UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, *Plaintiff,* AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC., and TOWN OF AQUINNAH, *Intervenor-Plaintiffs,* v. THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION, *Defendants*.	Civil Action No. 13-13286-FDS

OPPOSITION TO MOTION TO DISMISS INTERVENOR AGHCA'S COMPLAINT FOR LACK OF EFFECTIVE WAIVER OF SOVEREIGN IMMUNITY AND FAILURE TO STATE A CLAIM

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In the Settlement Agreement, the Wampanoag Tribe of Gay Head (Aquinnah) ("the Tribe") obtained the use of valuable lands, in exchange for which it agreed to be subject to state and local authority in connection with its use of those lands. Having reaped the benefit of its bargain for the past 30 years, the Tribe now asserts that it is immune from any attempt to enforce the terms of that agreement, to the extent it is bound by the agreement at all. As an initial matter, this argument was previously considered and rejected by the Supreme Judicial Court of Massachusetts, which found that the Tribe *did* waive its sovereign immunity as to use of the Settlement Lands in the Settlement Agreement. *See Bldg. Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1, 2, 13 (2004). Collateral estoppel bars the Tribe from re-arguing that result here. In any event, even if the Tribe were not precluded by collateral estoppel from asserting that sovereign immunity bars the AGHCA's suit, the Tribe's arguments fare no better on the merits. The Tribe's motion to dismiss should be denied.

ARGUMENT

I. THE TRIBE'S ARGUMENTS ARE PRECLUDED BY COLLATERAL ESTOPPEL

"[O]nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979). Collateral estoppel protects parties from the "expense and vexation" imposed when parties contest "matters that they have had a full and fair opportunity to litigate," "conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 153-154; *Commonwealth v. Stephens*, 451 Mass. 370, 375 (2008).

Massachusetts law dictates the preclusive effect of a Massachusetts state court judgment in federal court. 28 U.S.C. § 1738 (state "judicial proceedings" "shall have the same full faith

and credit in every court within the United States . . . as they have by law or usage" in their own state); *In re Sonus Networks, Inc, S'holder Derivative Litig.*, 499 F.3d 47, 56 (1st Cir. 2007) ("Under the full faith and credit statute, 28 U.S.C. § 1738, a judgment rendered in a state court is entitled to the same preclusive effect in federal court as it would be given within the state in which it was rendered."). In Massachusetts, as under federal law, collateral estoppel applies where "(1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication. Additionally, the issue decided in the prior adjudication must have been essential to the earlier judgment." *Kobrin v. Bd. of Registration in Med.*, 444 Mass. 837, 843-844 (2005) (citations and quotation marks omitted); *Manganella v. Evanston Ins. Co.*, 746 F. Supp. 2d 338, 347 (D. Mass. 2010) (same).

A. The Issues Here Are Identical To Those Specifically Litigated And Decided In *Shellfish Hatchery*

The Tribe's motion to dismiss focuses primarily on the contention that the Settlement Agreement does not represent an effective waiver of sovereign immunity, or one binding on the Tribe. *See* Tribe Memorandum, Dkt. 60, at 1-2. This is precisely the issue the SJC addressed in *Shellfish Hatchery*. 443 Mass. at 2 ("We granted an application for direct appellate review to determine whether the defendants … may properly invoke a claim of sovereign immunity to evade a zoning enforcement action and, ultimately, compliance with local permitting requirements."). The parties in *Shellfish Hatchery* had a full and fair opportunity to litigate the sovereign immunity question, which was the subject of extensive briefing, and the SJC concluded that the Settlement Agreement constitutes a valid and binding waiver of sovereign

immunity.[1] The SJC further noted that "the Tribe expressly memorialized a waiver of its sovereign immunity, with respect to municipal zoning enforcement, by agreeing, in paragraph three of the settlement agreement, to hold its land, including the Cook Lands, 'in the same manner, and subject to the same laws, as any other Massachusetts corporation.'" *Id*. at 13.

The SJC's holding in *Shellfish Hatchery* that the Tribe waived its sovereign immunity in the Settlement Agreement also encompasses several underlying factual determinations that operate as a bar to the sovereign immunity arguments raised by the Tribe here. *See, e.g.*, *Alba v. Raytheon Co.*, 441 Mass. 836, 844 (2004) (giving preclusive effect to "findings" that were "subsidiary" to ultimate prior determination); *see also Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 30-31 (1st Cir. 1994) ("An issue may be 'actually' decided even if it is not explicitly decided, for it may have constituted, logically or practically, a necessary component of the decision reached in the prior litigation." (emphasis omitted)); *Manganella*, 746 F. Supp. 2d at 347 (same).

