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' RULE 12(B)(1) AND 12(B)(7) MOTION TO DISMISS INTERVENOR AGHCA'S COMPLAINT FOR LACK OF EFFECTIVE WAIVER OF TRIBAL SOVEREIGN IMMUNITY AND FAILURE TO STATE A CLAIM.

SUMMARY OF ARGUMENT

Defendants[1] Wampanoag Tribe of Gay Head (Aquinnah) and the Aquinnah Wampanoag Gaming Corporation ("Defendants" or "Tribe") submit this Reply in Support of it Motion Pursuant to Fed.R.Civ.P 12(b)(1) and 12(b)(7) to Dismiss Plaintiff-Intervenor Aquinnah/Gay

[1] Although Plaintiffs named the Wampanoag Tribal Council of Gay Head, Inc.("Corporation") 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.

Head Community Association, Inc.'s ("AGHCA") Complaint For Lack Of Effective Waiver Of Tribal Sovereign Immunity And Failure To State A Claim (DK# 59). The Tribe's Memorandum of Points and Authorities (DK# 60) applies black letter federal law of tribal sovereign immunity to support its position that the current lawsuit should be dismissed for lack of an effective waiver. The District Court has already correctly ruled that the Tribe's sovereign immunity remains intact against claims alleging violations of the 1983 Memorandum of Understanding ("MOU") or the Settlement Act. Any state court decisions to the contrary were wrongly decided. Finally, the Tribe establishes that the 1983 MOU expired by its own terms in 1985 and, accordingly, all breach of contract claims based on the MOU must fail.

AGHCA argues in its Opposition Memorandum (DK# 67) that the Tribe is collaterally estopped from asserting tribal sovereign immunity because of *Bldg. Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1, (2004) ("State Court *Shed* case"), discussed below. AGHCA further argues that the Tribe is the successor in interest to the non-profit corporation formed under state law that signed the 1983 MOU, and as such, the Tribe is bound by the Corporation's actions as if the Corporation possessed the reservoir of authority reserved for federally recognized Indian Tribes. Finally, AGHCA argues that the express language of the MOU providing that it expired in 1985 does not impact AGHCA's ability to bring the current action alleging breach of the MOU. For the reasons set forth below, AGHCA's arguments fail.

A. **Prior to the State Court's Decision in the *Shed* Case, the United States District Court for the District of Massachusetts Ruled that the Tribe's Sovereign Immunity Against Claims Brought By Parties to the 1983 MOU Remains Intact.**

In the Tribe's Memorandum of Point and Authorities in Support of its Motion to Dismiss (DK# 60, pp. 6-7), the Tribe informs that this District Court previously applied federal case law to the Settlement Act, and concluded that there was no abrogation and/or waiver of the Tribe's sovereign immunity. *Wampanoag Tribe of Gay Head (Aquinnah) v. Massachusetts Commission Against Discrimination,* 63 F.Supp.2d 119 (D. Mass. 1999)("the *MCAD* case"). However, in it's Memorandum in Opposition (DK# 67, pp.17-18) AGHCA attempts to distinguish *MCAD* by arguing (1) *MCAD* addressed only Congressional abrogation of Tribal sovereign immunity rather than waiver, (2) *MCAD* addressed an issue not addressed by the "Settlement Agreement" (meaning the MOU), and (3) the State Court *Shed* case did not even mention *MCAD.* All three of these arguments fail to defeat the precedential and persuasive application of *MCAD* to the current lawsuit.

First, *MCAD* addressed both abrogation and waiver. 63 F.Supp.2d at 123-24. In that case, the Massachusetts Commission Against Discrimination ("Commission"), an arm of the Commonwealth, a party to the MOU, argued unsuccessfully that the Tribe waived its immunity. The District Court properly looked to the question of abrogation because it was the Settlement Act, and not the MOU, which determined the extent of the Tribe's waiver. This simply reinforces the correctness of the Tribe's argument that the non-profit corporation had no capacity and/or authority to waive immunity, discussed further below. AGHCA may be suggesting that the Commission did not artfully argue the distinction between waiver and abrogation. That suggestion is not supported by the text of the opinion, however. Certainly, the Commission had the same motivation to make the waiver argument that AGHCA has in the current litigation.

