**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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| THE COMMONWEALTH OF MASSACHUSETTS,<br><br>*Plaintiff,*<br><br>v.<br><br>THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION,<br><br>*Defendants*. | Civil Action<br>No. 13-13286-FDS |

**MEMORANDUM OF LAW IN SUPPORT OF THE AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION'S MOTION TO INTERVENE**

## INTRODUCTION

Proposed Intervenor-Plaintiff the Aquinnah/Gay Head Community Association, Inc. ("the AGHCA") submits this memorandum of law in support of its Motion to Intervene.[1] The AGHCA seeks to intervene to protect its unique legal interests as a party to a settlement agreement which are directly implicated by the recent actions of the several related Defendants, including the Wampanoag Tribe of Gay Head (Aquinnah) (hereinafter, "the Tribe"), and by the Commonwealth's December 2, 2013, complaint. For the reasons set forth below, allowing the AGHCA to intervene is necessary to fully preserve its interests and those of its members, and will not prejudice any other party. Accordingly, AGHCA's motion to intervene as a matter of right or, in the alternative, by permission, should be allowed.

## BACKGROUND

In 1974, the Wampanoag Tribal Council of Gay Head, Inc. (the predecessor-in-interest to the Tribe)—at the time a Massachusetts non-profit corporation without federally-recognized tribal status—commenced an action in this Court against the Town of Gay Head (now the Town of Aquinnah, hereinafter "the Town"), on the island of Martha's Vineyard, claiming that certain historical transfers of land in Gay Head violated the Indian Non-Intercourse Act, 25 U.S.C. § 177. *See Wampanoag Tribal Council of Gay Head, Inc. v. Town of Gay Head*, No. 74-5826 (D. Mass.); *see also Building Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1 (2004) (describing history of tribe and litigation). The AGHCA—then the Taxpayers' Association of Gay Head—intervened in that litigation,[2] and in

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[1] The AGHCA's Proposed Complaint is attached hereto as Exhibit 1 and incorporated by reference.

[2] The Taxpayers' Association of Gay Head was formed in 1973; in 2003, it incorporated as a Massachusetts not-for-profit corporation and changed its name to the AGHCA. The AGHCA's activities are supported by residents of the Town (both seasonal and year-round), and to a lesser extent by residents of other areas of Martha's Vineyard. The AGHCA has no affiliation with the Tribe. The AGHCA received 501(c)(3) status from the Internal Revenue Service in 2004, with the following mission: (a) to

1983 the Tribe, the Town, the Commonwealth, and the AGHCA entered into a "Joint Memorandum of Understanding Concerning Settlement of the Gay Head, Massachusetts Indian Land Claims" (hereinafter, "the Settlement Agreement"). The Settlement Agreement provides in pertinent part:

> The Tribal Land Corporation shall hold the Settlement Lands, and any other land it may acquire, ***in the same manner, and subject to the same laws, as any other Massachusetts corporation***…. ***Under no circumstances, including any future recognition of the existence of an Indian tribe in the Town of Gay Head, shall the civil or criminal jurisdiction of the Commonwealth of Massachusetts, or any of its political subdivisions***, over the settlement lands, or any land owned by the Tribal Land Corporation in the Town of Gay Head, or the Commonwealth of Massachusetts, or any other Indian land in Gay Head, or the Commonwealth of Massachusetts, ***be impaired or otherwise altered***, except to the extent modified in this agreement and in the accompanying proposed legislation.

*Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. at 4 (emphasis added). In 1985, the Commonwealth enacted legislation to implement the Settlement Agreement, An Act to Implement the Settlement of the Gay Head Indian Land Claims, Mass. Stat. 1985, c. 277, and on February 10, 1987, the Tribe was granted federal recognition, *see* 52 Fed. Reg. 4193-4194 (Feb. 10, 1987). After the Tribe gained federal recognition, Congress enacted federal legislation implementing the Settlement Agreement in the Massachusetts Indian Land Claims Settlement Act. Wampanoag Tribal Council of Gay Head, Inc., Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-95, *codified at* 25 U.S.C. §§ 1771-1771i. In this legislation, Congress ratified

