UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

THE COMMONWEALTH OF MASSACHUSSETTS, *Plaintiff,* vs. THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION, *Defendants.*	**CASE NO: 1:13-cv-13286-FDS** [Formerly Supreme Judicial Court for Suffolk County, Massachusetts, CIVIL ACTION NO. 2013-0479]

OPPOSITION TO TOWN OF AQUINNAH'S MOTION TO INTERVENE

Defendants Wampanoag Tribe of Gay Head (Aquinnah) and Aquinnah Wampanoag Gaming Corporation (collectively "Tribe") submit this opposition to the Motion to Intervene filed by Town of Aquinnah ("Town").

ARGUMENT

I. THE TOWN HAS FAILED TO ESTABLISH THAT IT MAY INTERVENE AS A MATTER OF RIGHT.

A. LEGAL STANDARD OF REVIEW

To intervene as a matter of right pursuant to Fed.R.Civ.P 24(a)(2), a would-be intervenor must demonstrate that: (i) its motion is timely; (ii) it has an interest relating to the property or transaction that forms the foundation of the ongoing action; (iii) the disposition of the action threatens to impair or impede its ability to protect this interest; and (iv) no existing party adequately represents its interest. *See R&G Mortgage Corp. v. Federal Home Loan Mortgage*

Corp., 584 F.3d 1, 7 (1st Cir. 2009); *Travelers Indemnity Co. v. Dingwell*, 884 F.2d 629, 637 (1st Cir. 2009). Each of these requirements must be fulfilled; failure to satisfy any one of them defeats intervention as of right. *B. Fernandez & Hnos. Inc. v. Kellogg USA, Inc*., 440 F.3d 541, 545 (1st Cir. 2006). The Town fails to satisfy the second, third and fourth requirements, and upon the failure to satisfy any one of the requirements, the Town's motion should be denied.

B. THE TOWN FAILS TO ESTABLISH THAT THE COMMONWEALTH IS NOT ABLE TO ADEQUATELY REPRESENT ITS INTEREST.

The Tribe initially addresses the fourth requirement, that "no existing party adequately represents its interest" because the Town's argument on this requirement lacks credibility and the Court need not look further to deny intervention. The Town argues that the Commonwealth of Massachusetts ("Commonwealth") cannot adequately represent the Town's interest because the "Commonwealth's approach could change." DK# 39 at 12. The Town concedes that the "Commonwealth has, to date, taken the position that the Tribe has relinquished any right to conduct gaming on its property on Martha's Vineyard", DK# 39 at 11 and "the Commonwealth has to date tendered arguments consistent with the Town's interpretation of the Settlement Agreement." DK# 39 at 11-12. The Town's concessions certainly state the obvious. The Commonwealth took the affirmative initiative to file the instant lawsuit against the Tribe. The Town can look to no tangible issue, action, fact or distinction between its advocacy and the Commonwealth's advocacy to make a credible case that the Commonwealth has not or will not adequately represent the Town's interest in the litigation. The Town's wild speculation that the Commonwealth may change its view is an empty baseless allegation raised solely in an attempt to enter into this litigation. The Town's assertion that a tribal "casino will have a measurably different impact on the Town and its residents" DK# 39 at 11, does not translate into any

difference in the State's advocacy of the legal issues in this litigation. Further, those "residents" to which the Town refers are also citizens of the Commonwealth.

The Town cites *Conservation Law Foundation of New England, Inc. v. Mosbacher*, 966 F.2d 39 (1st Cir. 1992) as its sole support for satisfying the fourth requirement for intervention. That case is critically distinguishable. In that case, the plaintiffs brought a lawsuit against the Commonwealth's then-Secretary of Commerce regarding fishing quotas, and the Secretary immediately entered into a Consent Decree, rather than defending against the lawsuit. The court noted that the Secretary had competing interests in setting fishing quotas that could be adverse to a single fisherman's desire to continue fishing, and further noted that the "Secretary's silence on any intent to defend the fishing group's special interest is deafening" 966 F.2d at 44. In sharp contrast here, as the Town concedes, the Commonwealth has taken the initiative to file this litigation against the Tribe, advocating the exact same interests and legal arguments as the Town now seeks to advocate. There are no competing interests. There is no silence on the Commonwealth's intent to defend the Town's interests. Additionally, the Town fails to inform the Court of the discussion in *Mosbacher* which, applied to this case clearly recognizes that the Town must demonstrate "adversity of interests, collusion or malfeasance" to establish that the Commonwealth is not able to represent its interests. Such a standard can be met only by showing that the Commonwealth is "sleeping on their oars" or that "settlement talks are underway." 966 F.2d at 44. See also, *Moosehead Sanitary District v. S.G. Phillips Corp*., 610 F.2d 49. 54 (1st Cir. 1979) ("Where the party seeking to intervene has the same ultimate goal as a party already in the suit, courts have applied a presumption of adequate representation. To overcome that presumption, petitioner ordinarily must demonstrate adversity of interest, collusion, or nonfeasance"). Further, the First Circuit later refused to extend *Mosbacher* in an action where the