Second, at issue in *MCAD* was the question of whether Massachusetts's employment discrimination laws could be enforced against the Tribe. Contrary to AGHCA's assertion, which is precisely the matter addressed in the MOU, to wit, the exercise of Tribal jurisdiction in contravention of "the civil regulatory and criminal laws of the Commonwealth of Massachusetts."

Third, that the State Court *Shed* case failed to even mention *MCAD* only underscores the State Court's wholesale failure to apply appropriate federal law. The District Court's decision in *MCAD* was properly decided and is *stare decisis* to the parties in the current litigation. *See, E.E.O.C. v. Trabucco*, 79 F.2d 1, 3-4 (1st Cir. 1986).

Despite this District Court's ruling in *MCAD*, and despite the Tribe's application of black letter federally law demonstrating that the State Court *Shed* case was wrongly decided, AGHCA argues that the Tribe is collaterally estopped from raising the issue of no effective waiver of sovereign immunity based on the State Court *Shed* case (DK# 67, pp.1-8). The Doctrine of Collateral Estoppel is an equitable doctrine and as such, cannot be applied against a governmental entity on the same terms as any other litigant. *See, Heckler v. Community Health Services* 467 U.S.51, 59-60 (collateral estoppel should not be invoked against the government unless doing so is to "avoid injustice in a particular case")*; See also, Pan Am Co. v. Sycuan Band of Mission Indians,* 884 F.2d 416, 419 (9th Cir. 1989)("Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation").

All of the arguments that AGHCA presents for the *Shed* case, a later-in-time state court case, to have preclusive effect upon the Tribe, instead make the case that *MCAD,* an earlier-in-time federal court case, should have preclusive effect on AGHCA. The issues in *MCAD* are

identical, the parties had a full and fair opportunity to litigate, and the District Court's determination on the sovereign immunity issue was necessary to its judgment in the case. AGHCA's own Memorandum (DK# 67, pp.7-8 and n.4) even articulates how *MCAD's* preclusive effect binds non-party entities that were "in privity" with the parties to the earlier lawsuit.

Additionally, the Tribe sets forth in its Memorandum of Points and Authorities (DK# 60, p.8) that even if the State Court *Shed* case was properly decided (which it was not), the holding is to be applied narrowly such that it only applies to governmental entities seeking to exercise jurisdiction. AGHCA points out (DK# 67, p.6) that private parties were involved in both the *Shed* and *Kitras* cases, but that fact alone does not prove the point. Rather, the governmental entities were parties in both cases and the state courts in either case did not hold that private parties may bring causes of action against the Tribe. The Tribe established that waivers are to be construed narrowly and AGHCA fails to refute that analysis with any reasoning as to why any waiver that may exists regarding the exercise of the Plaintiff Commonwealth of Massachusetts (the "Commonwealth") and/or Plaintiff-Intervenor Town of Aquinnah's (the "Town") jurisdiction should extend to private parties.

Furthermore, the Tribe sets forth in its Memorandum of Points and Authorities (DK# 60, p.8) that even if the State Court *Shed* case was properly decided (which it was not), the narrow holding only applies lands to the Cook lands. The MOU applies to lands to be held by a Tribal Land Corporation to be formed under Massachusetts state law. The lands at issue in the current litigation were never held by such an entity, and in sharp contrast, are held by the United States in trust for the Tribe. AGHCA does not respond to this distinction in its Memorandum of Opposition.

B. Regardless of Whether the Tribe is the 'Successor in Interest' to the Non-Profit Corporation that Signed the MOU, Such Entity Did Not Possess the Capacity or Authority to Waive the Tribe's Sovereign Immunity.

