UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

THE COMMONWEALTH OF MASSACHUSSETTS,

Plaintiff,

and

AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. (AGHCA) and TOWN OF AQUINNAH,

Intervenor-Plaintiffs,

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]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION PURSUANT TO FED.R.CIV.P. 19 TO DISMISS WITH LEAVE TO AMEND FOR FAILURE TO JOIN A NECESSARY PARTY.

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I. INTRODUCTION

Defendants[1] Wampanoag Tribe of Gay Head (Aquinnah) and the Aquinnah Wampanoag

[1] Although Plaintiff and Intervenors also named the Wampanoag Tribal Council of Gay Head, Inc. as a party defendant, alleging that Defendant Wampanoag Tribe of Gay Head (Aquinnah) "includes" Wampanoag Tribal Council of Gay Head, Inc., which no longer exists, Defendants deny that allegation, but if such allegation is true, and Defendant Wampanoag Tribe of Gay Head (Aquinnah) has the capacity for pleading on behalf of Wampanoag Tribal Council of Gay Head, Inc., then this Motion shall also be considered to be filed on behalf of Wampanoag Tribal Council of Gay Head, Inc.

Gaming Corporation ("Defendants" or "Tribe") hereby request that this Court dismiss the Complaints filed by Plaintiff Commonwealth of Massachusetts (the "Commonwealth") (DK# 1, EXH. A), Plaintiff-Intervenor Town of Aquinnah (the "Town") (DK# 52), and Plaintiff-Intervenor Aquinnah/Gay Head Community Association, Inc. ("the AGHCA") (DK# 53) as each Complaint fails to join the National Indian Gaming Commission (the "NIGC") as a necessary party to the litigation. Pursuant to Federal Rules of Civil Procedure 12(b)(7) and 19, and Local Rule 7.1(b), Defendants ask that the Court dismiss each Complaint and grant each party leave to amend in order to join the United States.[2]

The crux of the dispute between the Commonwealth and the Tribe is expressed by the Court in its Order denying remand: that each government claims to have the proper jurisdiction over Indian lands on Martha's Vineyard, pursuant to which it may properly regulate gaming activity that occurs on this land.[3] In fact, four governments assert such jurisdiction: the United States, the Tribe, the Commonwealth, and the Town. The relationships between these parties are complex. The United States and the Tribe assert jurisdiction over Indian gaming to the exclusion of the Commonwealth and the Town. The Commonwealth and the Town, in turn, attempt to assert jurisdiction over the contested gaming activities to the exclusion of the Tribe and the United States. By allowing the Town to intervene, three of the four governments are now

[2] By separate motion, filed simultaneously herewith, Defendants seek dismissal of the Complaint filed by AGHCA on the grounds that AGHCA has failed to show an effective waiver of tribal sovereign immunity and has failed to state a claim upon which relief may be granted. Defendants' Motion to Dismiss as to AGHCA's complaint requests dismissal with prejudice.

[3] In the very first paragraph of this Court's Order denying remand, the Court identified the crux of the dispute:

> This lawsuit involves a dispute between the Commonwealth of Massachusetts and a federally recognized Indian tribe as to who has regulatory jurisdiction over civil gaming on Indian lands on Martha's Vineyard.

July 31, 2014 Order (DK# 31) at p. 1.

included in the instant litigation. The United States remains the only government with purported jurisdiction that is not a party to the instant litigation. The Commonwealth and the Town are able to expeditiously join the United States, however, by amending their Complaint(s) to assert an action under the Administrative Procedures Act (the "APA") against the NIGC challenging its approval of the Tribe's site-specific gaming ordinance. For the reasons set forth herein, the Court should grant the Tribe's Motion under Rule 19 with leave to amend the Commonwealth's and Town's Complaint(s) to join the NIGC as a party-defendant.