1. *Shellfish Hatchery* determined that the Settlement Agreement is a presently enforceable contract that is binding on the parties, including the Tribe.

In announcing that the Settlement Agreement constitutes a knowing waiver of sovereign immunity, the SJC in *Shellfish Hatchery* examined and relied upon the Settlement Agreement, and remanded for additional proceedings against the tribal entities. In so doing, the SJC necessarily concluded that the Settlement Agreement is a binding, enforceable, contract.

[1] *See, e.g.*, Brief for Appellee Wampanoag Aquinnah Shellfish Hatchery, Wampanoag Tribal Council of Gay Head (Aquinnah), 2004 WL 3250665, at *1 ("This case is about the federal and constitutional right of a federally recognized and sovereign Indian Tribe to be immune from state court jurisdiction under the doctrine of sovereign immunity."); Brief of AGHCA, 2003 WL 24029972, at *14 ("Here, the Wampanoag Tribe waived any sovereign immunity with respect to land issues when it agreed to hold land 'in the same manner' as a Massachusetts corporation as part of its bargain to acquire the lands themselves."); *see also Kobrin*, 444 Mass. at 844 (when considering whether collateral estoppel applies, courts "look to the record to see what was actually litigated" in the prior action).

Shellfish Hatchery, 443 Mass. at 12-13, 15, 16-17 (noting that the Settlement Agreement is "a duly executed agreement" and that "paragraph three of the settlement agreement … is an obligation undertaken by the Tribe").

Moreover, *Shellfish Hatchery* concluded that the Settlement Agreement's present-day obligations bind the Tribe as well as the predecessor Wampanoag Tribal Council of Gay Head, Inc., as it specifically found that the Tribe was bound to the terms of the Settlement Agreement and subject to the waiver of sovereign immunity memorialized therein. *See id.* at 8 n.8 (clarifying that "any references to the 'Tribe'" specifically includes a reference to the Tribe "[b]ecause [the Wampanoag Tribe of Gay Head (Aquinnah)] is a successor to the [Wampanoag Tribal Council of Gay Head, Inc.]"). In announcing this conclusion, the SJC was fully aware of the Tribe's history, the various entities through which it has operated, and the federal recognition it received in 1987. *Id.* at 2-7. Nonetheless, the court specifically rejected the notion that changes in the Tribe's recognition status could thwart the Settlement Agreement's sovereign immunity waiver. *Id.* at 16 n.16 ("The subsequent form the Tribe assumed has no bearing on the form it took at the time it executed the settlement agreement, and does not alter the fact that the [Wampanoag Tribal Council of Gay Head, Inc.] had full authority to both settle disputes and to bind its successors. The form taken by its successors, thus, is insignificant.").

2. *Shellfish Hatchery* determined that the Tribe's immunity waiver applies to all land obtained in connection with the Settlement Agreement.

While the underlying dispute in *Shellfish Hatchery* involved use of the Cook Lands, the decision resolved the sovereign immunity issue as to all lands acquired by the Tribe in connection with the Settlement Agreement. The sovereign immunity waiver specifically identified in *Shellfish Hatchery* is in paragraph three of the Settlement Agreement, a section applicable not just to the Cook Lands, but to "the Settlement Lands, and any other land [the

