UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMELIA PETERS BINGHAM and STEVEN PETERS BINGHAM, on behalf of themselves and on behalf of descendants of the South Sea Indians who are similarly situated, Plaintiffs, v. COMMONWEALTH OF MASSACHUSETTS and the TOWN OF MASHPEE, Defendants.	C.A. No. 08-11770-GAO

MEMORANDUM IN SUPPORT OF THE COMMONWEALTH'S MOTION TO DISMISS

I. INTRODUCTION

The plaintiffs allege that they are citizens of the Commonwealth of Massachusetts and descendents of the South Sea Indians, now known as the Mashpee Wampanoag Indian tribe. Amended Complaint, ¶¶ 4-6. They are seeking, through this U.S. Constitutional challenge under the Fifth Amendment, just compensation for loss of a restriction on alienation of common land and sale of common land in Mashpee. They are also seeking an order giving them the right to immediate possession of certain lands presently owned by the Commonwealth and the Town of Mashpee. Amended Complaint, ¶¶ 1-2, 15-26. As individuals, they are attempting to represent the tribe through a class action suit against the Commonwealth and the town. Amended Complaint, ¶¶ 11-14.

The Eleventh Amendment constitutes a bar to suit in federal court by private parties against non-consenting states. The Commonwealth has not consented to this suit, thus, the claims against it should be dismissed.

II. ARGUMENT

This Case Against the Commonwealth Is Barred by the Eleventh Amendment.

The Eleventh Amendment sovereign immunity doctrine does not allow a state to be sued in federal court without the state's consent. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). The Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

U.S.Const., amend. XI. The Eleventh Amendment has been interpreted to bar suits against states brought in federal court by its own citizens as well as citizens of another state. Pennhurst, 465 U.S. at 100; Hans v. Louisiana, 134 U.S. 1, 15 (1890). Indian tribes and their individual members are likewise subject to the restrictions of the Eleventh Amendment.[1] Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268 (1997); Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991).

The Commonwealth has not consented to this suit in federal court. Plaintiffs, therefore, cannot maintain suit against the Commonwealth unless Congress has abrogated the Commonwealth's immunity in the exercise of its power to enforce the Fourteenth Amendment. As the First Circuit has held:

[1] The plaintiffs claim to bring suit as individuals and as representatives of the South Sea Indians, now known as the Mashpee Wampanoag Indian tribe. Amended Complaint, ¶ 6.

> The Eleventh Amendment stands as a palladium of sovereign immunity. It bars federal court lawsuits by private parties insofar as they attempt to impose liabilities necessarily payable from public coffers, unless the state has consented to suit or unless the protective cloak of the amendment has been doffed by waiver or stripped away by congressional fiat.

Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 697 (1st Cir. 1983).

The authority of Congress to authorize suits by private parties against a state is quite limited. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (discussing limitations).

> Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed on federal jurisdiction.

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72 (1996), *overruling* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 446-47 (2004) (discussing states bound by judicial action without consent in *in rem* admiralty and bankruptcy proceedings).

The plaintiffs' suit could be characterized as the functional equivalent of a quieting of title action because the plaintiffs are asking for title and possession of land, as well as monetary compensation for use and lost value. Amended Complaint, pp. 9 – 10, Prayer ¶¶ 4 - 12; see Mass. Gen. Laws c. 237 (writ of entry) and Mass. Gen. Laws c. 240, §§ 6-10C (equitable quieting of title). The plaintiffs claim that an unconstitutional taking occurred with the approval of state acts that enfranchised their ancestors, removed a restriction on alienation of their ancestors' property, and incorporated the Town of Mashpee out of the District of Mashpee. Amended Complaint, ¶¶ 20 – 22, referencing Mass. Acts of 1869, c. 463; Mass. Acts of 1870, c. 293.

The federal courts apply Eleventh Amendment immunity in this type of case. In Idaho v. Coeur d'Alene Tribe of Idaho, the Supreme Court held that the plaintiffs' cause

of action was the functional equivalent of a quiet title action. Idaho, 521 U.S. at 281. The Court held that claim for quiet title was the functional equivalent of a damage award against the state and was barred from federal jurisdiction under the Eleventh Amendment. Idaho, 521 U.S. at 265-66. Applying the rule of Idaho to the facts pled by the plaintiff, this case against the Commonwealth is also subject to dismissal under the Eleventh Amendment.

The plaintiffs' complaint against the Commonwealth cannot survive on an abrogation theory. To determine whether Congress has subjected States to suits by individuals, Congress must first make its intention "unmistakably clear" in the language of a statute; and second, if it does so, Congress must have acted pursuant to a valid grant of constitutional authority. Kimel v. Florida Board of Regents, 528 U.S. 62, 73 (2000). Congress has expressed no such "unmistakably clear" intent to abrogate state sovereign immunity, even in a suit by an Indian tribe. See Blatchford, 501 U.S. at 786-88 (1991) (rejecting claim that Congress abrogated Eleventh Amendment immunity for Indian tribe claims).[2]

The plaintiffs have not named any state actors in their official capacity. They therefore cannot avail themselves of the exception to the Eleventh Amendment in the doctrine of Ex Parte Young, 209 U.S. 123 (1908)(Young), which generally permits a suit against state officials for injunctive relief. Idaho, 521 U.S. at 269.

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[2] Section 1362 provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1362 (added Pub.L. 89-635, § 1, Oct. 10, 1966, 80 Stat. 880).

Even if the plaintiff did name state officials in their official capacities, the doctrine of Young would be inapplicable for this action because it is the functional equivalent of quieting title. Idaho, 521 U.S. at 287. The court will not apply the doctrine of Young when the state's "sovereign interest in its land and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable." Idaho, 521 U.S. at 287-88.

The plaintiffs are challenging the sovereignty of the state to create its own subdivision (the town) and its ultimate authority over all the town and state owned land in Mashpee. As in Idaho, the Eleventh Amendment bars the plaintiffs' suit.

III. CONCLUSION

The Eleventh Amendment "serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." Seminole Tribe, 517 U.S. at 58. The plaintiffs, citizens of the Commonwealth of Massachusetts, are barred from bringing the Commonwealth into federal court without its consent under the Eleventh Amendment. The Commonwealth has not consented to suit. Therefore, this case should be dismissed against the Commonwealth.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

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