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]

REPLY 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.

INTRODUCTION

Defendants[1] Wampanoag Tribe of Gay Head (Aquinnah) and the Aquinnah Wampanoag Gaming Corporation (collectively "Defendants" or "Tribe") submit this Reply in Support of its Motion, pursuant to Federal Rules of Civil Procedure 12(b)(7) and 19, and Local Rule 7.1(b)

[1] Although Plaintiffs 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 Reply shall also be considered to be filed on behalf of Wampanoag Tribal Council of Gay Head, Inc.

(DK# 61), 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)(collectively "Plaintiffs") without prejudice and with leave to amend as each Complaint fails to join the National Indian Gaming Commission (the "NIGC") as a necessary party to the litigation.

The Tribe, in its Memorandum of Points and Authorities (DK# 62) set forth the standards for deliberation on the motion and the analysis as to why this Court should dismiss the Complaints with leave to amend to join the NIGC as a party-defendant. The Commonwealth opposes the Motion (DK# 65) and the Town and AGHCA join in the Commonwealth's Opposition (DK# 66). The opposition briefs do not dispute the standards and fail to refute the analysis for granting the Motion.

The Plaintiffs spend an inordinate amount of energy fighting two ghosts. The first ghost is whether the Department of the Interior ("DOI") Solicitor's opinion is a reviewable final agency action. Arguing the opinion is not a final agency action, the Plaintiffs maintain that they cannot join the NIGC in the current litigation. The NIGC's approval of the Tribe's site-specific gaming ordinance is a reviewable final agency action, under the Administrative Procedures Act, 5 U.S.C. §§ 701 et seq. ("APA"). The Commonwealth concedes this point (DK# 65, p.16). The second ghost is whether the NIGC is an indispensible party. Arguing that the NIGC is not indispensible, the Plaintiff's maintain that the Tribe's motion should be denied. The Tribe does not address whether the NIGC is indispensible because the NIGC can be joined without divesting this Court of jurisdiction. *See*, Fed.R.Civ.P. 19(a)(1). Neither of these two ghosts has any bearing on the Tribe's Motion.

The Plaintiffs largely rehash the arguments made to this Court in support of their failed Motion to Remand (DK# 17) the matter to state court; namely, that the Commonwealth exercised its prerogative to frame its Complaint as a state-law breach of contract claim. This dispute turns on questions of federal law as to whether the United States and the Tribe possess jurisdiction to govern gaming activities on Aquinnah's Indian lands to the exclusion of the Commonwealth and the Town, which questions turn on whether Congress impliedly repealed portions of the Wampanoag Settlement Act, when it enacted the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq., thus removing the Commonwealth's civil jurisdiction over the Settlement Lands. Because this "surely is a question that implicates substantial federal interests," the Tribe has established the requisite showing to require Plaintiffs to amend their Complaints to include an APA action against the NIGC.

A. Plaintiffs are Able to Amend Their Complaints to Challenge the NIGC's Approval of the Tribe's Site-Specific Gaming Ordinance.

The Commonwealth concedes that it is able to amend its Complaint to name the NIGC as a party defendant:

> Certainly, this is true and the Commonwealth could sue the NIGC's approval of the Tribe's gaming ordinance under the APA, because IGRA specifically identifies such an approval as subject to judicial review. 25 U.S.C. § 2714; *see* 5 U.S.C. §§ 702.

(DK# 65, p.16). The Town and AGHCA join the Commonwealth's Memorandum "in full" (DK# 66, p.1). Yet, all Plaintiffs then attempt to misdirect the Court's attention to the DOI's August 23, 2013 opinion as the federal action with which they take issue, which action Plaintiffs then contend is not reviewable (DK# 65, pp.4,11,16-17; DK# 66, pp.3-4). The Town and AGHCA even go so far as to suggest that the United States' sovereign immunity bars any claim they may have (DK# 66, p.2).

This misdirection is unavailing. The DOI's opinion letter was issued in the context of NIGC's deliberations to approve the Tribe's Gaming Ordinance. The NIGC can only approve a site-specific Gaming Ordinance if those lands qualify for gaming under IGRA. The Commonwealth properly cites 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action")(DK# 65, p.16). Accordingly Plaintiffs can challenge the correctness of the DOI's opinion in the context of challenging NIGC's approval of the Gaming Ordinance[2]. The United States has waived its sovereign immunity from lawsuits challenging final agency actions under the APA. *See*, 5 U.S.C. § 702; *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 57-58 (1st Cir. 2007). Internal contradictions in their pleading aside, Plaintiffs are able to amend their Complaints to name the NIGC as a party-defendant, which joinder will not divest this Court of jurisdiction.

B. The United States Claims an Interest in the Subject Matter of this Litigation.

As established by the Tribe, the United States asserts that it has jurisdiction over gaming activities on Aquinnah Indian lands to the exclusion of the Commonwealth (and derivatively, the Town.) This is not speculative. The claims are irrefutably evidenced in the NIGC's approval of the Tribe's site-specific Gaming Ordinance, the DOI's August 23, 2013 opinion letter and NIGC's October 25, 2013 opinion letter. Accordingly, the Tribe has established the requirement of Rule 19(a)(1)(B) that the absent party claims an interest in the subject matter of the litigation.

