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

| | |
|---|---|
| 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 |

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

As a party to the Settlement Agreement, the interpretation of which will be the primary focus of this litigation, the AGHCA satisfies each of the required elements for intervention as a matter of right, or at a minimum, by permission. Unable to rebut this fact, the Tribe instead advances unfounded factual contentions and inapposite merits theories in an attempt to defeat the AGHCA's intervention. These arguments, however, directly conflict with prior rulings in related litigation, and in any event are irrelevant to the intervention calculus. The AGHCA's motion to intervene should be allowed.

## ARGUMENT

### I. THE TRIBE'S MERITS ARGUMENTS HAVE NO BEARING ON THE AGHCA'S INTERVENTION REQUEST

Rather than address the standard for intervention, throughout its opposition the Tribe instead previews its merits contentions and affirmative defenses: arguing that federal law completely controls the outcome of the action (Opposition to Town of Aquinnah's Motion to

Intervene, Dkt. 41 ("Opp. to Town Mot.") at 4, 6-7); that the Tribe is not a party to, or bound by the Settlement Agreement because it was not federally-recognized when the agreement was signed (Opp. to Town Mot. at 4-6); and that tribal sovereign immunity is a complete bar to the claims advanced in the action (Opp. to Town Mot. at 4 n.1, 9-11).

In addition to being wholly irrelevant to the AGHCA's eligibility for intervention, these arguments are in direct conflict with prior rulings in litigation related to the Settlement Agreement. For example, the Supreme Judicial Court ("SJC") has held that the Tribe is a successor to the Wampanoag Tribal Council of Gay Head, Inc. (signatory to the Settlement Agreement) and therefore bound by the Settlement Agreement. *See Building Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1, 8 n.8 (2004) (noting that it is undisputed that "the Wampanoag Tribe of Gay Head (Aquinnah) was formerly known as, and is a successor to, the Wampanoag Tribal Council of Gay Head, Inc." and explaining that "references to the 'Tribe' encompass a reference to both entities" as well as any successors). The SJC has also held that the Settlement Agreement, a product of extensive negotiation, constitutes a knowingly bargained for, fully understood waiver of tribal sovereign immunity in connection with the Settlement Lands. *Id.* at 12-13, 17 (noting in connection with Settlement Agreement that "the facts clearly establish a waiver of sovereign immunity stated, in no uncertain terms, in a duly executed agreement" and that "with respect to sovereign immunity, the Tribe knowingly bargained for, and fully understood, its obligations under the settlement agreement to submit to local zoning enforcement, and judicial action, where necessary").

In any event, the Tribe's apparent intent to re-litigate these questions before this Court (to the extent such re-litigation is not barred by collateral estoppel) has no bearing on the current inquiry. The question presently before the Court is whether the AGHCA satisfies the

intervention standards. *See, e.g., B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 543 (1st Cir. 2006) ("We derive the relevant facts primarily from the allegations and evidence submitted by [the proposed intervenor] in support of its motion to intervene but also consider uncontroverted facts established elsewhere in the record." (citation omitted)); *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001) ("[A] district court is required to accept as true the non-conclusory allegations made in support of an intervention motion.").

## II. THE AGHCA SATISFIES THE CRITERIA FOR INTERVENTION AS A MATTER OF RIGHT

Looking to the substantive intervention standards, it is plain that the AGHCA satisfies each of the required elements for granting intervention as a matter of right—timeliness, sufficient interest, a threat to the ability to protect that interest, and a lack of adequate representation by existing parties—and that the Tribe's cited authorities are not to the contrary.

As the Tribe apparently concedes, the AGHCA's motion to intervene is timely, especially 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).

Additionally, the AGHCA has a significant stake in the outcome of this litigation, which will affect the proper interpretation of the Settlement Agreement and therefore threatens to impair the AGHCA's ability to protect its independent contractual interests therein. *See* Memorandum of Law in Support of the AGHCA's Motion to Intervene, Dkt. 37 ("AGHCA Intervention Mem.") at 6-7.[1] It remains beyond dispute that a party to a contract has a significant

[1] The Tribe's vague contentions about the AGHCA's status in relation to its predecessor carry no weight as to the AGHCA's right to intervene. First, it is widely accepted that intervention motions are judged on the facts and allegations set forth in the motion and accompanying pleadings. *See, e.g.*,

stake in the interpretation of that agreement, sufficient to satisfy the requirements for intervention as a matter of right. *See Kellogg*, 440 F.3d at 545 ("An intervenor has a sufficient interest in the subject of the litigation where the intervenor's contractual rights may be affected by a proposed remedy," and litigation "could result . . . in an order directly affecting [the proposed intervenor]'s contractual rights."); *Cotter v. Mass. Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 35 (1st Cir. 2000); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 110-111 (1st Cir. 1999). The AGHCA therefore has an interest significant enough to warrant intervention in this action.[2]

Finally, the Tribe has failed to rebut the AGHCA's showing that none of the existing parties to the litigation will adequately represent the AGHCA's unique interest in the interpretation of the Settlement Agreement. The Tribe is incorrect that the AGHCA "must demonstrate 'adversity of interests, collusion or malfeasance' to establish that the Commonwealth is not able to represent its interests," (Opp. to Town Mot. at 3 (citing *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39 (1st Cir. 1992), and *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49 (1st Cir.1979)). Neither *Mosbacher* nor *Moosehead* require the strict adequacy criteria the Tribe suggests, and the First Circuit has warned against just the type of exaggerated emphasis the Tribe puts on this language.