The non-profit state corporation, Wampanoag Tribal Council of Gay Head, Inc. that signed the MOU was not, at the time of signing and never was a federally recognized Indian Tribe. AGHCA goes to great length to establish that the Tribe is the successor in interest of the Corporation. The Tribe appreciates that the Corporation engaged in efforts to advance the causes of the Tribe. But those efforts do not elevate the actions of the Corporation to be the actions of the federally recognized Tribe. AGHCA cannot point to any authority that suggests the earlier-in-time state corporate entity has those capacities that are unique to the later-in-time Tribal sovereign governmental entity. The Tribe established in its Memorandum of Points and Authorities that only Congress or a federally recognized Indian Tribe can waive tribal sovereign immunity (DK# 60, pp.4-6). There was no entity that had the capacity to waive the Tribe's sovereign immunity before the Tribe received federal recognition in April of 1987. AGHCA refers to the case law cited by the Tribe as "unremarkable" and "unsurprising." Those words do not negate the case law that an entity that purports to waive a Tribe's sovereign immunity must have authority under Tribal law to do so. There being no Tribal law in effect in 1983, much less specific tribal law regarding the manner and extent to which tribal sovereign immunity may be waived, renders it impossible for the Corporation to have possessed the authority or capacity when to waive the Tribe's sovereign immunity when the Corporation signed the MOU in 1983.

AGHCA's argument that the Tribe is the Corporation's successor-in-interest does not establish that a Tribal governmental entity assumes the liability of a prior non-governmental entity in the same manner as a merger of private companies with successor liability. The Corporation could declare bankruptcy. The Tribe cannot. The Corporation could reorganize into

another entity. The Tribe cannot. The Corporation could be sued without its consent or without Congressional abrogation of immunity. The Tribe cannot. Conversely, the Tribe possesses a reservoir of sovereign governmental authority to steward and impose taxes on activities on its Indian lands, to enact and enforce laws regarding its citizenry and its lands, and to exercise its police powers. The Corporation could not. For these reasons and likely more, AGHCA is unable to cite a single case where a federally-recognized Indian Tribe, under the principle of successor liability, is bound by the commitments made by a pre-recognition advocate simply because such commitments were made to advance a political effort to have the federal government properly recognize an Indian Tribe.

Significantly, AGHCA as well as the Commonwealth and the Town went out of their way to make sure the MOU merely facilitated the extinguishment of aboriginal title and did not advance the Corporation's agenda of formal federal recognition of the Wampanoag Tribe of Gay Head (Aquinnah). Simply put, the MOU did not contemplate federal recognition; rather it contemplated the continuation of a state-formed corporation, which did not possess Tribal sovereign immunity.

Additionally, the Tribe sets forth in its Memorandum of Points and Authority (DK# 60, pp.11-12) that even if the Corporation had the capacity and authority to waive the Tribe's immunity, such agreement is unenforceable under the Reserved Powers Doctrine which mandates that a government may not contractually bind future legislatures and executives in a manner that restricts the government from performing core legislative powers. AGHCA does not respond to this rationale in its Memorandum of Opposition.

C. Under the Unambiguous Terms of the MOU, it Expired in May of 1985.

The Tribe's Memorandum of Points and Authorities (DK# 60, pp. 9-10) sets forth that the 1983 MOU, on its own unambiguous terms, expired in May of 1985 because the condition precedent requiring the United States to take the action contemplated by the MOU within eighteen months of its execution was not timely satisfied. AGHCA responds (DK# 67, p.9, 14-15) that (1) the provision merely requires any one entity to do any one action; (2) Congress' belated enactment of the Settlement Act somehow waives the contractual requirement; (3) the MOU was supposedly renewed; and (4) the Tribe is precluded from making factual arguments in the context of its motion to dismiss. None of these arguments rebut the Tribe's point, that AGHCA's claim, which is deliberately and solely a state-law breach of contract claim, must be dismissed.

First, the provision at issue specifically refers to "requisite favorable action within 18 months of the execution of this settlement by . . . the United States." DK#1, EXH. A to Commonwealth's Complaint at ¶ 2. The "requisite favorable action" of the United States is set forth in paragraph 8 of the MOU, including various appropriations and subparagraph (d) which reads:

> Congress will enact legislation that eliminates all Indian claims of any kind, whether possessory, monetary, or otherwise, whether aboriginal or under recognized title involving lands and waters in the Town of Gay Head, and that effectively clears the titles to all land in Gay Head of any such claims, whether asserted in the past, present or future. That legislation will also extinguish all claims of any kind by the alleged Gay Head Tribe, whether possessory, monetary or otherwise, whether aboriginal or under recognized title involving any other lands and waters within the Commonwealth of Massachusetts and that effectively clears the titles to all land in the Commonwealth of any such claims, whether asserted in the past, present or future.