Commonwealth was sued by several supermarkets regarding limits on the number of liquor retail outlets in the Commonwealth. *Massachusetts Food Association v. Massachusetts Alcoholic Beverages Control Commission*, 197 F.3d 560 (1st Cir. 1999). In that case, several trade organizations moved to intervene, citing *Mosbacher*. The court noted that there was no credible evidence or argument made that the Commonwealth would take a position contrary to the proposed intervenors' interests. 197 F.3d at 567. If this Court accepted the Town's argument, it would vitiate the fourth requirement for intervention because any hopeful intervenor could meet the very low bar of establishing that the existing party to the litigation had some remote chance of changing its approach, however unlikely that might be.

C. THE TOWN FAILS TO ESTABLISH THAT IT HAS A SUFFICIENT INTEREST THAT FORMS THE FOUNDATION OF THE ONGOING ACTION; OR THAT THE DISPOSITION OF THE ACTION THREATENS TO IMPAIR OR IMPEDE ITS ABILITY TO PROTECT THIS INTEREST.

The Town alleges that it has a sufficient interest because it is a party to the contract that the Commonwealth alleges to be at issue (DK#37 at 10). However, as this Court points out in its Order denying the Commonwealth's Motion to Remand, it is the Settlement Act passed by Congress, and not the Memorandum of Agreement, that is at issue. DK# 31 at 8 ("Indeed, Congress had to pass a statute for the Settlement Agreement to have any effect"). Thus, there is no contractual interest at stake here and the Town's citation to cases allowing intervention by parties to a contract is unavailing. Additionally, there is no privity of contract between the Town and the Tribe. The Tribe was not federally-recognized at the time of the Memorandum of Agreement and the parties to the Memorandum of Agreement had no authority or capacity to bind the Tribe[1]. That capacity lies exclusively with Congress. The United States Congress has

[1] That includes capacity to waive the Tribe's sovereign immunity from suit. Discussed in greater detail in Section II.C and D below in the context of permissive intervention, the Tribe is

maintained plenary power over the rights and authority of federally recognized Indian Tribes, to the exclusion of the states. The United States Supreme Court bluntly summarized 200 years of jurisprudence as follows:

> This course of legislation and adjudication may be fairly summarized as recognizing the special relation of Indians toward the United States and the exclusion of state power with relation to them, except in so far as the federal government has actually released to the state governments its constitutional supremacy over this special field.

Oklahoma Tax Commission v. United States, 63 S.Ct. 1284, 1291 (1943). See also, *United States v. Lara,* 124 S.Ct. 1628, 1633 (2004); *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903); *K.G. Urban Enterprises v. Patrick*, 693 F.3d 1, 18 (1st Cir. 2012).

Wampanoag Tribal Council of Gay Head Inc., a Massachusetts non-profit corporation, had no authority or capacity whatsoever to exercise or limit the sovereign authority of, and/or contractually bind, a federally-recognized tribe that did not exist. See, e.g., *Bingham v. Massachusetts*, 616 F.3d 1, 6 (1st Cir. 2010) (Plaintiffs do not represent the tribe, nor do they claim the capacity to do so. Plaintiffs cannot assert the rights of the tribe, as an entity, simply by styling their claim as a class action on behalf of all tribal descendants); *Somerlott v. Cherokee Nation Distribs. Inc.,* 686 F.3d 1144, 1150 (10th Cir. 2012); *Inecon Agricorporation v. Tribal Farms, Inc.*, 656 F.2d 498, 501 (9th Cir. 1981); *Uniband, Inc. v. C.I.R.*, 140 T.C. No. 13, 2013 WL 2247986 at p. 14 (U.S. Tax Ct., 2013). Further, none of the parties to the Memorandum of Agreement had any authority to bind Congress. It is only the applicable Act of Congress that properly dictated to the Aquinnah Tribe, which laws of the Commonwealth, if any, would govern

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considering waiving its sovereign immunity against claims brought by the Commonwealth if those claims are properly postured to bring resolution to the dispute regarding the Tribe's jurisdiction to govern gaming activities on its lands. The Tribe will not consider waiving its immunity as to claims brought by the proposed intervenor Town (or the Homeowner's Association).

its affairs.