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gather, maintain, disseminate, and educate the public regarding current and historical information on all aspects of Town functions and to facilitate the implementation of such functions and operations, and to promote discussion and activity to serve to improve the quality of life for all persons owning property in, residing in, or visiting the Town; (b) to ensure the effective enforcement of all municipal laws and regulations, the proper collection and disbursement of public funds, and the prompt discharge of the Town's administrative responsibilities; (c) to assist the Town's public works (such as the Town library, playgrounds, beaches, and volunteer fire department); (d) to encourage historic and environmental preservation in the Town; and (e) to carry on any other charitable or educational activity consistent with Massachusetts law and the organization's Articles of Incorporation.

and confirmed the Tribe's existence as an Indian tribe, and also confirmed that, consistent with the terms of the Settlement Agreement, the Tribe is subject to the jurisdiction of the Commonwealth and the Town. In particular, the federal implementing Act states:

> Except as otherwise expressly provided in this subchapter or in the State Implementing Act, the settlement lands and any other land that may now or hereinafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts **(*including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance*)**.

25 U.S.C. § 1771g (emphasis added).

The clear import of the Settlement Agreement and the Massachusetts and federal implementing legislation is that the Tribe waived any sovereign right it may have had to engage in gaming under the subsequently-enacted Indian Gaming Regulatory Act ("IGRA"), and that the 1983, 1985, and 1987 agreements and enactments "specifically provide for exclusive state control over gambling." *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1341 (D.C. Cir. 1998) (construing section 1771 in litigation involving a Rhode Island tribe's similar claim); *see also Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994) (distinguishing the Tribe's federal implementing legislation from similar legislation relating to Indian settlement lands in Rhode Island, and noting that sections 1771e and 1771g "contain corresponding limits on Indian jurisdiction" that save the implementing legislation from implied repeal by IGRA). In the years since the Settlement Agreement was finalized and codified in statutes by both the Commonwealth and the United States, the AGHCA has continued to take measures, including in court when necessary, to protect its interests in the proper interpretation and scope of the Settlement Agreement. *E.g.*, *Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. at 1.

Notwithstanding the express terms of the Settlement Agreement—in which the Tribe received exclusive use of hundreds of acres of publicly- and privately-owned land in exchange for relinquishing its aboriginal title and claims—the Tribe now has professed its intention to engage in gaming-related activity on the lands it obtained in the Settlement Agreement ("the Settlement Lands"). This led the Commonwealth to initiate this action for a declaratory judgment to confirm the plain meaning of the Settlement Agreement. Comm. Compl. ¶8 ("The Commonwealth seeks judgment declaring that the Aquinnah Tribe must follow the terms of the Settlement Agreement by, among other things, abiding by all laws of the Commonwealth, including those laws that prohibit gaming without a State-issued license.").

## ARGUMENT

The Tribe's eligibility to game on the Settlement Lands—an issue squarely implicating the Settlement Agreement—is the central issue in this action. As a party to the Settlement Agreement, the AGHCA satisfies the standard for intervention as a matter of right, and should be permitted to intervene to defend the unique interests it has in the Settlement Agreement's proper interpretation, application, and enforcement. In the alternative, the AGHCA should be granted permissive intervention to defend the terms of the Settlement Agreement.

### I. THE AGHCA SHOULD BE ALLOWED TO INTERVENE TO DEFEND ITS INTERESTS IN, AS WELL AS THE MEANING AND ENFORCEABILITY OF, THE SETTLEMENT AGREEMENT

Under Fed. R. Civ. P. 24, intervention is appropriate where a party is entitled to either intervention as of right or permissive intervention. Rule 24(a)(2) allows intervention as of right for any party who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent

that interest." Rule 24(b) allows for permissive intervention where a party "has a claim or defense that shares with the main action a common question of law or fact."

### A. The AGHCA Qualifies for Intervention As A Matter of Right Because The Tribe's Contentions in Support of Its Gaming Efforts, If Successful, Would Eviscerate The Settlement Agreement To Which The AGHCA Is A Party

The First Circuit has identified four factors to consider in determining whether a moving party is entitled to intervene as a matter of right: (1) the timeliness of the motion to intervene; (2) the party's interest relating to the property or transaction that forms the basis of the ongoing action; (3) whether the disposition of the action threatens to impair the moving party's ability to protect that interest; and (4) whether existing parties cannot adequately represent the moving party's interest in the proceedings. *See Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 41 (1st Cir. 1992); *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 637 (1st Cir. 1989). The AGHCA satisfies each of these considerations.