II. LEGAL STANDARDS: RULE 19

Pursuant to Rule 19(a)(1):

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1). Rule 19 addresses situations where a lawsuit is proceeding without a party whose interests are central to the suit. *Picciotto v. Continental Casualty Co*., 512 F.3d. 9, 15 (1st Cir. 2008). The Rule provides for joinder of required parties when feasible, and for dismissal of suits when joinder of a required party is not feasible and that party is indispensable.[4] The Rule calls for courts to make pragmatic, practical judgments that are heavily influenced by the facts of each case. *Id.*at 14 – 15; *Bacardi Intern. Ltd. V. V. Suarez & Co. Inc.,* 719 F.3d 1, 9 (1st Cir. 2013)*, see also 7 C.* Wright & A.Miller*, Federal Practice and Procedures § 1604* ("By

[4] The language of Rule 19 was amended in 2007 changing 'necessary' party to 'required' party and deleting the term "indispensible," but these changes are intended to be stylistic only. Fed.R.Civ.P 19 Advisory Committee Notes.

its very nature Rule 19(a) calls for determinations that are heavily influenced by the facts and circumstances of individual cases....").

In proceeding with its inquiry into both necessity and indispensability, a district court should keep in mind the policies that underlie Rule 19, including the public interest in preventing multiple and repetitive litigation, the interest of the present parties in obtaining complete and effective relief in a single action, and the interest of absentees in avoiding the possible prejudicial effect of deciding the case without them. *Picciotto*, 512 F3d. at 16; *Pujol v. Shearson/American Express,* 877 F.2d 132, 134 (1st Cir. 1989)*; Action Co. v. Bachman Foods, Inc*. 668 F.2d 76, 78 (1st Cir. 1982). The Supreme Court has instructed that the decision whether to dismiss for non-joinder is a practical determination that must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests. *Provident Tradesmens Bank v. Patterson,* 390 U.S. 102, 119 (1968); *Picciotto*, 512 F3d. at 16.

Silence or non-intervention by the absent party does not equate to having no claim of interests relating to the subject of the litigation. *Tell v. Trustees of Dartmouth College,* 145 F.3d 417, 419 (1st Cir. 1998). Inconsistent obligations occur when a party is unable to comply with one court order without breaching another court order concerning the same incident. *Delgado v. Plaza Las Americas, Inc.,* 139 F.3d 1, 3 (1st Cir. 1998). Where the defendant and the absent party have similar but different interests, finding the absent party to be 'required' is appropriate and desirable where the interest being litigated at the same time will promote judicial efficiency, or minimize prejudice to the absent party, or minimize the risk to the present party of inconsistent judgments and duplicative litigation. *Axis Insurance Co. v. Hall,* 287 F.R.D. 110, 114 (D. Maine 2012), *see also Bourgoin v. Sebelius,* 296 F.R.D. 15 (D. Maine 2013) (Class

action by Medicaid benefit recipients dismissed for lack of standing because relief would have effect of voiding actions taken by State of Maine – granting motion and providing leave to amend to join the absent State). Finding that absent parties are 'required' is appropriate where the absent parties were instrumental in or responsible for the actions out of which the dispute arises. See *Z&B Enterprises v. Tastee Freez International,* 162 Fed. Appx. 16, 20 (1st Cir. 2006). Similarly, finding that absent parties are 'required' is appropriate where the judgment would have the practical effect of voiding or rescinding the actions of the absent parties, even if the judgment is technically not binding upon the absent party. *Id.* Additionally, even though the absent party is not bound by the judgment, there is a larger public policy interest in avoiding repeated lawsuits on the same essential matter. Fed.R.Civ.P 19 Advisory Committee Notes.

Although only one of the provisions under Rule 19(a)(1) need be satisfied to justify joinder in cases where such joinder is feasible without depriving this Court of jurisdiction, all three of the tests for a 'required' party are satisfied here. *Picciotto*, 512 F3d. at 16.