The Memorandum of Agreement served only as a vehicle to urge Congress to exercise its plenary authority over tribes and determine the allocation of tribal, state and federal jurisdiction over the Tribe's lands. It is not a matter of interpreting a contract; rather, it is a matter of interpreting federal statutes. As this Court further reasoned in its Order, even though the Commonwealth "framed the dispute as one of breach of contract":

> Resolution of the gaming jurisdiction issue is unquestionably "necessary" to the Commonwealth's case. The Commonwealth would not be responsible for the enforcement of gaming laws—and the Tribe would not violate Massachusetts law—if the Tribe, rather than the Commonwealth, had jurisdiction over the Settlement Lands. Thus, adjudication of the declaratory-judgment request will necessarily require application of federal Indian gaming law and jurisdiction to the facts of the case.

DK# 31 at 7.

The Town argues that even if it has no contractual interests at stake, its interests in the interpretation and application of the statute are sufficient to satisfy the second and third requirements for intervention. DK# 39 at 10. Whatever tenuous jurisdictional interests the Town may have, they are derivative of and subsumed by the Commonwealth's jurisdiction. In *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994), the Court allowed the Town of Charleston, which was party to an agreement allegedly granting the town jurisdiction over the yet-to-be-federally-recognized Narragansett Tribe, to intervene in similar litigation. When it finally came down to addressing the Town of Charleston's interests on the merits, however, the court found the town's interests to be too tenuous to burden the Court's resources and analysis:

> We digress to add a few words about local jurisdiction, mindful that the Town of Charlestown and certain municipal officials are parties to this lawsuit. Although we recognize both the town's desire to assert jurisdiction in respect to the settlement lands and the Tribe's opposition, we see nothing to be gained by giving separate treatment to the question of local jurisdiction. As a general matter, municipal authority is entirely derivative of state authority, and in the exercise of governmental powers (as opposed to proprietary powers), municipalities act only

> as the agents of the state. It follows that if the state chooses to cede a portion of its sovereignty to the town, the town may use that authority to the extent of the power delegated. But delegated powers, of necessity, cannot exceed those possessed by the delegator. The town has cited no *independent* basis upon which it might exercise municipal jurisdiction, and none is apparent to us. Thus, Charlestown's concerns are necessarily subsumed in our discussion of the state's jurisdiction.

19 F.3d at 696-697 (internal citations omitted).

To summarize the lack of sufficient interests to establish intervention as a matter of right: (1) the Town has no contractual right to usurp tribal jurisdiction; (2) there is no privity of contract between the Town and the federally-recognized Wampanoag Tribe of Gay Head (Aquinnah); (3) the case turns on interpretation of federal statutes as to the allocation of jurisdiction between the Commonwealth and the Tribe; and (4) the Town's jurisdictional interests are derivative of and subsumed by the Commonwealth's interests. Separately and together, this analysis demonstrates that the Town does not have sufficient interests in this litigation to satisfy the second and third requirements for intervention as a matter of right.

II. THE COURT SHOULD EXERCISE ITS DISCRETION AND DENY THE MOTION FOR PERMISSIVE INTERVENTION.

A. LEGAL STANDARD OF REVIEW

Upon a timely motion pursuant to Fed.R.Civ.P 24(b)(1)(B), a court may permit a third party to intervene, when that party has a claim or defense that shares with the main action a common question of law or fact with the main action. When making that determination a court must consider whether permissive intervention will unduly delay or prejudice the adjudication of the original parties' rights. Fed.R.Civ.P. 24(b)(3). Among other factors, a court should consider whether the putative intervenor's interest is adequately represented by an existing party. See, *Massachusetts Food Association v. Sullivan,* 184 F.R.D. 217, 224 (D. Mass. 1999), *aff'd sub nom.* 197 F.3d at 560; *In Re Thompson,* 965, F.2d 1136, 1142 n.10 (1st Cir. 1992). Permissive

intervention is also allowable where there are independent jurisdictional grounds *Paper Co. v. Inhabitants of Town of Jay*, 887 F.2d 338, 346 (1st Cir. 1989). *See also, Moosehead Sanitary Dist. v. S.G. Philips Corp.* Apart from these considerations, a district court may consider "almost any factor rationally relevant" in granting or denying a motion to intervene. *Daggett v. Commission on Governmental Ethics and Election Practices*, 172 F.3d 104, 113 (1st Cir. 1999). A court may base its denial on concerns that a proposed intervention will cause undue

delay and expense as a result of the intervenor's potential to seek longer hearings and conduct discovery. See *Costa v. Marotta, Gund, Budd & Dzera, LLC*, 281 Fed. Appx. 5, 6 (1st Cir. 2008).