#### 1. The AGHCA's motion is timely

This motion is filed only nine days after the Court denied the Commonwealth's Motion to Remand, and is thus timely. *See* Memorandum and Order on Plaintiff's Motion to Remand, Dkt. 31 (July 1, 2014). Only after this Court's denial of the Commonwealth's Motion to Remand could the AGHCA know with certainty how and where this action implicating its interests would proceed. Moreover, there have been no filings addressing the merits of the Commonwealth's claims, nor has the Tribe filed any responsive pleading. The timeliness of the AGHCA's motion is particularly apparent in light of the First Circuit's mandate that intervention motions should be evaluated "in keeping with a commonsense view of the overall litigation," *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998). This litigation is in its infancy, and allowing the AGHCA to intervene at this stage in the proceedings will not alter the issues presented or delay the timely advancement of this action.

**2. The AGHCA has a significant stake in the outcome of this litigation, which will affect the proper interpretation of the Settlement Agreement to which the AGHCA is a party**

Underlying the Tribe's pursuit of gaming on the Settlement Lands is its contention that the Settlement Agreement does not constitute a waiver of any right the Tribe might have had to conduct gaming on the lands it obtained in the Settlement Agreement, and that the Tribe thus is eligible to game on the Settlement Lands. *See, e.g.*, Comm. Compl. ¶¶54-61 (detailing the recent efforts taken by the Tribe and its affiliates to obtain statements supporting the Tribe's eligibility to game on the Settlement Lands); Memorandum in Support of Motion to Intervene Filed by The Aquinnah Gaming Corporation, and The Wampanoag Tribe of Gay Head (Aquinnah) at 11-12, 15, *KG Urban Enterprises, LLC v. Patrick*, No. 11-cv-12070 (D. Mass. Sept. 7, 2012) (Dkt. 40) (advancing the Tribe's contention that it may conduct gaming on the Settlement Lands). The Commonwealth's December 2, 2013, complaint, sounding in breach of contract, directly contests this position of the Tribe, as does the AGHCA's Proposed Complaint. It is beyond dispute that a party seeking to defend and protect the validity of a contract to which it is a party has a significant stake in the interpretation of that agreement. Likewise, there can be no serious dispute that such a party—like the AGHCA here—awaits the outcome of such an interpretation on the sidelines at its own peril. *See Cotter v. Mass. Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 35 (1st Cir. 2000) (remanding with directions to allow intervention as of right; while equal protection action did not specifically seek rescission of promotions, fact that eventual decision regarding relief was in hands of district court and past courts rescinded promotions sufficiently threatens interests: "even a small threat that the intervention applicants' present promotions could be jeopardized would be ample reason for finding" impairment element of intervention test satisfied); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 110-111 (1st Cir. 1999) (while proposed intervenor may not have been

bound by determination "in a strict res judicata sense," fact that court's interpretation of statute would operate to bar proposed intervenor from benefitting from statute "easily satisfie[s]" impairment element of intervention test). Therefore, the AGHCA's interest in protecting the terms of the Settlement Agreement to which it is a party is surely significant enough to warrant intervention in this action, the disposition of which will turn on the Court's determination as to the Tribe's eligibility to game on the Settlement Lands—squarely implicating the Settlement Agreement and threatening the AGHCA's ability to protect its unique interests therein.

**3. The existing parties cannot adequately represent the AGHCA's interests**

The AGHCA also is entitled to intervene as a matter of right because none of the existing parties to the litigation will adequately represent the AGHCA's unique interest in vigorously defending the Settlement Agreement from the Tribe's attack. While the Commonwealth initiated this action, and has to date taken the position that the Tribe has relinquished any right to conduct gaming on its property on Martha's Vineyard, it suffers from competing priorities in the context of the Settlement Agreement. While the Commonwealth has an interest in the full enforcement of the Settlement Agreement, to which it is a party, it also has an express interest in the promulgation of state-licensed gaming in the Commonwealth—evidenced most directly in the Massachusetts Expanded Gaming Act, Mass. Stat. 2011, c. 194, which includes provisions specific to tribal gaming. Although the Commonwealth has to date tendered arguments consistent with the AGHCA's interpretation of the Settlement Agreement, the Commonwealth's approach could change. *See Mosbacher*, 966 F.2d at 44-45 (noting that interests of private party intervenors will not always be adequately protected by a government party, and holding that Secretary of Commerce did not adequately represent intervenors' interests because "[t]he Secretary's judgments are necessarily constrained by his view of the public welfare").