Tribe] may acquire." Exhibit A to Comm. Compl., Dkt. 1 ("Settlement Agreement") at ¶ 3. *Shellfish Hatchery* recognized the general applicability of this language, repeatedly identifying it as constituting a broad waiver as to all lands transferred in connection with the Settlement Agreement. *See, e.g.*, 443 Mass. at 13 ("[T]he Tribe expressly memorialized a waiver of its sovereign immunity, with respect to municipal zoning enforcement, by agreeing, in paragraph three of the settlement agreement, *to hold its land, including the Cook Lands*, 'in the same manner, and subject to the same laws, as any other Massachusetts corporation.'" (emphasis added)). Moreover, nothing in *Shellfish Hatchery* confines the SJC's sovereign immunity determination to the Cook Lands; to the contrary, the court's analysis demonstrates that the waiver issue was conclusively determined for all lands transferred in connection with the Settlement Agreement. *See id.* at 16 ("By employing the 'in the same manner ... as' language in paragraph three of the settlement agreement, the parties ensured, in unequivocal wording, that the Tribe *would have no special status in its land holdings* different from an ordinary Massachusetts business corporation." (emphasis added)). Reflecting the breadth of the sovereign immunity determination in *Shellfish Hatchery*, the Massachusetts Appeals Court in a later case confirmed that the Tribe's waiver of sovereign immunity in the Settlement Agreement applies to all land transferred in connection with the Settlement Agreement, and on that basis determined that the Tribe could be joined in litigation relating to such lands. *See Kitras v. Town of Aquinnah*, 64 Mass. App. Ct. 285, 297-298, *further appellate review denied*, 445 Mass. 1109 (2005).

3. *Shellfish Hatchery* determined that private parties, including the AGHCA, can enforce the Settlement Agreement.

Nothing in *Shellfish Hatchery* differentiates between the rights of private and public parties to proceed against the Tribe in light of the Settlement Agreement's sovereign immunity

waiver. In fact, two non-governmental entities—the AGHCA and UMB Bank (trustee of a trust owning abutting land)—participated in the *Shellfish Hatchery* case on behalf of the Plaintiffs-Appellants. *Shellfish Hatchery*, 443 Mass. at 1, 1 n.2, 10. The SJC's opinion did not distinguish between these private parties and the governmental parties, and placed no limit on the private party claims. *See id.* at 14, 16-17. Given that sovereign immunity implicates jurisdictional questions, this confirms that the AGHCA may properly advance claims against the Tribe pursuant to the Settlement Agreement's waiver of sovereign immunity. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 28 (1st Cir. 2000) (noting that "tribal sovereign immunity is jurisdictional in nature").[2]

B. The SJC's Determination Of These Issues Was Necessary To Its Judgment In *Shellfish Hatchery*

Shellfish Hatchery establishes that the Settlement Agreement is a presently enforceable contract binding on the parties, including the Tribe; that the Settlement Agreement's waiver of sovereign immunity applies to all lands obtained in connection with the Settlement Agreement; and that the AGHCA was a proper party to the *Shellfish Hatchery* proceedings. *See supra* pp. 3-6. These determinations all have preclusive effect, as they were necessary to the court's ultimate conclusion. *See, e.g.*, *Hoult v. Hoult*, 157 F.3d 29, 32 (1st Cir. 1998) ("[A] finding is 'necessary' if it was central to the route that led the factfinder to the judgment reached[.]'" (citation omitted)); *Alba*, 441 Mass. at 844 (where party "had a full and fair opportunity to litigate, and did litigate, the relevant issues in the first proceeding," adjudicator's findings as to those issues, although subsidiary to ultimate determination, "were 'the product of full litigation and careful

[2] *Kitras* reinforces this conclusion, as that case determined that private parties could join the Tribe in litigation relating to the Settlement Lands. A request (joined by the Tribe) for further appellate review of the Appeals Court decision challenged this conclusion, with the Tribe specifically raising sovereign immunity concerns, but the SJC declined further review of this decision. 445 Mass. 1109 (2005).

decision,'" and so qualified "as essential to that determination"); *see also* Restatement (Second) of Judgments § 27, comment j (1982) (necessity analysis turns on "whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment. If so, the determination is conclusive between the parties in a subsequent action . . .").

C. The Tribe Was A Party In *Shellfish Hatchery* For Preclusion Purposes

Although the Tribe was not a named defendant in *Shellfish Hatchery*, it is bound by the determinations made therein. In Massachusetts, preclusion flows from a prior judgment to bind parties to the prior case as well as those in "privity" with such a party. *See, e.g.*, *Kobrin*, 444 Mass. at 843. This standard is flexible, and can be satisfied in a variety of manners. *See Boston Scientific Corp. v. Schneider (Europe) AG*, 983 F. Supp. 245, 257 (D. Mass. 1997) ("Traditionally, privity has been found (1) where the nonparty substantially controlled the previous litigation; (2) where the nonparty is a successor-in-interest to a prior party; or (3) under the doctrine of 'virtual representation.'" (internal citations omitted)); *see also* 18A Wright, et al., Fed. Prac. and Proc. § 4448 (2d ed.). The examination "essentially reduces itself to an inquiry whether the party against whom preclusion is asserted participated in the prior proceeding, either himself or by a representative." *Bourque v. Cape Southport Assocs., LLC*, 60 Mass. App. Ct. 271, 275 (2004).