The Plaintiffs repeat several times (DK# 65, pp. 2,8-10,15) that the United States could

[2] The Court has already determined that the DOI's August 23, 2013 opinion likely does not rise to the level of applying the *Chevron* deference doctrine. (DK# 31, p.7 n.6). The Tribe will argue that the NIGC's approval of the Gaming Ordinance is entitled to *Chevron* deference, and that with or without such deference the DOI's opinion is correct. Resolution of that question is not germane to the current Rule 19 motion, however.

intervene and because the United States has not intervened[3], this Court should deny the Rule 19 motion. The Tribe cites (DK# 62, p.4) the law of the First Circuit ruling that 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). "Claims an interest" in this context means nothing more than appears to have such an interest. *Id.* The interest also need only be a colorable interest, and not a proven interest. *Id.* n.2.

The cases cited by the Commonwealth are unavailing. The case cited in the body of the Commonwealth's Opposition *Provident Tradesman Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968) (DK# 65, pp.8-9), notably addressed a party's failure to intervene in deliberating whether the absent party was indispensible. *Id.* at 114. The cases from other circuits set forth in a footnote (DK# 65, p.9 n.9) are similarly distinguishable. The Sixth Circuit in *School District of City of Pontiac v. Secretary of the U.S. Dept. of Educ.,* 584 F.3d 253 (6th Cir. 2009), did note that the absent states in that case could have intervened, but that statement was no more than dicta coming after the Court's determination that the absent states had no "obvious interest in the dispute that requires protection." *Id* at 266. *Jansen v. City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990) is not germane to this case in any way – it is not a Rule 19 case. The Fifth Circuit in *United States v. Sabine Shell, Inc.*, 674 F.2d 480, 483 (5th Cir. 1982), also noted that the absent parties could have intervened, but that the Appellant-Defendants never raised the Rule 19 issue to the District Court below and indeed represented to the District Court below that there were no claims of other parties. *Id*. at 482-83. The last two cited cases actually support the Tribe's

[3] The Commonwealth speculates that the United States has chosen not to intervene. There is no basis for such an assertion. If speculation is to be made, perhaps it is that the federal bureaucracy is slow to make a decision, or that it has limited resources, that it is consumed by other priorities, or that its intervention or appearance as an amicus is imminent. That such speculation is not conclusive underscores the propriety of the First Circuit's analysis regarding silence or non-intervention.

position. In *Helzberg's Diamond Shops, Inc. v. Valley W. Des Moines Shopping Ctr., Inc.,* 564 F.2d 816, 820 (8th Cir. 1977), the Eighth Circuit concluded that the absent party was a necessary or required party under Rule 19(a), but also found it not to be indispensible after offering it an opportunity to intervene. *Id.* at 818-19. Similarly, in *Pueblo of Sandia v. Babbitt*, 47 F.Supp.2d 49 (D.D.C. 1999) the court found the absent state to be both necessary and indispensible. The footnote cited by the Commonwealth first noted that the absent state could have intervened, but then cites to the rule in the D.C. Circuit that an immune party's refusal to intervene does not factor into the court's analysis of whether the otherwise required or necessary party is indispensible. *Id.* at 54 n.3. Thus, none of these cases stand for the proposition for which they are cited, that an absent party's silence or non-intervention negates the fact that the absent party claims an interest relating to the subject of the litigation.

The Commonwealth next advocates for Rule 19 to be rewritten such that a necessary or required party should be able to choose whether to intervene rather than be joined into litigation because that party may have refrained from filing its own lawsuit in the matter. (DK# 65, pp. 9-10). The Commonwealth cites to several cases for the proposition that the United States has discretion to file a lawsuit on behalf of a Tribe as opposed to being compelled to do so. None of those cases suggest that such discretion exempts the United States from Rule 19. The dispositive question is, rather, whether the United States claims an interest in the subject matter. The Commonwealth would have this Court write an exception to Rule 19 in a manner that swallows the Rule. There would be no purpose for Rule 19(a) if it did not apply to parties that could have intervened, but for whatever reason, did not do so.

C. Plaintiff's Framing of the Dispute as a State-Law Breach of Contract Claim Does Not Alter the Fact that Resolution Implicates Substantial Federal Interests.

The Commonwealth rehashes the arguments made in its failed Motion to Remand and extends that analysis to argue that the United States is not impacted by resolution of a state law contract claim. This Court has already rejected that argument:

> [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, pp. 7-8). The Plaintiffs' assertion that this Court can answer the question of the Commonwealth's claims, as framed by the Commonwealth, in a manner that has no impact on the United States generally, or the NIGC specifically, is simply wrong. This Court already reasoned that it is for Congress, to the exclusion of states, to determine the balance of jurisdiction among the federal government, state governments, and Indian tribes. (DK# 31, p.8)(citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214 (1987) and *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). This Court properly noted that the MOU was only put into effect by and to the extent allowed by Congress. (DK# 31, p.8). If Congress subsequently repealed the Commonwealth's (and derivatively the Town's) jurisdiction over gaming on Aquinnah Indian lands, then the MOU, even if otherwise enforceable, is no longer enforceable as it relates to gaming. *See, State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 704-05 (1st Cir. 1994). Accordingly, the Court cannot resolve this dispute without

impacting the interests claimed by the NIGC.