Furthermore, this is not a case in which because the Commonwealth is seeking to enforce or defend the terms of a state statute it can be presumed to be representing the interests of all constituents in that endeavor: while state statutes are pertinent to this case, it is the terms of the Settlement Agreement that are of central importance, and it is the AGHCA's interests in the proper interpretation and scope of those terms that the AGHCA will pursue in this case should it be permitted to intervene.

* * * *

The AGHCA satisfies all the criteria for intervention as a matter of right and the AGHCA's motion should be granted.

**B. In The Alternative, The AGHCA Should Be Allowed To Intervene By Permission**

If the Court concludes that the AGHCA does not meet the standard for intervention as a matter of right, the AGHCA requests in the alternative that the Court exercise its discretion to permit the AGHCA to intervene in this litigation. Permissive intervention is appropriate where a party "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Courts have "broad discretion" in deciding whether or not to grant permissive intervention under Rule 24(b). *Dingwell*, 884 F.2d at 641. The First Circuit has articulated three factors to be considered in determining whether permissive intervention is warranted, including whether: "(i) the applicant's claim or defense and the main action have a question of law or fact in common; (ii) the applicant's interests are not adequately represented by an existing party; and (iii) intervention would not result in undue delay or prejudice to the original parties." *In re Thompson*, 965 F.2d 1136, 1142 n.10 (1st Cir. 1992).

For the reasons discussed above, the AGHCA easily satisfies the first two considerations for permissive intervention: the AGHCA's contractual rights are directly implicated by this

action, and its interests may not be adequately represented by the Commonwealth. As to the third consideration, permitting the AGHCA to intervene would prejudice no existing party: this litigation is in its infancy, and all parties have long been made aware of the AGHCA's intent to protect its interests in the Settlement Agreement. *See, e.g.*, *Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. at 1 (noting the AGHCA's intervention and full participation in the litigation); Motion to Intervene of the Aquinnah/Gay Head Community Association, *KG Urban Enterprises, LLC v. Patrick*, No. 13-1861 (1st Cir. July 16, 2013) (Dkt. No. 6) (intervention motion filed by the AGHCA in an effort to protect its interest in the proper interpretation and scope of the Settlement Agreement); Conditional Motion to Intervene, *KG Urban Enterprises*, No. 11-cv-12070 (D. Mass. Sept. 17, 2013) (Dkt. 52) (same). Allowing the AGHCA to intervene at this juncture would not delay any aspect of the proceedings, nor would it cause any prejudice. Therefore, the AGHCA should be allowed to intervene by permission. *See Daggett*, 172 F.3d at 113 ("[T]he district court can consider almost any factor rationally relevant but enjoys very broad discretion" in deciding a motion for permissive intervention).

## CONCLUSION

For the foregoing reasons, this Court should grant the AGHCA's motion to intervene.

AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC.

By its attorneys,

/s/ Felicia H. Ellsworth

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July 10, 2014

**CERTIFICATE OF SERVICE**

In accordance with Local Rule 5.2(b), I hereby certify that this document filed through the ECF system on July 10, 2014, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Felicia H. Ellsworth
Felicia H. Ellsworth

# EXHIBIT 1

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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| THE COMMONWEALTH OF MASSACHUSETTS,<br><br>*Plaintiff,*<br><br>v.<br><br>THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION,<br><br>*Defendants*. | Civil Action<br>No. 13-13286-FDS |

**[PROPOSED] COMPLAINT OF INTERVENOR-PLAINTIFF AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC.**

Intervenor-Plaintiff the Aquinnah/Gay Head Community Association, Inc. ("the AGHCA"), a non-profit corporation organized under the laws of the Commonwealth of Massachusetts, by and through its attorneys, upon information and belief hereby asserts the following complaint against the Wampanoag Tribe of Gay Head (Aquinnah) (hereinafter, "the Tribe"), and its affiliates—the Wampanoag Tribal Council of Gay Head, Inc. (predecessor-in-interest to the Tribe), and the Aquinnah Wampanoag Gaming Corporation.

**Nature of the Action**

1. This action was initiated by the Commonwealth of Massachusetts when it filed a complaint in the Supreme Judicial Court for Suffolk County on December 2, 2013, alleging a breach of contract, and seeking a declaratory judgment.

