UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

The COMMONWEALTH OF MASSACHUSETTS, *Plaintiff*, and The AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. (AGHCA) 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*.	No: 1:13-cv-13286-FDS

PLAINTIFF, COMMONWEALTH OF MASSACHUSETTS',
MEMORANDUM OF REASONS IN SUPPORT OF ITS MOTION TO DISMISS
DEFENDANTS' COUNTERCLAIMS

This Court should dismiss the three counterclaims contained in the defendants' Answer to Complaint, Affirmative Defenses and Counterclaim to Complaint of the Commonwealth of Massachusetts (Dkt. #57).[1] The defendants assert two counterclaims for declaratory relief and

[1] The Tribe has since filed a revised answer. See First Amended Answer to Complaint, Affirmative Defenses, Counterclaim to Complaint of the Commonwealth of Massachusetts, and Counterclaims Against Third-Party Defendants, October 24, 2014 (Dkt. #74). However, this amended answer was filed without leave of Court well past the date set by this Court for as-of-right amendments to pleadings. See Scheduling Order, August 7, 2014 (Dkt. #54), at ¶ 4 ("**Amendments to Pleadings.** Except for good cause shown, no motions seeking leave to add new parties or to amend pleadings to assert new claims or defenses may be filed after September

one for injunctive relief. With respect to the claim for injunctive relief, the defendants fail to state a claim and lack standing to pursue one. Moreover, all three counterclaims are barred by the Eleventh Amendment and the doctrine of sovereign immunity. The Commonwealth has not waived its immunity to these claims in federal court.

BACKGROUND

The Commonwealth filed this action in the Massachusetts Supreme Judicial Court for Suffolk County to enforce its contractual rights pursuant to a 1983 Settlement Agreement and state and federal legislation codifying that agreement. *See generally* Compl. The Commonwealth asserted a claim against the Aquinnah Tribe[2] for breach of contract as well as a claim for declaratory judgment under Mass. G. L. c. 231A, § 2. Compl. ¶¶ 62-78. The Commonwealth requested judicial declarations that (1) the Tribe has no right to license, open, or operate a gaming establishment on the Settlement Lands without complying with all laws of the Commonwealth; and (2) the Tribe's gaming ordinance, and any action taken pursuant to it, is void as contrary to the Settlement Agreement and Massachusetts law, which is expressly made applicable by the Settlement Agreement. Compl. p. 16.

After removal, the Tribe answered the Commonwealth's complaint and asserted counterclaims for declaratory and injunctive relief. *See* Dkt. # 57, ¶¶ 96-106. Specifically, the Tribe asked this Court to declare that Congress, in its passage of the Indian Gaming Regulatory Act (IGRA), repealed those portions of the federal legislation codifying the Settlement Agreement that grant jurisdiction to the Commonwealth over gaming on the Settlement Lands. *See* Dkt. # 57, ¶ 99. The Tribe further requested that the Court declare that the National Indian

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24, 2014.") (emphasis in original). Therefore, the Commonwealth is filing this motion in order to timely respond to the Tribe's operative filing. It will file a revised motion to dismiss should subsequent docket events render it appropriate.

[2] References to the "Tribe" are to all three defendants.

Gaming Commission's (NIGC) approval of the Tribe's gaming ordinance constitutes federal authorization under IGRA that preempts the application of state law. *See* Dkt. # 57, ¶ 103. Finally, the Tribe requested that the Court enjoin the Commonwealth from "further interference" with gaming activities on the Tribe's lands, without specifying in what previous "interference" the Commonwealth has engaged. *See* Dkt. # 57, ¶ 106.