As an initial matter, in *Shellfish Hatchery*, the tribal defendant the Wampanoag Shellfish Hatchery Corporation admitted that it was an entity "exercising delegated authority from," "controlled by," and "wholly owned and operated by the Wampanoag Tribe of Gay Head (Aquinnah)." *See* Answer and Counterclaim at 1 ¶ 2, 5 ¶ 2, *Jerry Weiner et al. v. Wampanoag Shellfish Hatchery Corp., et al.*, No. 01-10924 (D. Mass. July 13, 2001) (Dkt. 4). The record also contains admissions that the Wampanoag Tribe of Gay Head (Aquinnah) is the present-day name used by the federally recognized Wampanoag Tribal Council of Gay Head, Inc. *See, e.g.*,

id. at 5 ¶ 1 ("Plaintiff-in-Counterclaim, Wampanoag Tribal Council of Gay Head, Inc. … is a federally recognized Indian Tribe (now known as Wampanoag Tribe of Gay Head (Aquinnah)").

These admissions establish that the Tribe is either a successor-in-interest to the tribal parties in *Shellfish Hatchery*, substantially controlled the *Shellfish Hatchery* litigation, or both. This is more than sufficient to establish privity. *See* Restatement (Second) of Judgments § 39 (1982) ("A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.").[3] Said differently, the Tribe was the real tribal party in interest in *Shellfish Hatchery*—present through the named defendants, and understood to be the real party in interest whose sovereign immunity rights were at issue and found to be waived. *See Montana*, 440 U.S. at 155 ("[A]lthough not a party, the United States plainly had a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel." (citation omitted)); 18A Wright, et al., Fed. Prac. and Proc. § 4451 (2d ed.) ("[A] nonparty may participate in such a way as to become a de facto party, tacitly if not formally treated as such by all parties.").[4]

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[3] *See also Montana*, 440 U.S. at 154 ("'[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own … is as much bound …. as he would be if he had been a party to the record.'" (citations omitted)); *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 758 (1st Cir. 1994) ("Substantial control means what the phrase implies; it connotes the availability of a significant degree of effective control in the prosecution or defense of the case—what one might term, in the vernacular, the power—whether exercised or not—to call the shots."); *Bourque*, 60 Mass. App. Ct. at 274-275 ("exercis[ing] 'substantial control'" over party in prior action sufficient participation).

[4] Even if the Tribe were not in privity for all these various reasons, at a minimum the Tribe was sufficiently connected with the *Shellfish Hatchery* litigation and defendants to warrant application of collateral estoppel. *See Boston Scientific Corp.*, 983 F. Supp. at 258 (finding preclusion by "virtual representation" where second action would allow party to "evade" prior judgment directed at related entity, despite "clear identity of interests" between entities as to "relevant issues" at time of first suit, and party had "actual notice of [prior] litigation while it was

II. THE TRIBE'S ARGUMENTS LACK SUBSTANTIVE MERIT

As demonstrated *supra*, the Tribe's sovereign immunity arguments are completely precluded by the determinations made by the SJC in *Shellfish Hatchery*. But even if they were not, the Tribe nevertheless cannot prevail on its sovereign immunity argument because it relies on improper factual challenges and inapposite case law. The Tribe's other arguments for dismissal fail for similar reasons.

A. The Tribe's Motion Relies On Factual Contentions Inappropriate In A Motion To Dismiss

The AGHCA's complaint alleges sufficient facts to support a claim for relief that is plausible on its face. Nothing more is required at this early stage in the litigation. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Samuels v. Bureau of Prisons*, 498 F. Supp. 2d 415, 417-418 (D. Mass. 2007) ("On both a 12(b)(1) motion to dismiss founded on considerations of sovereign immunity and a 12(b)(6) motion to dismiss for failure to state a claim, the court must accept as true all well pleaded factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff.").[5]

Rather than accepting as true the complaint's factual allegations, the Tribe seeks dismissal based on factual argumentation, in an attempt to import merits contentions into the evaluation of the complaint. In particular, the Tribe contests factual points regarding the legal relationships between present and existing tribal entities, the legal authority held at times by these entities, historic actions taken by parties to the Settlement Agreement in furtherance of the

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being conducted"); 18A Wright, et al., Fed. Prac. and Proc. § 4462 (2d ed.) ("Successive property relationships provide some of the oldest and best established rules for extending preclusion to nonparties.")