B. THE TOWN FAILS TO ESTABLISH THAT THE COMMONWEALTH IS NOT ABLE TO ADEQUATELY REPRESENT ITS INTERESTS.

For the same reasons set forth in Section I.B. above, the Town fails to establish that the Commonwealth cannot or will not adequately represent the Town's interests. The Town concedes that it must establish the inability of the Commonwealth to adequately represent the Town's interests in order to establish intervention as a matter of right, or to pursue permissive intervention. DK # 39 at 13. The adequacy of the Commonwealth's representation also factors into the undue delay and expense, that would result from the Town's intervention, and this in turn provides separate grounds to deny the Town permissive intervention as discussed further in section II D, below.

C. THE TOWN FAILS TO ESTABLISH THAT INDEPENDENT JURISDICTIONAL GROUNDS FOR ITS INTERVENTION – IT CANNOT ESTABLISH A VALID WAIVER OF THE TRIBE'S SOVEREIGN IMMUNITY FROM SUIT.

The Tribe is considering waiving its tribal sovereign immunity from suit as to claims brought by the Commonwealth if those claims are properly postured to resolve the issue of the

Tribe's jurisdiction to govern gaming activities on its Indian lands. The Tribe is not willing to waive its immunity as to claims brought by the Town or Homeowner's Association. Absent such a waiver, the Court lacks jurisdiction to hear the Town's claims, and as there are no independent jurisdictional grounds for the Town's claims and permissive intervention must be denied. The Tribe's willingness to waive its immunity if the Commonwealth's claims are properly postured and the Tribe's unwillingness to do the same as to the Town's claims also factor into the undue delay and expense, analysis, and provide separate grounds to deny the Town permissive intervention as discussed further in section II D, below.

In this case, the defendants are a federally-recognized Indian Tribe, the Wampanoag Tribe of Gay Head (Aquinnah), and an economic instrumentality of the Tribe (the Aquinnah Wampanoag Gaming Corporation). As such, each enjoys the full protection of tribal sovereign immunity, which acts as an absolute subject matter jurisdictional bar to suit by the proposed intervenor against both defendants. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509 (1991) (tribal sovereign immunity is a jurisdictional bar to suit); *Maynard v. Narragansett Tribe*, 984 F.2d 14 (1st Cir. 1993)("Although sovereign immunity may be waived by the tribe, or abrogated by Congress its relinquishment *cannot be implied* but must be unequivocally expressed"); *United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir. 1981) (tribal sovereign immunity extends to tribal officials acting in their official capacity and within the scope of their authority). Indian Tribes long have been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. . *Kiowa Tribe v. Manufacturing Techs*, 523 U.S. 751, 756, 118 S.Ct 1700 (1998); *Turner v. United States,* 248 U.S. 354, 358 (1919); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978). Tribal sovereign

immunity therefore bars suits against a Tribe absent a clear waiver by the Tribe. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509 (1991).

Tribal waivers of sovereign immunity are strictly construed. *Ramey Construction v. Apache Tribe of the Mescalero Reservation,* 673 F.2d 315, 320 (10th Cir. 1982). "Because a waiver of immunity is altogether a voluntary act on the part of [a Tribe] it follows that [a Tribe] may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *Missouri River Services v. Omaha Tribe of Nebraska,* 267 F.3d 848, 852 (8th Cir. 2001).

