain action items, but ultimately the Tribe had the authority to run the Partnership. However, the Tribe retained majority control over the "business, assets and affairs of the Partnership" and was the decision maker in taking action to effect the purposes of the Partnership.

IV. As an Arm of the Tribe, the Mashpee Wampanoag Village Limited Partnership is Entitled to the Protections of Tribal Sovereign Immunity and there is No Express Waiver of Tribal Sovereign Immunity in the Contract

As the MWV is an arm of the Tribe it is entitled to the protections of tribal sovereign immunity. Waiver must be express; waiver cannot be implied. *Oklahoma Tax Comm'n v. Citizen Bank Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). In determining whether a tribe has waived its immunity with sufficient clarity, courts have inquired "whether the language [operative agreement or clause] might have hoodwinked an unsophisticated Indian negotiator into giving up the tribe's immunity without realizing he was doing so…" *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F. 3d 656, 660 (7th Cir. 1996).

Calamar in its brief grossly misstates the holding of *Bldg. Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1 (2004) (*Aquinnah*). In *Aquinnah*, the Court held that the Tribe was bound by the terms of the settlement agreement where the Tribe expressly waived its tribal sovereign immunity. *Aquinnah*, 443 Mass. at 13. Unlike the MWV in the instant contract negotiation, in Aquinnah the tribe "bargained for, and knowingly agreed to" the waiver of tribal sovereign immunity. *Id.* This is not the fact of the instant case and there was no waiver here.

Calamar similar missteps in its reading of *Acevedo v. Musterfield Place, LLC*. 479 Mass. 705 (2018). Tribal sovereign immunity is not the same as state sovereign immunity. *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 756 (1998). While *Acevedo* may be a useful

cite to discuss sovereign immunity, tribal sovereign immunity is a broader concept. See, for example, *Native Am. Church of N. Am. v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir.1959) ("Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers [except] to the extent that they have expressly been required to surrender them by the superior sovereign, the United States."). *Acevedo* is distinguishable from the instant case for a variety of reasons.

In *Acevedo*, following a slip and fall down a set of stairs at the public housing complex where plaintiff resided, plaintiff brought suit against the housing authority, the property owner, and the managing owner of the property owner. The owner and manager moved for partial summary judgment on the basis they were public employers under the Massachusetts Tort Claims Act ("MCTA"), and therefore could not be liable for damages in excess of $100,000.00. The trial court denied the motion, finding the owner and managing owner did not enjoy protections as a public employer under the MTCA and on direct appellate review, the Supreme Judicial Court agreed. In *Acevedo*, the issue was one of statutory interpretation, which is not the case here and cannot be likened to the instant facts.

WHEREFORE, the Mashpee Wampanoag Village, Limited Partnership respectfully requests this Court dismiss the claims in the Plaintiff's Amended Complaint against it.

Respectfully submitted,
The Mashpee Wampanoag Village, Limited Partnership,
By its attorneys,

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CERTIFICATE OF SERVICE

I, Jeffrey B. Loeb, counsel for the Mashpee Wampanoag Village, Limited Partnership, hereby certify that the within document was served upon all counsel of record via electronic service to the following:

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