III. APPLICATION OF RULE 19 IN THE CONTEXT OF THE INSTANT LITIGATION COMPELS THE JOINDER OF THE NIGC

The absent chair in the courtroom is the United States. The Tribe is proceeding with its Class II gaming facility because it has secured the necessary approvals from the United States to go forward under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA") to conduct Class II gaming on its trust land. The NIGC has approved the Tribe's site-specific gaming ordinance (DK# 21, ATT. 1, EXH. C). As part of NIGC's internal decision making, the NIGC formally received a legal opinion from the Department of the Interior's Office of the Solicitor that the Tribe's existing trust lands qualify for gaming under IGRA (DK# 21, ATT. 1, EXH. A). As part of that opinion, the Solicitor expressly acknowledged the legal position of the Commonwealth, analyzed its arguments in depth, and rejected the Commonwealth's position

(DK# 21, ATT. 1, EXH. A). This is not a case where one is speculating whether the United States asserts an interest in the subject matter of the litigation. Rather, it is a case where the United States has affirmatively asserted its interest and has expressly stated that gaming on the Tribe's Indian lands is subject to the jurisdiction of the Tribe and the United States, to the exclusion of the Commonwealth (and derivatively, the Town).

Suit under the APA is the appropriate mechanism for a party aggrieved by final agency action to challenge that decision. 5. U.S.C. §§ 701-706. Accordingly, the Commonwealth and the Intervenors should have pursued an APA action against the NIGC. Their failure to do so now compels the Tribe to file the instant Rule 19 motion to require the Commonwealth and the Intervenors to join the United States. This is also not an effort to cause the lawsuit to die on jurisdictional grounds. The Commonwealth and Intervenors can successfully join the United States without divesting this Court of jurisdiction. The United States has waived its sovereign immunity from suit in actions brought under the APA. 5 U.S.C. § 702. By amending the Complaint(s) to include an APA action against the United States, challenging the NIGC's approval of the Tribe's site-specific Gaming Ordinance, this litigation can proceed in this Court with all of the governments that assert jurisdiction over gaming on the Tribe's trust lands present as parties, and with all of such governments able to assert and protect their respective interests.

Although the Plaintiffs and Intervenors have framed their complaints as a state law breach of contract claim, this Court's analysis in denial of the Commonwealth's Motion to Remand is instructive of the federal context and the federal interests at stake:

> [A]djudication of the assertion in Count Two would require a determination as to whether a state or a federally recognized Indian tribe has jurisdiction over gaming on Indian lands—which is clearly a matter of federal law. 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. . . . .If Congress subsequently has impliedly repealed the Wampanoag Settlement Act, and removed the Commonwealth's civil jurisdiction over the Settlement Lands to any extent, that surely is a question that implicates substantial federal interests.

July 31, 2014 Order (DK# 31) at pp. 7 – 8. Similarly, resolution of the United States' jurisdiction generally, and the NIGC's jurisdiction, is unquestionably necessary to the Commonwealth's case.

A. Rule 19(a)(1)(A): in NIGC's absence, the court cannot accord complete relief among existing parties.

Pursuant to Rule 19(a)(1)(A), a party should be 'required' if the court cannot accord complete relief among the existing parties. Because NIGC is not a party to the instant litigation, any relief provided by this Court while NIGC is not a party will be incomplete. The decision will not be binding on the NIGC. At the crux of the dispute is the question of jurisdiction over gaming activities on the Tribe's Indian lands. The Commonwealth and the Intervenors assert that the Commonwealth and the Town have such jurisdiction. The Tribe asserts that the United States and the Tribe have such jurisdiction.

If the Tribe prevails in the instant litigation, it will not be accorded complete relief because the Commonwealth and/or the Intervenors can avail themselves of a second bite at the apple by filing an APA action against NIGC challenging its approval of the Tribe's site-specific gaming ordinance.