The Town's sole basis for claiming that the Tribe's sovereign immunity was waived is its assertion that the Wampanoag Tribal Council of Gay Head Inc., a state non-profit organization that no longer exists, executed a Memorandum of Agreement with the Town at a time when the Wampanoag Tribe of Gay Head (Aquinnah) was not yet recognized by the federal government. Importantly, the Town fails to point to any act on the part of the Tribe, through its governing body, to clearly and unequivocally authorize the state non-profit organization to waive the Tribe's immunity from suit in the first instance. Indeed, because the Tribe was not federally-recognized as of the date of the signing of the Memorandum of Agreement, it would have been literally and factually impossible for the Tribe, as a federally-recognized Indian tribe, to waive its sovereign immunity, or authorize the waiver of its sovereign immunity, at that time. If the entity purporting to waive a tribe's immunity does not have express authority delegated from the tribe to waive that immunity, the purported waiver is invalid. *Chance v. Coquille Indian Tribe,* 327 OR. 318, 963 P.2d 638 (1998)(The Tribe's CEO lacked authority to waive, therefore the waiver was invalid); *Danka Funding Co. v. Sky City Casino (Pueblo of Acuma),* 329 N.J. Super. 357, 747 A.2d 837 (1999) (the Comptroller, not the Council, purportedly waived the Tribe's immunity

by executing the lease form containing the forum selection clause. Such a waiver was ineffective); *World Touch Gaming v. Massena Management (Akwesasne Mohawk),* 117 F.Supp.2d 271 (N.D.N.Y. 2000) (only the tribal council can waive the tribe's sovereign immunity, and such waiver must be express. The tribal council did not authorize the senior vice president to waive sovereign immunity, nor did the tribal council expressly waive the tribe's sovereign immunity. Thus, the tribe's sovereign immunity was not waived, and it is immune from suit); *Filer v. Tohono O'Odham Nation Gaming Enterprise,* 212 Ariz 167, 170 (tribal immunity is a matter of federal law and is not subject to diminution by the states).

Lacking an independent jurisdictional basis for its claims, the Town's motion for permissive intervention must be denied.

D. GRANTING PERMISSIVE INTERVENTION WILL CAUSE UNDUE DELAY AND PREJUDICE TO THE TRIBE.

The only tangible rationale for the Town to intervene is to "pile on" the Tribe, and it is no coincidence that the Town's motion was filed simultaneously with the Homeowners' Association. Why hit the Tribe with one complaint, when it can hit the Tribe with three? Why provide a pleading to this Court within the page limits imposed by the rules, when it can effectively triple that page limit by being granted permissive intervention? Why have one attorney advocating against the Tribe's interest for twenty minutes at an oral argument, when it can have three attorneys advocate for an hour? Why cause the Tribe to incur the expense of defending against the litigation brought by the Commonwealth, when it can burden the Tribe with triple that expense? These realities are underscored by the incredibly weak reasoning put forth by the Town that the Commonwealth is incapable of adequately representing the Town's interests. Because the Commonwealth, by the Town's own admission, has been advocating this case in a matter consistent with the Town's view of the case, any pleading or argument that the

Town submits will be repetitive, duplicitous and only serve to add unneeded expense and delay.

To burden this Court with motions to dismiss on grounds of tribal sovereign immunity because permissive intervention is granted, when the issues on the merits can instead be resolved by the Tribe's waiver of its immunity as to properly-postured claims by the Commonwealth, would also create undue delay and expense.

Prudence justifies denial of the Town's motion for permissive intervention.

CONCLUSION

The Court need not look further than the ability and track record of the Commonwealth in adequately representing the interests of the Town and its residents to deny both the motion to intervene as a right, and the motion for permissive intervention. If this Court chooses to look further, the Town's interests are too tenuous to meet the second and third requirements for intervention as a matter of right. The Town's lack of an independent basis for jurisdiction, arising from the Tribe's refusal to waive its sovereign immunity as against the Town's claims, mandates the denial of permissive intervention. Finally, the high potential for unnecessary and substantial added expense and undue delay mandate the denial of permissive intervention. For all the reasons set forth herein, the Town's motion should be denied.

DATED: July 24, 2014

Respectfully Submitted,

/s/ Scott Crowell
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CERTIFICATION PURSUANT TO LOCAL RULE 7.1(A)(2)

I hereby certify that on July 24, 2014, I, Scott Crowell, spoke by telephone with Ronald H. Rappaport, counsel to the proposed Intervenor in the above-captioned action, in good-faith effort to resolve or narrow the issues presented in this motion and we were unable to do so.

/s/ Scott Crowell
SCOTT CROWELL

CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that the OPPOSITION TO INTERVENE was filed through the ECF System and therefore copies will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF); paper copies will be sent, via first-class mail, to those indicated as non-registered participants.

Dated: July 24, 2014

/s/ Scott Crowell
SCOTT CROWELL