---

*Kellogg*, 440 F.3d at 543; *Berg*, 268 F.3d at 819. Second, the AGHCA's publicly-available Internal Revenue Service filings establish that in 2003 the predecessor taxpayers' association changed its name to the AGHCA, incorporated as a Massachusetts not-for-profit corporation, and obtained 501(c)(3) status. Finally, the AGHCA's status has been previously established in prior court proceedings. *Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. at 3 (confirming AGHCA's status as successor to taxpayers' association).

[2] Contrary to the Tribe's allusions, nothing in the Court's order denying remand (Dkt. 31) alters the fact that this action implicates contractual rights and requires interpretation of the meaning and import of the Settlement Agreement. The Court's remand order simply establishes that the resolution of this case will require the Court to interpret the IGRA in the process of determining the proper interpretation and scope of the Settlement Agreement and the related implementing legislation. This does nothing to diminish the import of the Settlement Agreement to the resolution of this case, or change the fact that the AGHCA has a contractual interest in the subject of this case sufficient to warrant intervention.

*See, e.g.*, *Kellogg*, 440 F.3d at 546 (noting that "the district court focused too narrowly when it ruled that [the proposed intervenor] could only rebut the presumption by showing adversity of interest, collusion, or nonfeasance"; "this trilogy of grounds for rebutting the adequate representation presumption is only illustrative"); *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 567 n.5 (1st Cir. 1999) (clarifying that there is no "artificial limitation on the way in which parties may show inadequate representation," and that the language from *Moosehead*—"adversity of interests, collusion or malfeasance"—was not to be misconstrued as being to the contrary); *Daggett*, 172 F.3d at 111 (noting that the "adversity of interest, collusion or nonfeasance" "trilogy" was not intended "to be an exclusive list").[3]

Contrary to the Tribe's assertion, an intervenor need only "make a 'minimal' showing that the representation afforded by a named party would prove inadequate," and even "where the intervenor's ultimate objective matches that of the named party," "the intervenor need only offer 'an adequate explanation as to why' it is not sufficiently represented by the named party." *Kellogg*, 440 F.3d at 545-546. To that end, an intervenor can demonstrate inadequacy of representation where its interests differ in kind, degree, or intensity from those of a named party, even where the named party shares the ultimate objective of the intervenor. *Id.* at 546 ("One way for the intervenor to show inadequate representation is to demonstrate that its interests are sufficiently different in kind or degree from those of the named party."); *Glancy v. Taubman*

[3] *See also State v. Dir., U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 19 (1st Cir. 2001) ("The facts of these cases vary greatly and whether the proposed intervenors' explanation of inadequacy suffices must be determined 'in keeping with a commonsense view of the overall litigation.'" (citation omitted)). Moreover, it is widely accepted that the demonstration of a direct independent interest, like the AGHCA's interest in the Settlement Agreement here, as opposed to a "thin and widely shared interest," lowers the burden of the adequacy element. *See Kellogg*, 440 F.3d at 546 (where party has a "tangible and substantial stake in the outcome of the case," presenting a "direct interest," inadequacy burden is "lighter" than where interest is "thin and widely shared."); *U.S. Fish & Wildlife Serv.*, 262 F.3d at 20 ("It is difficult to analyze 'inadequacy' without looking at the strength of the interests the would-be intervenors present and the tests of inadequacy may vary with the strength of the interests."); *Daggett*, 172 F.3d at 113 ("tests of 'inadequacy' tend to vary depending on the strength of the interest.").

*Ctrs., Inc.*, 373 F.3d 656, 675 (6th Cir.2004) ("[A]symmetry in the intensity of the interest can prevent a named party from representing the interests of the absentee.").

As the AGHCA's motion to intervene demonstrates, the Commonwealth may not adequately represent the AGHCA's interests in this litigation. *See* AGHCA Intervention Mem. at 7-8. In particular, the Commonwealth, unlike the AGHCA, represents the interests of all citizens of Massachusetts, is constrained by its views of the public welfare, and suffers from competing priorities in the context of the Settlement Agreement, especially in connection with its express interest in the promulgation of state-licensed gaming in the Commonwealth. *See Mosbacher*, 966 F.2d at 44 ("An intervenor need only show that representation may be inadequate, not that it is inadequate.").[4] The AGHCA, in contrast, has a specific contractual interest focused on the Settlement Lands and the proper interpretation and enforcement of the Settlement Agreement for the benefit of the residents of Martha's Vineyard, both seasonal and year-round. *See id.* at 44-45 (interests of private party intervenors will not always be adequately protected by a government party); *Penobscot Nation v. Mills*, No. 12-CV-254-GZS, 2013 WL 3098042 at *4 (D. Me. June 18, 2013) (private-party intervenors' "private, economic interest," "narrower in scope and of a different type" than government's interests, was "sufficiently divergent" to render government representation inadequate).[5]

[4] As the Town is not an existing party, the AGHCA need not demonstrate the Town's inadequacy as a representative of the AGHCA's interests. Nevertheless, the Town, like the Commonwealth, may have interests distinct from the AGHCA's in this case.