Alternatively, if the Commonwealth and Intervenors prevail in the instant litigation, they may not be accorded complete relief because any effort to actually assert jurisdiction regarding gaming on the Tribe's trust lands could subject the Commonwealth or Town to litigation brought by the United States for illegal encroachment on the jurisdiction of the United States. *See e.g.,*

United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993)(challenge to state attempt to regulate hazardous waste on federal enclave); *United States v. Washington,* 384 F.Supp. 312 (W.D. Wash. 1974), *affirmed and remanded* 520 F.2d 676 (9th Cir. 1975), *cert. denied* 423 U.S. 1086 (1976), 459 F.Supp. 1020 (W.D. Wash. 1978), and 626 F.Supp. 1405 (W.D. Wash. 1985)(challenging state interference with tribal treaty rights); *United States v. Michigan*, 424 F.3d 438 (6th Cir. 2005)(challenging state interference with tribal treaty rights); *United States v. Alabama,* 691 F.3d 1269 (11th Cir. 2012)(challenging state attempt to assert jurisdiction regarding immigration matters); *U.S. v. South Carolina,* 720 F.3d 518 (4th Cir. 2013) (challenging state attempt to assert jurisdiction regarding immigration matters); *United States v. Maine*, 475 U.S. 89 (1986)(challenging state attempt to assert jurisdiction over submerged lands); *United States v. California and Nevada*, 412 U.S. 534 (1973)(challenging state attempt to assert jurisdiction over navigable waters).

B. Rule 19(a)(1)(B)(i): The NIGC claims an interest relating to the subject of the action and is so situated that disposing of the action in NIGC's absence may as a practical matter impair or impede NIGC's ability to protect the interest.

Pursuant to Rule 19(a)(1)(B)(i), an absent party should be 'required' if the absent party claims an interest relating to the subject of the action and is so situated that disposing of the action in the entity's absence may as a practical matter impair or impede the entity's ability to protect the interest. As is clearly set forth in the Solicitor's and NIGC's legal opinions (DK# 21, ATT. 1, EXH. A and B), and as is manifested by the NIGC's approval of the Tribe's site-specific gaming ordinance and other approvals related to the opening of the Tribe's Class II gaming facility (DK# 21, ATT. 1, EXH. C), the United States claims an interest related to the subject of the instant litigation – namely the interest of federal jurisdiction regarding gaming on the Tribe's trust lands. Disposing of the action in NIGC's absence, as a practical matter, certainly

impairs and impedes NIGC's ability to protect NIGC's interests. If this Court rules in favor of the Commonwealth and Intervenors, the decision of this Court, which will not be binding on the NIGC, will mean that the Commonwealth and the Tribe proceed as if the NIGC has no jurisdiction.

The Tribe believes that the satisfaction of Rule 19(a)(1)(B)(i) is self-evident. Throughout its Complaint, the Commonwealth alleges that the Tribe may conduct gaming on its trust lands if it obtains the required licenses available under the laws of the Commonwealth. (DK#1, at EXH. A) Assume for the purpose of argument that the Tribe acquired such a license, whether it be for a full-blown casino resort license or slot parlor license pursuant to Massachusetts General Laws ch. 23K, or bingo, raffles or casino nights pursuant to Massachusetts General Laws ch. 10, §§ 37 and 38.[5] Proceeding to conduct gaming activities on trust land under state law would be a violation of IGRA generally and the NIGC's regulations, specifically. 25 C.F.R parts 501 through 585. The issuance by the NIGC of a Notice of Violation ordering the Tribe to comply with NIGC regulations would, as a practical matter, require the Tribe to violate the decision of this Court. The Tribe would be in a virtual Catch-22. Such a decision by this Court would certainly, as a practical matter, impair or impede the NIGC's ability to protect its interest.