2. The AGHCA hereby incorporates the factual recitations in the Commonwealth's December 2, 2013, complaint (¶¶1-14 and 20-61).

3. The AGHCA asserts a claim for breach of contract based on recent gaming-related actions taken by the Tribe and its affiliates, and seeks a declaratory judgment—with corresponding injunctive relief—that the Tribe may only engage in gaming activity (i.e., gambling activity) after properly complying with all pertinent regulatory, permitting, and licensing requirements—including the relevant local zoning ordinances as specified in the below-identified Settlement Agreement.

**Parties**

4. The Commonwealth of Massachusetts, the party that initiated this action, is a sovereign state, one of the several United States of America.

5. The AGHCA is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts.

6. The AGHCA's activities are supported by residents—both seasonal and year-round—of the Town of Gay Head (now the Town of Aquinnah, hereinafter "the Town"), and to a lesser extent by residents of other areas of Martha's Vineyard; the AGHCA has no affiliation with the Tribe.

7. The AGHCA received 501(c)(3) status from the Internal Revenue Service in 2004, with the following mission: (a) to gather, maintain, disseminate, and educate the public regarding current and historical information on all aspects of Town functions and to facilitate the implementation of such functions and operations, and to promote discussion and activity to serve to improve the quality of life for all persons owning property in, residing in, or visiting the Town; (b) to ensure the effective enforcement of all municipal laws and regulations, the proper collection and disbursement of public funds, and the prompt discharge of the Town's administrative responsibilities; (c) to assist the Town's public works (such as the Town library,

playgrounds, beaches, and volunteer fire department); (d) to encourage historic and environmental preservation in the Town; and (e) to carry on any other charitable or educational activity consistent with Massachusetts law and the organization's Articles of Incorporation.

8. The AGHCA has previously participated in litigation involving the proper interpretation and application of the contract in question—the below-detailed agreement between the Tribe, the Commonwealth, and the AGHCA—including in this Court. *See, e.g.*, *Building Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1 (2004) (noting the AGHCA's intervention and full participation in the litigation); Motion to Intervene of the Aquinnah/Gay Head Community Association, *KG Urban Enterprises, LLC v. Patrick*, No. 13-1861 (1st Cir. July 16, 2013) (Dkt. No. 6) (intervention motion filed by the AGHCA); Conditional Motion to Intervene, *KG Urban Enterprises*, No. 11-cv-12070 (D. Mass. Sept. 17, 2013) (Dkt. 52) (same).

9. The Tribe "exists as an Indian tribe within the meaning of Federal law." 52 Fed. Reg. 4193 (Feb. 10, 1987).

10. The Wampanoag Tribal Council of Gay Head, Inc. is the predecessor-in-interest to the Tribe, and was formerly a non-profit corporation organized under the laws of the Commonwealth of Massachusetts.

11. The Aquinnah Wampanoag Gaming Corporation is a wholly-owned entity established by the Tribe, with certain authority explicitly delegated to it by the Tribe, and is thus a related entity to the Tribe.

## Jurisdiction and Venue

12. This action was removed from the Supreme Judicial Court for Suffolk County to this Court by the Tribe.

13. This court has subject matter jurisdiction over this action in accordance with 28 U.S.C. § 1331.

14. This court has personal jurisdiction over all parties to this action.

15. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b)(1), and 1391(b)(2).

**Background**

16. In 1974, the Wampanoag Tribal Council of Gay Head, Inc.—then a Massachusetts non-profit corporation without federally-recognized tribal status—commenced an action in this Court against the Town, on the island of Martha's Vineyard, claiming that certain historical transfers of land in Gay Head violated the Indian Non-Intercourse Act, 25 U.S.C. § 177. *See* Comm. Compl. ¶24; *Wampanoag Tribal Council of Gay Head, Inc. v. Town of Gay Head*, No. 74-5826 (D. Mass.); *see also Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1 (describing history of tribe and litigation).

17. The AGHCA—as the Taxpayers' Association of Gay Head—intervened in this land-transfer litigation.[1]

18. In 1983 the Tribe, the Town, the Commonwealth, and the AGHCA entered into a "Joint Memorandum of Understanding Concerning Settlement of the Gay Head, Massachusetts Indian Land Claims" (hereinafter, "the Settlement Agreement"); the Settlement Agreement resolved the land-transfer litigation and its various inter-related claims. Comm. Compl. ¶25.