[5] The Tribe's motion is styled as one under Rule 12(b)(7), but presents Rule 12(b)(6) arguments. *See* Tribe Memorandum, Dkt. 60 at 13 (requesting dismissal for "failure to state a claim upon which relief can be granted").

Settlement Agreement, and the meaning and import of terms used in the Settlement Agreement. S*ee generally* Tribe Memorandum, Dkt. 60 at 2-3, 9-12. But merely disputing a complaint's factual allegations is insufficient to defeat a complaint at the motion to dismiss stage. *See, e.g.*, *Haley v. City of Boston*, 657 F.3d 39, 52 (1st Cir. 2011) (motion to dismiss "is neither the time nor the place to resolve the factual disputes between the parties. Whether [plaintiff] can prove what he has alleged is not the issue. At this stage of the proceedings, we must take the complaint's factual allegations as true" where the facts present a "plausible picture."); *Stratus Techs. Bermuda Ltd v. EnStratus Networks, LLC*, 795 F. Supp. 2d 166, 169 (D. Mass. 2011) ("While defendant disputes many of the complaint's factual allegations, factual disputes cannot be resolved with a motion to dismiss.").

B. The Tribe Is Bound By The Settlement Agreement

The Tribe bound itself to the terms of the Settlement Agreement through its then duly-appointed representative body, the Wampanoag Tribal Council of Gay Head, Inc. ("the Tribal Council"). It did this in full contemplation of its eventual federal recognition as a tribe, and after receiving recognition took actions in furtherance of the Settlement Agreement that affirmed its binding nature. While the Tribe may now wish to be free from the constraints and obligations to which it submitted in order to obtain the benefit of very valuable lands, its attempts to evade the implication of the Settlement Agreement's terms are unsuccessful.

1. The Tribal Council had the ability to, and did, bind the Tribe to the terms of the Settlement Agreement.

The Tribal Council signed the Settlement Agreement as the representative body of the then-existing, but as-yet unrecognized, Tribe. Indeed, at that time the Tribal Council was operating as the formal body through which what is now the Tribe carried out its affairs, with one of its founding purposes being "'to obtain Federal recognition for the Gay Head Indians,'"

James v. U.S. Dep't of Health & Human Servs., 824 F.2d 1132, 1134 (D.C. Cir. 1987). It is through the Tribal Council that the Tribe filed its land claim action in 1974, and in so doing, represented that the Tribal Council was either a tribe within the meaning of the Indian Non-Intercourse Act, 25 U.S.C. § 177, or "properly represent[ed]" such a tribe. *Mashpee Tribe v. Sec'y of Interior*, 820 F.2d 480, 482 (1st Cir. 1987); *see also Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899, 902 (D. Mass. 1977). It is also through the Tribal Council that the Tribe filed for federal recognition in 1981, 46 Fed. Reg. 50614 (Oct. 14, 1981), carrying out one of the Tribal Council's founding purposes, *James*, 824 F.2d at 1134. The Tribal Council signed the Settlement Agreement in a continuation of this role, and promised to accept land transferred in the future as a private corporation would, notwithstanding any future recognition it might obtain as an Indian tribe under federal law. *See* Settlement Agreement ¶ 3 (lands obtained in connection with Settlement Agreement to be held "in the same manner, and subject to the same laws, as any other Massachusetts corporation"; "future recognition of the existence of an Indian tribe in the Town of Gay Head" will not serve to "impair[] or otherwise alter[]" constraints accompanying such lands when transferred).