[5] That the Commonwealth might shift positions is more than mere speculation, as the Tribe has previously acknowledged. *See* Interested Party-Appellant's Response to Motion(s) to Intervene at 4, *KG Urban Enterprises, LLC v. Patrick*, No. 13-1861 (1st Cir. August 5, 2013) (Dkt. No. 23) (Tribe submission indicating that the Commonwealth was not "capable of advocating the interest" of the AGHCA or the Town because of the Commonwealth's competing priorities in connection with tribal gaming). Moreover, just as in *Mosbacher*, the Commonwealth could easily decide to settle or enter into a consent decree unsatisfactory to AGHCA, thereby impairing the AGHCA's contractual interests. *See Penobscot*, 2013 WL 3098042 at *4 (allowing intervention where "while [parties] may be united at this point in time . . . it is not clear that they will be united on any further questions or potential ramifications").

## III. THE TRIBE LIKEWISE FAILS TO SHOW THAT PERMISSIVE INTERVENTION IS NOT WARRANTED

The AGHCA easily satisfies the first two permissive intervention considerations: its contractual rights are directly implicated by this action, and its interests may not be adequately represented by the Commonwealth. *See supra* at 3-6; AGHCA Intervention Mem. at 6-9.

As to the third consideration, allowing the AGHCA to intervene at this juncture would not delay any aspect of the proceedings or cause any prejudice. The Tribe has identified no meaningful burden that the AGHCA's intervention would interpose. *Penobscot*, 2013 WL 3098042 at *3 (allowing permissive intervention where the opposing party "has not pointed to any particular prejudice or delay that it will suffer"). The Tribe has yet to file a pleading responsive to the Commonwealth's complaint, and discovery has yet to begin. *Id.* at *3 (timely permissive intervention "will not unduly delay the adjudication of this case because this case is still in its early stages, with discovery not set to be completed for several months"). Moreover, while the AGHCA is unwilling to preemptively commit to waiving all discovery—especially prior to the Tribe filing a responsive pleading—the AGHCA has no expectation that extensive discovery will be required. This places the AGHCA in no different a position regarding discovery than the Commonwealth and the Tribe. *See* Joint Statement Pursuant to Local Rule 16.1, Dkt. 44 at 2 n.2 (reserving right "to seek limited discovery at the preliminary stage to address issues raised in pre-summary judgment dispositive motions").[6]

Moreover, allowing the AGHCA to intervene serves the interests of justice, prevents the Tribe from having to engage in duplicative litigation, and reduces burden and delay. As a party to the Settlement Agreement, the AGHCA could advance its breach of contract claims in a

[6] Moreover, to the extent any issues requiring discovery are apparent at this early juncture, it is the Tribe's doing—it is the Tribe that raised factual questions regarding the status of the AGHCA and the authority of the Wampanoag Tribal Council of Gay Head, Inc. to bind the Tribe to the terms of the Settlement Agreement.

separate action, forcing the Tribe to defend itself in two cases. Thus, allowing the AGHCA to intervene here would ease the burden on all parties and best allow for a complete and efficient resolution of the claims presented. 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); *Penobscot*, 2013 WL 3098042 at *2 ("The First Circuit has noted that the threshold for permissive intervention is low, and that once the threshold requirements are satisfied, the district court may 'consider almost any factor rationally relevant.'" (citation omitted)).

## CONCLUSION

For the foregoing reasons, and those detailed in the previously filed Memorandum of Law in Support of the Aquinnah/Gay Head Community Association's Motion to Intervene (Dkt. 37), this Court should grant the AGHCA's motion to intervene.

AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC.

By its attorneys,

/s/ Felicia H. Ellsworth

Felicia H. Ellsworth (BBO# 665232)
Oramel H. Skinner (BBO# 680198)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, Massachusetts 02109
(617) 526-6000
Felicia.Ellsworth@wilmerhale.com
Oramel.Skinner@wilmerhale.com

James L. Quarles III (BBO# 408520)
WILMER CUTLER PICKERING
HALE AND DORR LLP

1875 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 663-6000
James.Quarles@wilmerhale.com

August 1, 2014

**CERTIFICATE OF SERVICE**

In accordance with Local Rule 5.2(b), I hereby certify that this document filed through the ECF system on August 1, 2014, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Felicia H. Ellsworth
Felicia H. Ellsworth