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), et al., *Defendants* and DEVAL PATRICK, in his official capacity as GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, et al. *Third-Party Defendants.*	No: 1:13-cv-13286-FDS

PLAINTIFF COMMONWEALTH OF MASSACHUSETTS' AND THIRD-PARTY DEFENDANTS' MEMORANDUM OF REASONS IN SUPPORT OF THEIR MOTION TO DISMISS DEFENDANTS' AMENDED COUNTERCLAIMS

This Court should dismiss the three counterclaims contained in the defendants' First Amended Answer (Dkt. #74). The defendants assert two counterclaims for declaratory relief and one for injunctive relief against the plaintiff Commonwealth of Massachusetts and three individual third-party defendants (Governor Deval Patrick, Attorney General Martha Coakley, and Massachusetts Gaming Commission Chairman Stephen Crosby) sued in their official

capacities.[1] All of the counterclaims against the Commonwealth are barred by the Eleventh Amendment and the doctrine of sovereign immunity. Additionally, with respect to the claim against the Commonwealth for injunctive relief, the defendants fail to state a claim and lack standing to pursue one. Finally, the defendants fail to state a claim against any of the three individual third-party defendants.

BACKGROUND

The Commonwealth filed this action in the 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. The Commonwealth asserted a claim against the Aquinnah Tribe[2] for breach of contract and 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 against the Commonwealth for declaratory and injunctive relief. *See* Dkt. # 57, ¶¶ 96-106. Subsequently, the Tribe filed an amended answer and counterclaims, in which it added three individual Commonwealth officials – Governor Deval Patrick, Attorney General Martha Coakley, and Massachusetts Gaming Commission Chairman Stephen Crosby – as third-party defendants. *See* Dkt. # 74, ¶¶ 90-92. In its amended counterclaims, the Tribe asked this Court to

[1] The defendants have not served, nor sought waiver of service on, any of the three individual third-party defendants named in the amended counterclaims. Nonetheless, the individual third-party defendants do not seek dismissal on those grounds.

[2] The term "Tribe" is used to reference all three defendants collectively.

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. # 74, ¶ 107. The Tribe further requested that the Court declare that the National Indian 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. # 74, ¶ 110. Finally, the Tribe asked the Court to enjoin the Commonwealth and the individual third-party defendants from "further interference" with gaming activities on the Tribe's lands, without specifying in what previous "interference" the Commonwealth and the individual third-party defendants have engaged. *See* Dkt. # 74, ¶ 113.

ARGUMENT

I. The Tribe's Counterclaims Against the Commonwealth are Barred by the Commonwealth's Sovereign Immunity.

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

It is well-established that 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 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.").

That the Tribe removed to federal court an action initiated by the Commonwealth is of no effect. That decision was 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 against the Commonwealth. *See Alden v. Maine*, 527 U.S. 706, 748-49 (1999) (quotations omitted).

B. The Commonwealth's Suit Against the Tribe in State Court Did Not Expose it to Suit by Way of Counterclaim in Federal Court.

The Commonwealth accepts that, because it filed a declaratory action against the Tribe in state court, the Tribe could have sought limited declaratory relief *via* counterclaim in state court. *See Woelffer v. Happy States of America, Inc.*, 626 F. Supp. 499, 502 (N.D. Ill. 1985). But that is not what the Tribe has done. Instead, it has asserted counterclaims that extend far beyond the Commonwealth's claims (and arise from wholly separate events). In addition, it has done so in federal court, where the Commonwealth's sovereign immunity bars these claims.

In limited circumstances, the Commonwealth acknowledges that, when it brings an affirmative case, its sovereign immunity may yield to counterclaims necessarily implicated in that case. Specifically, a counterclaim may be asserted against a state only where it "1) arise[s] from the same event underlying the state's action and 2) [is] 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). Neither condition is present here. The relief

that the Tribe seeks is sweeping. The Tribe asks this Court to declare that (1) by enacting IGRA, Congress undertook to rewrite the Settlement Act by deleting from it the express Congressional grant of jurisdiction to the Commonwealth over the Settlement Lands; and (2) by approving the Tribe's gaming ordinance, the NIGC has authorized gaming on the Settlement Lands, preempting any state law to the contrary. The Commonwealth's action, by contrast, is far narrower. The Commonwealth requests a declaration that the Tribe's adoption of its gaming ordinance constituted a breach of the Settlement Agreement.

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 in which the Commonwealth had no involvement. The Commonwealth's consent to suit by way of counterclaim does not extend to separate affirmative claims. *See, e.g., In re Greenstreet,* 209 F.2d 660, 664 (7th Cir. 1954). 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.