Further evidencing the authority it had at the time it signed the Settlement Agreement, the Tribal Council continued to operate as the formal representative of the Tribe long after it signed the Settlement Agreement. For example, after the Bureau of Indian Affairs published a proposed finding against federal acknowledgement, 51 Fed. Reg. 23604 (June 30, 1986), the Tribal Council submitted a "rebuttal containing substantive new evidence and arguments," which eventually led to the United States officially "acknowledge[ing] that the Wampanoag Tribal Council of Gay Head, Inc., … exists as an Indian tribe within the meaning of Federal Law," 52 Fed. Reg. 4193 (Feb. 10, 1987). It is this very federal acknowledgement that the Tribe now cites

as its own federal recognition. Tribe Memorandum, Dkt. 60 at 11. Therefore, notwithstanding the Tribe's unfounded statements, the public record shows that the Tribal Council served as the formal entity through which the Tribe operated; that it was serving as the Tribe's formal representative at the time it signed the Settlement Agreement; and that it actually became the Tribe as presently recognized.[6]

2. The timing of tribal recognition has no bearing on whether the Tribe is bound to the Settlement Agreement's terms.

The Tribe's argument that the federal recognition of the Tribe in 1987 defeats the Settlement Agreement's waiver of sovereign immunity fails for similar reasons. *See* Tribe Memorandum, Dkt. 60 at 10-11. The Tribe existed prior to being federally recognized, *see* 46 Fed. Reg. 50614 (Oct. 14, 1981) (petition for recognition); 25 C.F.R. § 83.1 ("Petitioner means any entity that has submitted a letter of intent to the Secretary requesting *acknowledgment* that *it is* an Indian tribe."), and signed the Settlement Agreement through its then-official representative, the Tribal Council, promising to accept land in the future pursuant to certain conditions while acknowledging the possibility of federal recognition; it then gained federal recognition by way of that same official representative. *See supra* pp. 4, 11-12; 52 Fed. Reg. 4193 (Feb. 10, 1987). Nothing about federal recognition changes the fact that the Tribe is bound by the Settlement Agreement.

[6] The Tribe's argument to the contrary relies on inapposite case law, none of which calls into question the authority of the Tribal Council to waive the Tribe's sovereign immunity in the Settlement Agreement. Rather, the Tribe's cases stand only for the unremarkable proposition that individual employees of commercial tribal enterprises cannot waive tribal sovereign immunity. *See Chance v. Coquille Indian Tribe*, 963 P.2d 638, 640 (Or. 1998) (employee of Tribal development corporation had no authority to waive tribal sovereign immunity); *Danka Funding Co., LLC v. Sky City Casino*, 747 A.2d 837, 844 (N.J. Super. Ct. Law Div. 1999) (employee of tribal gaming organization could not effect "unequivocal waiver" of tribe's sovereign immunity); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271, 272-273, 275 (N.D.N.Y. 2000) (employee of casino management company engaged by tribe had no authority to waive tribe's sovereign immunity).

Unsurprisingly, the federal implementing act reflects this reality. *See* 25 U.S.C. § 1771(7) (noting prior federal acknowledgment of "the Wampanoag Tribal Council of Gay Head, Inc. as an Indian tribe," and ratifying "existence of the Wampanoag Tribal Council of Gay Head, Inc. as an Indian tribe … with a government to government relationship with the United States."); 25 U.S.C. § 1771d(a) (directing funds be used to obtain land in connection with the Settlement Agreement "at the request of the Wampanoag Tribal Council of Gay Head, Inc.," and specifying that "[a]ny lands acquired pursuant to this section, and any other lands which are on and after August 12, 1987, held in trust for the Wampanoag Tribal Council of Gay Head, Inc., any successor, or individual member, shall be subject to this subchapter, the Settlement Agreement and other applicable laws."); 25 U.S.C. § 1771e (confirming that any subsequent transfer of land to an Indian tribe would be subject to same limits; specifically contemplating transfer to a "tribal entity which may be organized as a successor in interest to Wampanoag Tribal Council of Gay Head, Inc."). Moreover, it confirms that the land transfers made in connection with the Settlement Agreement were made subject to the limitations detailed in the Settlement Agreement. *See* 25 U.S.C. § 1771d (noting that any title conveyed into "trust for the Wampanoag Tribal Council of Gay Head, Inc. … shall be subject to … the Settlement Agreement").