ARGUMENT

I. The Tribe's Claim for Injunctive Relief Must be Dismissed Because The Tribe is Not Entitled to the Relief Requested.

A. The Tribe Has Failed to Plead Facts Demonstrating an Entitlement to Injunctive Relief.

The Tribe's counterclaim for injunctive relief must be dismissed because the Tribe has not alleged an immediate threat of future injury and therefore lacks standing to pursue a claim for injunctive relief. "In accordance with Article III of the United States Constitution, a plaintiff must have standing to bring a claim before a federal court." *Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 151 (D. Mass. 2011). A plaintiff requesting prospective injunctive relief "must allege an immediate threat of future injury." *Id.* For example, in *City of Los Angeles v. Lyons*, the Supreme Court held that a plaintiff lacked standing to bring a claim seeking to enjoin the use of certain police practices, the future use of which was merely speculative. 461 U.S. 95, 111 (1983). Here, the Tribe's counterclaim is devoid of any allegation that the Tribe faces an immediate threat of future injury in the absence of injunctive relief. The Tribe has not alleged that the Commonwealth, or any individual state official, has taken any actions or threatened to take any actions (other than litigating this dispute) to "interfere" with the Tribe's efforts to open a gaming establishment. Likewise, the Tribe has not alleged that it faces an immediate threat of injury nor has it alleged facts that would support such a conclusion. All parties have consistently taken the position that this is a strictly legal dispute. As such, it is eminently resolvable through

a declaration of law issued by this Court. No operative facts support the Tribe's claim for injunctive relief, which should be dismissed.

B. The Tribe's Claim for Injunctive Relief is Both Unnecessary and Unnecessarily Broad.

The Tribe's counterclaim for injunctive relief should be dismissed for the additional reason that the requested injunction is overbroad and vague. The Tribe asks this Court to enjoin the Commonwealth from "interfering with gaming activities that occur on the Tribe's trust lands." Dkt. # 57, p. 14. The requested order would extend not only to the Tribe's existing trust lands but also to any lands that may be taken into trust any time in the future. *Id.* at ¶ 106. Furthermore, the terms of the Tribe's request are so overbroad as to be essentially unenforceable. For example, the requested injunction would prohibit any Commonwealth official from making any public statement about the any aspect of the Tribe's gaming establishment. Likewise, it would prohibit the Massachusetts Department of Environmental Protection from enforcing clean-up of a chemical spill that extends beyond tribal lands or the Massachusetts Gaming Commission from approving a license for a gaming establishment that might compete with the Tribe's. Nothing in the Tribe's factual allegations would support the entry of such an order.

An injunction must be "specific and reasonably detailed" and rightly so, as the punishment for violation of an injunction is severe. *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 439 (1976). It is for this reason that federal courts are often reluctant to issue an injunction against state officers, especially when a declaratory judgment will issue and there is no reason to believe state officials will fail to comply. *See, e.g., Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1078 (D.N.C. 1969) ("We adhere to the philosophy of federalism and think it unseemly that a federal court should issue its injunctive process against state or local officers except in situations of the most compelling necessity. Entry of a declaratory judgment ... seems

to us, on the facts of this case, a fully sufficient remedy."). Similarly, this Court should dismiss the Tribe's counterclaim for injunctive relief because a judgment will issue in this case declaring the parties' rights, with which there is no reason to believe the Commonwealth will not comply.

C. The Commonwealth's Sovereign Immunity Bars the Tribe's Claim for Injunctive Relief.

Even if the Tribe could assert the necessary factual bases to support its claim for injunctive relief, the Eleventh Amendment bars suits in federal court against unconsenting states. *Rosie D. v. Swift*, 310 F.3d 230, 234 (1st Cir. 2002). In forceful terms, the Supreme Court has repeatedly upheld the states' sovereign immunity, often referred to as Eleventh Amendment immunity, from private suits. *See, e.g., Hans v. Louisiana*, 134 U.S. 1, 17 (1890) ("It may be accepted as a point of departure unquestioned . . . that neither a State nor the United States can be sued as a defendant in any court in this country without their consent," except in the Supreme Court under its original jurisdiction. (quotations and citations omitted)); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 76 (1996) ("The Eleventh Amendment prohibits Congress from making the [states] capable of being sued in federal court.").