19. The Settlement Agreement represented a carefully struck bargain, through which several sophisticated parties—each represented by legal counsel—resolved their respective

[1] The Taxpayers' Association of Gay Head was formed in 1973; in 2003, it incorporated as a Massachusetts not-for-profit corporation and changed its name to the AGHCA.

differences in a manner that both conferred benefits and placed obligations on all involved. Comm. Compl. ¶¶26-27.

20. In the Settlement Agreement the Tribe received exclusive use of hundreds of acres of publicly- and privately-owned land in exchange for relinquishing its aboriginal title and claims. Comm. Compl. ¶¶28-29.

21. In the context of this litigation, the Settlement Agreement most pertinently provides in part that:

> The Tribal Land Corporation shall hold the Settlement Lands, and any other land it may acquire, ***in the same manner, and subject to the same laws, as any other Massachusetts corporation***…. ***Under no circumstances, including any future recognition of the existence of an Indian tribe in the Town of Gay Head, shall the civil or criminal jurisdiction of the Commonwealth of Massachusetts, or any of its political subdivisions***, over the settlement lands, or any land owned by the Tribal Land Corporation in the Town of Gay Head, or the Commonwealth of Massachusetts, or any other Indian land in Gay Head, or the Commonwealth of Massachusetts, ***be impaired or otherwise altered***, except to the extent modified in this agreement and in the accompanying proposed legislation.

*Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. at 4 (emphasis added).

22. In 1985, the Commonwealth enacted legislation to implement the settlement, Comm. Compl. ¶33; An Act to Implement the Settlement of the Gay Head Indian Land Claims, Mass. Stat. 1985, c. 277, and on February 10, 1987, the Tribe was granted federal recognition, *see* 52 Fed. Reg. 4193-4194 (Feb. 10, 1987).

23. After the Tribe gained federal recognition, Congress enacted federal legislation implementing the Settlement Agreement in the Massachusetts Indian Land Claims Settlement Act. Comm. Compl. ¶35; Wampanoag Tribal Council of Gay Head, Inc., Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-95, *codified at* 25 U.S.C. §§ 1771-1771i.

24. In this legislation, Congress ratified and confirmed the Tribe's existence as an Indian tribe, and also confirmed that, consistent with the terms of the Settlement Agreement, the Tribe is subject to the jurisdiction of the Commonwealth and the Town. *See* Comm. Compl. ¶36. In particular, the federal implementing act states:

> Except as otherwise expressly provided in this subchapter or in the State Implementing Act, the settlement lands and any other land that may now or hereinafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts **(*including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance*)**.

25 U.S.C. § 1771g (emphasis added).

25. As detailed more fully in the Commonwealth's December 2, 2013, complaint (¶¶48-61), notwithstanding the express terms of the Settlement Agreement, the Tribe and its affiliates have recently engaged in gaming-related activity, including the adoption of a "Gaming Ordinance," with the expressed intention of conducting gaming on the lands conferred in the Settlement Agreement ("the Settlement Lands") "as soon as possible."

26. Since the filing of the Commonwealth's December 2, 2013, complaint, the Tribe has maintained the validity of the existing "Gaming Ordinance," including by failing to repeal the ordinance at a vote earlier this year, and reiterated its intention of conducting gaming, with a plan to have a gaming facility "open within a year."

27. The clear import of the Settlement Agreement and the Massachusetts and federal implementing legislation is that the Tribe cannot continue to pursue gaming activities on the Settlement Lands. In the Settlement Agreement, the Tribe waived any sovereign right it may have had to engage in gaming under the subsequently-enacted Indian Gaming Regulatory Act ("IGRA"), and the 1983, 1985, and 1987 agreements and enactments "specifically provide for

exclusive state control over gambling." *Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1341 (D.C. Cir. 1998) (construing section 1771 in litigation involving a Rhode Island tribe's similar claim); *see also Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994) (distinguishing the Tribe's federal implementing legislation from similar legislation relating to Indian settlement lands in Rhode Island, and noting that sections 1771e and 1771g "contain corresponding limits on Indian jurisdiction" that save the implementing legislation from implied repeal by IGRA).

**Allegations**

**Count I: Breach of Contract**

28. The facts and allegations set forth in paragraphs 1 through 27 above are incorporated by reference, as if set forth herein in full.