Further, the Tribe took post-recognition actions confirming the existing status of the Wampanoag Tribal Council and the binding nature of the Settlement Agreement. In particular, the Tribe accepted beneficial use of lands transferred in connection with the Settlement Agreement, including the lands at issue here, after it became federally recognized and after passage of the federal implementing act. The lands were transferred by deeds specifying that the lands were "to be held 'in trust for the Wampanoag Tribe of Gay Head (Aquinnah), formerly

known as The Wampanoag Tribal Council of Gay Head Inc., a federally recognized Indian Tribe,'" "subject to the settlement agreement" and the implementing acts that incorporated that agreement. *Shellfish Hatchery*, 443 Mass. at 8. By accepting beneficial use of the land transferred in connection with the Settlement Agreement, the Tribe's actions affirm the Settlement Agreement's binding effect.[7]

C. The Settlement Agreement Is Valid, Binding, And Has Never Lapsed

The Tribe's argument that the Settlement Agreement lapsed because the federal implementing legislation was not passed within eighteen months is without merit. Notably, the Tribe provides no explanation of how the language cited—requiring only "favorable action within 18 months … by other entities, including" various government branches—could impose such a condition. To the contrary, the language on which the Tribe relies stands, at most, for the proposition that the parties to the Settlement Agreement intended there to be some follow-through in furtherance of the Settlement Agreement by at least one interested party within eighteen months of execution—which obviously did take place. To the extent that this language in the Settlement Agreement did constitute a condition precedent, the Tribe makes no effort to explain how its acceptance of lands identified in the Settlement Agreement, subject to the terms of the Settlement Agreement, *supra* pp. 13-14, was anything but a waiver as to any conditions that might have gone unsatisfied. *See McCord v. Horace Mann Ins. Co.*, 390 F.3d 138, 143 (1st Cir. 2004) (conditions precedent can be waived); *Moran v. Phoenix Ins. Co.*, 7 Mass. App. Ct. 822, 824 (1979) ("Waiver or excuse of the condition precedent may be inferred from the conduct of" a party); *see also* 25 U.S.C. § 1771f(10) (noting that Settlement Agreement was "executed as

[7] Because the federal implementing act extinguished any existing aboriginal title to the lands transferred in connection with the Settlement Agreement, 25 U.S.C. § 1771b, the bundle of property rights obtained in connection with the Settlement Agreement are expressly limited by these deed provisions, which further confirms the Settlement Agreement's binding effect.

of November 22, 1983, and *renewed thereafter* by representatives of the parties to the lawsuit" (emphasis added)).

D. The Settlement Agreement Includes A Waiver Of Sovereign Immunity In Connection With Use Of The Settlement Lands

An Indian tribe is subject to suit where "the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Such a waiver must be "clear," *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001), but no specific or particular words, such as "sovereign immunity," need be used, *id.* at 419-420. Rather, an Indian tribe may waive sovereign immunity in any number of ways, including by agreeing to submit disputes to the jurisdiction of a particular court, *id.* at 420-422, and "courts must take a practical, commonsense approach in attempting to separate words that fairly can be construed as comprising a waiver of tribal sovereign immunity from words that fall short." *Ninigret*, 207 F.3d at 31.

Here, the Tribe waived any sovereign immunity with respect to land use when it agreed to hold the land transferred in connection with the Settlement Agreement "in the same manner and subject to the same laws, as any other Massachusetts corporation . . ." Settlement Agreement at ¶ 3. The Tribe made this commitment in full contemplation of its eventual federal recognition, explicitly agreeing that "under no circumstances, including any future recognition of the existence of an Indian tribe in the Town of Gay Head" would the manner in which the lands were held or regulated be "impaired or otherwise altered." *Id.* at ¶ 3. The words "in the same manner" carry special weight in the context of sovereign immunity, as this is the language used by the United States and the Commonwealth when they waive their own immunity.[8] It is also

[8] *See* 28 U.S.C. § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, *in the same manner* and to the same extent *as* a private individual under like circumstances" (emphasis added)); Mass. Gen. Laws c. 258, § 2 ("Public employers shall be

similar to language the Supreme Court has found sufficient to waive or abrogate an Indian tribe's sovereign immunity. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 505-506, 510-511 (1986) (language in 25 U.S.C. § 935, providing that "the laws of the several States shall apply to [a tribe and its members] *in the same manner* they apply to other persons or citizens within their jurisdiction," obligated tribe to comply with limitation statute with respect to land claim (emphasis added)).