The Commonwealth attempts to dismiss the hypothetical Catch-22 set forth in the Tribe's Memorandum, wherein the Tribe obtains a license under state law to operate a casino, slot parlor, bingo[4] and/or raffle. If the Tribe proceeded as the Plaintiffs argue it must, it would then be in direct conflict with NIGC's asserted jurisdiction. The Commonwealth speculates that the NIGC might stand down and accept this Court's analysis if it were to rule that the Tribe must secure a state license (DK# 65, p.10). The Tribe has established the position of the NIGC is that the NIGC has jurisdiction. If the Plaintiffs prevailed and the Tribe obtained and operated gaming activities on Aquinnah's Indian lands based on a state-issued license, the Tribe would then be subject to criminal and civil penalties imposed by the United States. This is not speculative; it is the clearly stated position of the United States. That the NIGC would acquiesce to a court decision that is not binding on the NIGC is wild and unsubstantiated speculation on the part of the Commonwealth that stands in stark contrast to the irrefutable facts presented in this matter.

D. Whether the NIGC Would be "Indispensible" if NIGC were Immune from Suit is Not a Relevant Inquiry to the Tribe's Rule 19 Motion.

The Tribe has made clear that it is not seeking to cause the Commonwealth's lawsuit to be dismissed with prejudice, but rather is seeking dismissal with leave to amend to name the NIGC as a party-defendant. The Tribe's Motion is based on Rule 19(a), which directs the court to order that the required or necessary party be made a party to the lawsuit. Only where such joinder is not feasible does the court need to ascertain whether the absent party is indispensible. Rule 19(b). Plaintiffs conflate the two arguments (DK# 65, pp.12-15; DK# 66, pp.2-4), reasoning that because NIGC is supposedly not indispensible, the Tribe's Rule 19(a) motion

[4] The Tribe, in its Memorandum in Support (DK# 62, p.9 n.5), directly refuted the Town's repeated assertion that its zoning ordinances prohibit gaming. Notably, none of the Plaintiffs address this, which only reinforces that the hypothetical Catch-22 is not mere speculation.

should be denied. The Tribe does not address whether the NIGC is indispensible because the NIGC can be joined without divesting this Court of jurisdiction. Fed.R.Civ.P. 19(a)(1).

The Plaintiffs also suggest that the NIGC is not indispensible because the Tribe is capable of representing the interests of the United States. This Court, in the context of granting the Town's and AGHCA's Motions to Intervene found that the Commonwealth could not adequately represent the interests of AGHCA because of the inherent changing priorities of governmental entities ("political entities with different interests that may change over time, depending on the interests in part of the elected officials who are the decision-makers")(DK# 55, p.14). Both the Town and AGHCA advocated this position in their briefing in support of intervention (DK# 37, pp.7-8, DK# 39, pp.11-12, DK# 48, p.2, DK# 50, pp.4-6). Similar analysis applies here. The First Circuit instructs that "without a perfect identify of interests, a court must be very cautious in concluding that a litigant will serve as a proxy for an absent party." *Tell*, 145 F.3d at 419; *See also,* 4 R.D. Freer, *Moore's Federal Practice* § 19.03[3][f], at 19–56 to 19–57 (3d ed.1998) Although similar, the NIGC's and the Tribe's positions are not identical. The Tribe's interest is to secure its sovereign authority to govern gaming on its Indian lands; the NIGC's interest is to preserve its authority to oversee and regulate gaming on Indian lands consistent with federal law. The Commonwealth cites *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992) *and Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996), but in both of those cases the court found that the United States could not adequately represent the interests of absent tribes because of inherent conflicts in the trustor/trustee relationship. Although, here it is the trustor that the Commonwealth asserts can adequately represent the trustee, rather than the reverse, the same analysis applies.

CONCLUSION

In its Memorandum of Points and Authorities (DK# 62), 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, 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 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, the Town and AGHCA to amend their Complaints to assert an action sounding in the APA challenging the NIGC's approval of the Tribe's site-specific Gaming Ordinance.

Plaintiffs' opposition contradicts itself as to whether the NIGC can be joined. The Commonwealth's analysis that it may file an APA action against the NIGC for its approval of the Tribe's site-specific Gaming Ordinance is correct. The Plaintiffs arguments regarding intervention and indispensability do not impact the correctness of the Tribe's arguments that the NIGC is a necessary or required party under Rule 19. The Plaintiff's rehash that their Complaints can be resolved without impacting significant federal interests has already been rejected by this Court. Plaintiffs' arguments fail to refute the standards and analysis set forth by the Tribe. Accordingly, this Court should find that the Tribe has established all three grounds for granting the Rule 19 Motion. Finding that the Tribe has established any one of the three grounds,

however, is sufficient.

DATED: October 20, 2014

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that the MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS 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: October 20, 2014

/s/ Scott Crowell
SCOTT CROWELL