29. The Settlement Agreement is a valid and enforceable contract that created enduring legal obligations on the part of all parties to the agreement, including the Tribe.

30. Under the Settlement Agreement, the Tribe is prohibited from engaging in any gaming on the lands conferred in the Settlement Agreement.

31. The Tribe's recent gaming-related actions, as detailed above and in the Commonwealth's December 2, 2013, complaint, constitute actual and/or anticipatory breaches of the terms of the Settlement Agreement and the Tribe's obligations thereunder.

32. As a party to the Settlement Agreement, the AGHCA and its members have been harmed by the Tribe's actual and/or anticipatory breaches of the Settlement Agreement.

33. The Tribe's gaming-related actions, as detailed above and in the Commonwealth's December 2, 2013, complaint, are significant: they go to the very essence of the several parties' contractual bargain in the Settlement Agreement.

34. Relief in the form of damages or other restitution is inadequate to remedy the present and potential future injury inflicted by the Tribe's actual and/or anticipatory breaches of the Settlement Agreement.

**Count II: Declaratory Judgment**

35. The facts and allegations set forth in paragraphs 1 through 34 above are incorporated by reference, as if set forth herein in full.

36. Pursuant to 28 U.S.C. § 2201, this Court is authorized to declare the rights and other legal relations of any interested party seeking such declaration, where an actual controversy exists, as it does here.

37. As detailed above, the Tribe's actions constitute actual and/or anticipatory breaches of the Settlement Agreement.

38. As a party to the Settlement Agreement, the AGHCA may seek to enforce the terms of the Settlement Agreement.

39. In light of the Tribe's actions, as well as the Commonwealth's December 2, 2013, complaint, an actual controversy has arisen between the Tribe, the Commonwealth, and the AGHCA concerning the Tribe's actual and/or anticipatory breaches of the Settlement Agreement.

40. Not only is there no other adequate remedy for the above-detailed injuries, but a declaratory judgment from this Court is otherwise appropriate in this case because such a judgment would remove any uncertainty as to the Tribe's obligations under the Settlement Agreement, allowing all parties to the Settlement Agreement to arrange their affairs with certainty, and thus terminate the present controversy.

**Count III: Injunctive Relief**

41. The facts and allegations set forth in paragraphs 1 through 40 above are incorporated by reference, as if set forth herein in full.

42. Pursuant to 28 U.S.C. § 2202, this Court is authorized to grant further necessary or proper relief in support of a declaratory judgment or decree.

43. As detailed above, the Tribe's actions constitute actual and/or anticipatory breaches of the Settlement Agreement.

44. As detailed above, the Tribe has a history of challenging the scope and proper interpretation of the Settlement Agreement, both in and out of court.

45. In light of the Tribe's actions, issuing an injunction would properly support the above-requested declaratory judgment and remove any uncertainty as to the Tribe's obligations under the Settlement Agreement.

**Prayer for Relief**

WHEREFORE, Intervenor-Plaintiff the AGHCA respectfully beseeches this Court to enter judgment:

I. In favor of the AGHCA, and against the Tribe on all counts;

II. Declaring that the Settlement Agreement is valid and enforceable; that in the Settlement Agreement the Tribe waived any right it may have had to engage in gaming, including under the subsequently-enacted IGRA; and that the Tribe is in breach of the Settlement Agreement;

III. Declaring that the Tribe's recently promulgated Gaming Ordinance, and any actions taken pursuant to the same, are in irreconcilable conflict with, and breach, the Settlement Agreement and therefore void;

IV. Issuing an injunction stating that the Settlement Agreement is valid and enforceable, that the Settlement Agreement was not repealed by IGRA, and that, pursuant to the Settlement Agreement, the Tribe may only engage in gaming activity (i.e., gambling activity) after properly complying with all pertinent regulatory, permitting, and licensing requirements—including the relevant local zoning ordinances as specified in the Settlement Agreement; and

V. Awarding the AGHCA any other, further relief the Court deems just and proper.

Respectfully submitted,

/s/ Felicia H. Ellsworth

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*Counsel for the Aquinnah/Gay Head Community Association, Inc.*

July 10, 2014

**CERTIFICATE OF SERVICE**

In accordance with Local Rule 5.2(b), I hereby certify that this document filed through the ECF system on July 10, 2014, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Felicia H. Ellsworth
Felicia H. Ellsworth