The import of this language is only increased by the fact that the "manner" in which the Tribe agreed to hold the lands in question is "as any other Massachusetts corporation" would. *See* Settlement Agreement at ¶ 3. A Massachusetts corporation does not have immunity from suit with regard to its land holdings, and the first enumerated power of a Massachusetts corporation is to "sue and be sued, appear, prosecute and defend to final judgment or decree and execution." Mass. Gen. Laws c. 155, § 6. There could have been no confusion as to the import of the Tribe's promise in the Settlement Agreement to hold any lands transferred "in the same manner, and subject to the same laws, as any other Massachusetts corporation . . ." Settlement Agreement at ¶ 3. As the SJC observed in *Shellfish Hatchery*, "[a]lthough the Tribe may not desire the precise result now occurring, the Tribe's agreement had a 'real world objective' and 'practical consequence.'" 443 Mass. at 15 (quoting *C & L Enterprises*, 532 U.S. at 422).

Additionally, the Tribe also waived any sovereign immunity with respect to land issues when it agreed that the lands it obtained would be subject to federal, state, and local laws, including zoning bylaws of the Town. *See* Settlement Agreement at ¶ 5 (applying such laws to "Cook Lands"), ¶ 13 (applying such laws to "Settlement Lands"). The First Circuit has held

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liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, *in the same manner* and to the same extent *as* a private individual under like circumstances . . ." (emphasis added)).

analogous language to be a waiver of tribal sovereign immunity. *See Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006) (en banc) (where land claims settlement agreement stated that "'all laws of the State of Rhode Island shall be in full force and effect on the settlement lands' … the parties to the [settlement agreement] intended to subjugate the Tribe's autonomy on and over the settlement lands (and, thus, its sovereign immunity) to the due enforcement of the State's civil and criminal laws …" and tribal sovereign immunity was waived). Moreover, the references are of particular import here because "the town's zoning bylaw … expressly provides for judicial review and enforcement." *Shellfish Hatchery*, 443 Mass. at 17. Because these bylaws explicitly provide for judicial enforcement, the Tribe's agreement to hold its lands subject to these laws and bylaws constitutes a waiver of sovereign immunity. S*ee C & L Enterprises*, 532 U.S. at 423 (tribe's agreement to arbitration of disputes and to judicial enforcement of arbitral awards in state courts constitutes waiver of tribal sovereign immunity).

None of the cases relied upon by the Tribe are to the contrary. Most simply state uncontested points of Indian law, and are otherwise inapposite to the particular facts of this case. The Tribe's heavy reliance on *Wampanoag Tribe of Gay Head (Aquinnah) v. Massachusetts Comm'n Against Discrimination*, 63 F. Supp. 2d 119, 123 (D. Mass. 1999) (hereinafter, "*MCAD*"), is similarly misplaced. First, the *MCAD* court noted that the parties there made no assertion regarding waiver of sovereign immunity; as such, the opinion focuses entirely on whether the Tribe's sovereign immunity had been legislatively abrogated, a very different question. *Id.* at 123. Second, the *MCAD* dispute involved an employment-related issue and considered whether the internal workings of the Tribal government were subject to Massachusetts employment discrimination law, *id.* at 120, an issue not addressed by the

Settlement Agreement, which speaks to land use. Indeed, *Shellfish Hatchery*, which was decided after *MCAD*, did not even mention the decision (despite the fact that the tribal defendants mentioned the case in briefing), further demonstrating its inapplicability to the question here.

E. The Waiver Of Sovereign Immunity In The Settlement Agreement Is Broad Enough To Allow Suit By The AGHCA

As noted *supra* pp. 3, 15-16, the waiver of sovereign immunity as to land issues memorialized in the Settlement Agreement ensures that the Tribe holds its lands as would any other Massachusetts corporation. There can be no question that private corporations are subject to suit by private parties in connection with their land holdings. Moreover, the AGHCA is not just any private party—it is a party to the Settlement Agreement. Thus, the AGHCA has a contractual relationship with the Tribe, and the corresponding right to bring suit against the Tribe to enforce the terms of that contract. *See C & L Enterprises*, 532 U.S. at 418, 423 (allowing private entity to pursue action "aris[ing] out of the breach of a commercial, off-reservation contract by a federally recognized Indian Tribe" where private entity was party to contract in question and contract included waiver of sovereign immunity).

CONCLUSION

For the foregoing reasons, the Court should deny the Tribe's motion to dismiss the AGHCA's complaint.

AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC.

By its attorneys,

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October 6, 2014

CERTIFICATE OF SERVICE

In accordance with Local Rule 5.2(b), I hereby certify that this document filed through the ECF system on October 6, 2014 will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Felicia H. Ellsworth
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