C. Rule 19(a)(1)(B)(ii): NIGC claims an interest relating to the subject of the action and is so situated that disposing of the action in NIGC's absence may leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Pursuant to Rule 19(a)(1)(B)(ii), an absent party should be 'required' if the absent party claims an interest relating to the subject of the action and is so situated that disposing of the

[5] Intervenor Plaintiff Town of Aquinnah asserts that the Town's zoning law prohibits gaming (DK# 52, at ¶ 25). A review of the Town's zoning by-laws, or any of the Town's by-laws, however, fails to reveal any law that prohibits gaming. See http://www.aquinnah-ma.gov/docs. Even if the allegation were true, however, the Town could amend its bylaws to allow for such gaming, thus subjecting the Tribe to inconsistent obligations.

action in the party's absence may leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. Any judgment in the absence of the NIGC would impair and impede the NIGC's ability to assert its jurisdiction regarding gaming activities on eligible Indian lands, and potentially subject the Tribe to inconsistent obligations. Of the three provisions under Rule 19(a)(1), this third provision is perhaps the strongest in deliberating the practical impacts of granting or denying the Tribe's instant motion.

Granting the Commonwealth and Intervenors the requested relief, without the NIGC as a party, will inherently subject the Tribe to double and inconsistent obligations. The NIGC expects the Tribe to proceed under federal law; the Commonwealth and Intervenors expect the Tribe to proceed under State law. Again, the Tribe would be placed in a Catch-22. Proceeding under State law would require that the Tribe violate federal law; proceeding under federal law would require that the Tribe violate State law. This whipsaw is untenable and easily avoidable by requiring the Commonwealth and Intervenors to amend their Complaint(s) to challenge the NIGC's actions under the APA.

IV. CONCLUSION

Above, the Tribe establishes that it meets all three alternative grounds for finding that the absent party, the NIGC, is 'required' to be joined in the instant litigation. First, in NIGC's absence, the court cannot accord complete relief among the existing parties. Second, the NIGC claims an interest relating to the subject of the action and is so situated that disposing of the action in NIGC's absence may, as a practical matter, impair or impede NIGC's ability to protect the interest. Third, NIGC claims an interest relating to the subject of the action and is so situated that disposing of the action in NIGC's absence may leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the

interest. If the Court finds that the Tribe has established any one of the three grounds, it should grant the Tribe's Motion under Rule 19 with leave to amend and require the Commonwealth and Intervenors to amend their Complaint(s) to assert an action sounding in the APA challenging the NIGC's approval of the Tribe's site-specific gaming ordinance. This Court should find that the Tribe has established all three grounds.

DATED: August 27, 2014

Respectfully Submitted,

/s/ Scott Crowell

SCOTT CROWELL *(pro hac vice)*
TRIBAL ADVOCACY GROUP LLP
1487 W. State Route 89A, Suite 8
Sedona, Arizona
Telephone: 425-802-5369
Facsimile: 509-290-6953

BRUCE SINGAL (BBO #464420)
ELIZABETH MCEVOY (BB) # 683191)
DONOGHUE, BARRETT & SINGAL
One Beacon Street, Suite 1320
Boston, MA 02108-3106
Telephone: 617-720-5090
Facsimile 617-720-5092

LAEL R. ECHO-HAWK (*pro hac vice)*
GARVEY SHUBERT BARER
1191 Second Ave. 18th Floor
Seattle, Washington 98101
Telephone: 206-816-1355
Facsimile: 206-414-0125

JOHN DUFFY (*pro hac vice)*
JOHN R. CASCIANO, BBO #634725
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, DC 20036
Telephone: 202-429-6268
Facsimile: 202-429-3902

Attorneys for Proposed Defendants

CERTIFICATION PURSUANT TO LOCAL RULE 7.1(a)(2)

Undersigned counsel certifies that, pursuant to Local Rule 7.1(a)(2), he has conferred with counsel for the other parties to this action in a good faith effort to resolve or narrow the issue presented by this motion.

Dated: August 27, 2014

/s/ Scott Crowell
SCOTT CROWELL

CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that the MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS FOR FAILURE TO JOIN A PARTY UNDER RULE 19 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: August 27, 2014

/s/ Scott Crowell
SCOTT CROWELL