DK#1, EXH. A to Commonwealth's Complaint at ¶ 8(d) (the reference the "alleged" Gay Head Tribe reinforces the analysis at pp. 6-7, above). There is no support for AGHCA's

wishful thinking that ¶ 2 merely requires "someone" to do "something" within 18 months.

Second, Congress' subsequent enactment of the Settlement Act, which references the MOU, is consistent with the Tribe's position that the purpose and effect of the MOU was to inform Congress of the parties' desired effect of the proposed legislation. The Tribe does not dispute the relevance of the MOU regarding the interpretation and intent of the Settlement Act. But AGHCA's claim is not based on the Settlement Act. Rather it is a breach of contract claim based on the MOU, which by its express language, expired in May of 1985. The concept that Congress' belated passage of the Settlement Act constitutes the Corporation's, much less the Tribe's, waiver of ¶ 2 is without merit.

Third, a reference in the Settlement Act that the MOU was "renewed" does not support any theory that the terms of ¶ 2 were altered or waived. AGHCA provides no evidence that the MOU was ever renewed, and if so, whether ¶ 2 was altered or waived.

Fourth, in the context of a motion to dismiss based on lack of an effective waiver of Tribal sovereign immunity, the Court is not obliged to accept the allegations in the Complaint as true. Indeed, when considering a motion to dismiss on grounds of tribal immunity, the Court is not constrained by the allegations of the Complaint, but is free to consider evidence extraneous to the Complaint itself without converting the motion into a Rule 56 motion for summary judgment. *See, Somerlott v. Cherokee Nation Distributors*, 686 F.3d 1144, 1152 (10th Cir.2012); *Wheeler v. Hurdman*, 825 F.2d 257, 259 n. 5 (10th Cir.1987). Here, the extraneous evidence is not provided by the Tribe, but is an Exhibit attached to the Commonwealth's Complaint.

AGHCA was deliberate in framing its Complaint to be a breach of contract claim.

That contract by its express terms, has expired. AGHCA cannot rely on the contract to establish an effective waiver of the Tribe's immunity. Similarly, AGHCA's Complaint fails to state a claim for which relief may be granted.

CONCLUSION

AGHCA's Complaint should be dismissed for lack of an effective waiver of tribal sovereign immunity. A longstanding and deep body of federal case law makes clear that AGHCA's Complaint must be dismissed if AGHCA cannot establish an effective waiver of the Tribe's sovereign immunity. A previous decision of this District Court held that neither (i) the Memorandum of Understanding executed on September 23, 1983 ("MOU") by and among the Commonwealth of Massachusetts ("Commonwealth"), Wampanoag Tribal Council of Gay Head, Inc., the Town of Aquinnah ("Town") and the Aquinnah Taxpayers Inc., nor (ii) the Massachusetts Land Claim Settlement Act of 1987, 25 U.S.C. §§ 1771 et. seq., ("Settlement Act") at issue here, waived or abrogated the Tribe's sovereign immunity from suit. AGHCA relies on state case law that, even if correctly decided, does not stand for the proposition that a private interest such as AGHCA can avail itself of a limited waiver of immunity otherwise available to specified governmental entities. The state case law on which AGHCA relies, however, was wrongly decided, and stands in direct conflict with the prior decision of this District Court. Finally, the 1983 MOU upon which AGHCA relies is not an enforceable contract and accordingly AGHCA cannot rely upon that contract to establish a valid waiver of tribal sovereign immunity. The MOU terminated on its express terms in May 1985. Wampanoag Tribal Council of Gay Head, Inc. lacked the capacity to make the contractual obligations in which AGHCA relies. These fundamental flaws also defeat AGHCA's breach of contract theory of liability such that AGHCA's Complaint should also be dismissed for failure to state a claim.

For the reasons set forth herein, and the reasons set forth in the Tribe's Memorandum of Points and Authorities (DK# 60), AGHCA's Complaint should be dismissed for want of an effective waiver of Tribal sovereign immunity and failure to state a claim.

DATED: October 20, 2014

Respectfully Submitted,

/s/ Scott Crowell
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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