Even if the Tribe's counterclaims were necessarily implicated by the Commonwealth's action, they could not be asserted in federal court. The Commonwealth sought declaratory relief in *state* court, thus exposing itself to limited counterclaims in *state* court. It has done nothing whatsoever to consent to the jurisdiction of this Court, over these counterclaims or any others. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99, n.9 (1984) ("[A] State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts."); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) ("[A] state does not consent to suit in federal court merely by consenting to suit in the courts of its own creation."). Therefore, the Tribe's

counterclaims against the Commonwealth must be dismissed in their entirety because the Commonwealth's sovereign immunity bars them.

II. The Tribe's Counterclaims Against the Individual Commonwealth Officials Fail to State a Claim, and Must be Dismissed.

The Tribe has asserted the same claims against three individual third-party defendants in their individual capacities: Governor Patrick, Attorney General Coakley, and Massachusetts Gaming Commission Chairman Crosby. Unlike the Commonwealth, these defendants could be subject to the jurisdiction of this Court. *E.g.*, *Ex parte Young*, 209 U.S. 123 (1908) (recognizing that federal courts may "enjoin state officials to conform future conduct to the requirements of federal law" in limited circumstances"). But the claims that have been asserted against them are not actionable and they must be dismissed.

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.

"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 individual third-party defendants. The Tribe merely alleges, as to each of the individual third-party defendants, that the individual Commonwealth official "intends to use [his/her] office and authority under the laws of the Commonwealth of Massachusetts to stop Defendants-Counterclaim Plaintiffs from proceeding with their plans to open and operate a Class II gaming facility under IGRA and tribal law." Dkt. # 74, ¶¶ 100-102. The Tribe does not allege that such conduct, even if undertaken, constitutes a violation of IGRA or other federal law. Therefore, the Tribe has not satisfied the *Ex parte Young* requirements because the Tribe has failed to allege "an ongoing violation of federal law." *See Virginia Office for Prot. & Advocacy*, 131 S. Ct. at 1639.

III. The Tribe's Counterclaim for Injunctive Relief Against the Commonwealth and the Individual Third-Party Defendants 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.

As set forth above, the Tribe's counterclaims against the Commonwealth must be dismissed in their entirety because the Commonwealth's sovereign immunity bars such claims, and the Tribe's counterclaims against the individual Commonwealth officials must be dismissed because the Tribe has not alleged the ongoing violation of federal law required by *Ex parte Young*. Additionally, 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 any claim for injunctive relief, whether against the Commonwealth or the individual Commonwealth officials. "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 to enjoin 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 of the individual named state officials, have 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.

The entirety of the Tribe's factual allegations about purported "interference" is a series of identical allegations as to the Commonwealth and each of the individual third-party defendants. *See* Dkt. # 74, ¶¶100-102 ("[The individual named third-party defendant] alleges that the Commonwealth of Massachusetts has jurisdiction regarding gaming activities on the Tribe's trust lands to the exclusion of the Tribe and the United States, and that [he/she] intends to use his office and authority under the laws of the Commonwealth of Massachusetts to stop Defendants-Counterclaim Plaintiffs from proceeding with their plans to open and operate a Class II gaming facility under IGRA and tribal law."); Dkt. # 74, ¶ 99 ("The Commonwealth of Massachusetts alleges that it has jurisdiction regarding gaming activities on the Tribe's trust lands to the exclusion of the Tribe and the United States, and that [sic] intends to stop Defendants-Counterclaim Plaintiffs from proceeding with their plans to open and operate a Class II gaming facility under IGRA and tribal law.").

Those vague allegations cannot withstand a motion to dismiss because "the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009). "Nor does a complaint

suffice if it tenders naked assertions devoid of further factual enhancement." *Id.* at 1949 (citations and internal quotations omitted). In particular, the Tribe's counterclaims fail to allege any supporting facts or context for the bald accusations that the Tribe makes against each of the individual third-party defendants. The Tribe's assertion as to the Commonwealth's allegation of its position (Dkt. # 74, ¶ 99) presumably stems from the Commonwealth's allegations in its own Complaint, but it is unclear how or when the individual third-party defendants could have made such allegations as they were not parties to the Commonwealth's Complaint. The Tribe has not alleged that any of the counterclaim-defendants -- even the Commonwealth -- have done anything more than file this lawsuit seeking a declaration of the parties' legal rights. The Tribe's sketchy allegations cannot defeat this motion to dismiss.

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 and the named Commonwealth officials from "interfering with gaming activities that occur on the Tribe's trust lands." Dkt. # 74, p. 16. 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 ¶ 113. 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 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 a sweeping 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 or any Commonwealth officials will not comply.

IV. 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 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, Governor Deval Patrick, Attorney General Martha Coakley, and Gaming Commission Chairman Stephen Crosby respectfully requests that this Court enter an order DISMISSING the Tribe's counterclaims in their entirety.

Respectfully submitted,

THE COMMONWEALTH OF MASSACHUSETTS,
DEVAL PATRICK, MARTHA COAKLEY, and
STEPHEN CROSBY

By and through their attorney,

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Dated: November 19, 2014

CERTIFICATE OF SERVICE

I, Carrie Benedon, hereby certify that on this 19th day of November, 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