Sovereign immunity is not absolute as a state may waive its immunity by consenting to suit, but no such waiver has occurred here. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670, 675-76 (1999). Here, the Commonwealth consented to the jurisdiction of, and counter-suit in, the Massachusetts *state* courts by initiating this lawsuit against the Tribe in the Supreme Judicial Court. "A state plaintiff thus will be subject to suit by way of counterclaim arising from the same transaction, the consent to such countersuit being implied." *State of N.J. Dept. of Env. Protection v. Gloucester Env. Mgmt. Svcs, Inc.*, 923 F. Supp. 651, 663 (D.N.J. 1995). That waiver, however, is limited to state-court jurisdiction, and does not extend to the plenary jurisdiction of this Court. As the Supreme Court "consistently has

held[,] . . . a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99, n.9 (1984); *College Sav. Bank*, 527 U.S. at 676 ("[A] state does not consent to suit in federal court merely by consenting to suit in the courts of its own creation."); *Gloucester Env. Mgmt.*, 923 F. Supp. at 663 (A plaintiff government may be held to have voluntarily waived its Eleventh Amendment immunity "with respect to a counterclaim arising from the same subject matter and seeking recoupment against the state's claim, *but not for a counterclaim seeking injunctive relief*"). The Tribe's removal of this action to federal court is of no moment to this rule. That decision as the Tribe's alone, and it was met with the Commonwealth's assiduous opposition, rather than its assent. See Dkt. ## 17, 18, 25. *Cf. Lapides v. Bd. of Regents of Univ. System of Georgia*, 535 U.S. 613, 620 (2002) (State defendant's voluntary removal of action to federal court constituted waiver of immunity by litigation conduct). Because the Commonwealth has not taken any action that would expose it to a suit brought by a private party in federal court, the constitution bars the exercise of federal jurisdiction over the Tribe's counterclaims. See *Alden v. Maine*, 527 U.S. 706, 748-49 (1999) (quotations omitted).

The Tribe asserts its claims only against the Commonwealth, not against any state officials. Perhaps, with appropriate amendment, it may be able to pursue some measure of relief against an appropriate state official named in his or her official capacity, but not the relief requested on the basis of the facts alleged. As the Supreme Court announced in *Ex parte Young*, 209 U.S. 123 (1908), an exception to the rule of sovereign immunity "allows federal courts . . . [to] enjoin state officials to conform future conduct to the requirements of federal law." *Rosie D.*, 310 F.3d at 234 (quotation marks omitted). However, the *Ex parte Young* exception is

"narrow." *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). It permits suits against state officials in their official capacity for "prospective injunctive relief" only. *Rosie D.*, 310 F.3d at 234; *Green v. Mansour*, 474 U.S. 64, 68 (1985) (*Ex parte Young* exception permits only "injunctive relief to prevent a continuing violation of federal law"); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) ("a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief"). Accordingly, the exception "does not permit judgments against state officers declaring that they violated federal law in the past." *Metcalf & Eddy*, 506 U.S. at 146. Nor does it extend to any other "claims for retrospective relief." *Green*, 474 U.S. at 68.

Ex parte Young amendment would not permit the relief the Tribe seeks here. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1639 (2011) (quotation marks and alterations omitted). The Tribe fails to satisfy the first prong of this analysis. Nowhere does the Tribe allege an ongoing violation of federal law by the Commonwealth. Indeed, the Commonwealth has not taken any action, other than filing this case seeking a declaration of the parties' rights with regard to the Tribe's efforts to open a gaming establishment. The Commonwealth has threatened no additional action. Therefore, even if this counterclaim were asserted against a state official, it would not satisfy the *Ex parte Young* requirements because the Tribe has failed to allege "an ongoing violation of federal law." *See id*. For these reasons also, the Tribe's Third Claim for Relief should be dismissed.

II. The Tribe's Remaining Counterclaims for Declaratory Relief are Likewise Barred by the Commonwealth's Sovereign Immunity.

A. The Counterclaims Do Not Arise From the Same Transaction on Which the Commonwealth's Claims are Based.

The Court should dismiss the Tribe's counterclaims for declaratory relief because the Commonwealth's sovereign immunity bars such claims. As set forth above, the Commonwealth acknowledges that, by suing the Tribe in state court, it opened itself up to limited counterclaims in that court arising from the same transaction on which the Commonwealth's claims are based. *See Woelffer v. Happy States of America, Inc.*, 626 F. Supp. 499, 502 (N.D. Ill. 1985). The Tribe's counterclaims for declaratory relief, however, extend far beyond the Commonwealth's claims and do not arise from the same transaction as the Commonwealth's claims. Therefore, the Commonwealth's sovereign immunity bars these claims.

The Tribe asks this Court to declare that (1) Congress, in its passage of IGRA, repealed those portions of the Settlement Act that grant jurisdiction to the Commonwealth over the Settlement Lands; and that (2) the NIGC's approval of the Tribe's gaming ordinance constitutes federal authorization under IGRA and preempts the application of state law. By contrast, the Commonwealth requested only that this Court declare that the Tribe has no right to operate a gaming establishment on the Settlement lands without complying with state law in accordance with the terms of the Settlement Agreement and that the Tribe's gaming ordinance is irreconcilable with the Settlement Agreement. For a counterclaim to fall within the scope of a state's waiver of its sovereign immunity, the "counterclaim must 1) arise from the same event underlying the state's action and 2) be asserted defensively, by way of recoupment, for the purpose of defeating or diminishing the State's recovery, but not for the purpose of obtaining an affirmative judgment against the State." *Woelffer*, 626 F. Supp. at 502 (internal quotation marks and citations omitted). Courts that have addressed the permissible scope of a counterclaim have

authorized only limited suit by way of counterclaim in the form of a claim for set-off to the extent of the government plaintiff's claim. *See, e.g., In re Greenstreet,* 209 F.2d 660, 664 (7th Cir. 1954). The Commonwealth's consent to suit by way of counterclaim does not extend to the court's power to decide separate affirmative claims. *Id.* The Tribe's request that this Court rule on the validity and intent of federal action goes far beyond the relief sought by the Commonwealth and arises out of an entirely separate federal process with which the Commonwealth had no involvement. Therefore, even if the Commonwealth exposed itself to limited counterclaims by filing this action, it did not expose itself to the broad counterclaims that the Tribe now asserts.

B. The Commonwealth Did Not Waive its Immunity to Suit in Federal Court.

Even if the Tribe's counterclaims are found to arise from the same transaction on which the Commonwealth's claims are based, the Commonwealth's waiver of its immunity extends only to counterclaims asserted in state court. The Commonwealth's limited waiver does not expose it to the Tribe's counterclaims in this Court, as set forth above at pages 6-7.

III. Dismissal of the Counterclaims Will Not Preclude the Tribe from Obtaining its Requested Relief.

Dismissal of the Tribe's counterclaims will not impede the Tribe in pursuing the relief it seeks. The Commonwealth's complaint includes a claim for declaratory judgment pursuant to Mass. G.L. c. 231A, § 2. Specifically, the Commonwealth requests that the Court declare (1) that the Tribe has no right to license, open, or operate a gaming establishment on the Settlement Lands without complying with all laws of the Commonwealth; and (2) that the gaming ordinance, and any action the Tribe takes pursuant thereto, are illegal and void because the gaming ordinance and actions taken pursuant thereto are in irreconcilable conflict with the Settlement Agreement and Massachusetts law. Compl. p. 16. "In declaratory judgment actions,

even where relief is denied, the rights of the parties must be declared." *Williams v. Secretary of Exec. Office of Human Svcs.*, 414 Mass. 551, 570, 609 N.E.2d 447, 460 (1993). Therefore, this Court may make a declaration in the Tribe's favor and resolve the disputed issues without the necessity of the Tribe's counterclaims.

CONCLUSION

For the reasons set forth above, the Commonwealth of Massachusetts respectfully requests that this Court enter an order DISMISSING the Tribe's counterclaims against the Commonwealth.

Respectfully submitted,

THE COMMONWEALTH OF MASSACHUSETTS,

By and through its attorney,

MARTHA COAKLEY
ATTORNEY GENERAL

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Dated: October 27, 2014

CERTIFICATE OF SERVICE

I, Carrie Benedon, hereby certify that on this 27th day of October, 2014, I filed the foregoing document through the Electronic Case Filing (ECF) system and thus copies of the foregoing 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.

/s/ Carrie Benedon