UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

THE COMMONWEALTH OF MASSACHUSETTS,

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.

and

DEVAL PATRICK, in his official capacity as GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, MARTHA COAKLEY, in her official capacity as ATTORNEY GENERAL, COMMONWEALTH OF MASSACHUSETTS, and STEPHEN CROSBY in his official capacity as CHAIRMAN, MASSACHUSETTS GAMING COMMISSION,

Third-Party Defendants.

CASE NO: 1:13-cv-13286-FDS

[Formerly Supreme Judicial Court for Suffolk County, Massachusetts, CIVIL ACTION NO. 2013-0479]

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' AMENDED COUNTERCLAIMS.

ORAL ARGUMENT REQUESTED

INTRODUCTION

Defendants Wampanoag Tribe of Gay Head (Aquinnah) and the Aquinnah Wampanoag Gaming Corporation submit this opposition to the motion to dismiss filed by Plaintiff Commonwealth of Massachusetts and Third Party Defendants Governor Deval Patrick, Attorney General Martha Coakley, and Massachusetts Gaming Commission Chairman Stephan Crosby. Contrary to the contentions of the Commonwealth and the Third Party Defendants, the Defendants' counterclaims, which seek only prospective relief against state officials, contain factual allegations sufficient to show that the Third Party Defendants have ignored, and intend to continue to ignore, the Tribe's federal right to game on its trust lands and intend to continue to try to prevent the construction and operation of a gaming facility on those lands.

BACKGROUND

The Indian Gaming Regulatory Act ("IGRA") requires any federally-recognized tribe that wants to conduct Class II gaming on its trust land to submit a gaming ordinance to the National Indian Gaming Commission ("NIGC') for approval.[1] If the gaming ordinance is "site specific," anticipating gaming on a particular part of the tribe's land, IGRA requires the NIGC to make a determination that the designated gaming site is "Indian lands," as defined by IGRA 25 USC 2703(4) and legally suitable under IGRA as the site of a gaming facility. Pursuant to an inter-office MOU, an Indian lands determination is referred to the Department of the Interior's ("DOI's") Office of the Solicitor ("Solicitor") for decision. The approval of a site-specific gaming ordinance authorizes the tribe to conduct Class II gaming on the specified site pursuant to federal law.

[1] *See Board of Comm'rs of Cherokee Cnty, Kan. v. Jewel*, 956 F.Supp.2d 116, 122-23 (D.D.C. 2013) which describes the process of NIGC review of site-specific gaming ordinances.

On May 29, 2013, Defendant Wampanoag Tribe of Gay Head ("Aquinnah") filed its amended tribal gaming ordinance with the NIGC.[2] The gaming ordinance was "site specific," and, therefore, it was referred to the Solicitor for an Indian lands determination. On August 23, 2014, the Solicitor determined that the Tribe possesses sufficient legal jurisdiction over its Settlement Lands for IGRA to apply, that the land qualifies as Indian lands under IGRA, and that IGRA impliedly repeals the portions of the Settlement Act repugnant to IGRA.[3] The NIGC's Office of the General Counsel concurred and issued a separate opinion under its authority, opining that the Settlement Lands qualify as Indian lands under IGRA and are thus eligible for gaming under the Act.[4] The NIGC allowed the Aquinnah ordinance to be approved by operation of law.[5] With the approval of its gaming ordinance, the Aquinnah has received a federal authorization under IGRA to conduct gaming at the designated site on its trust land.

The NIGC's approval of the Aquinnah gaming ordinance engendered several public objections from representatives of the Commonwealth. Rather than seeking judicial review of the NIGC's decision,[6] the Commonwealth filed a complaint in state court, alleging that a Memorandum of Understanding ("MOU") between the Commonwealth and the Wampanoag

[2] The Aquinnah gaming ordinance is in the Record at doc. 1-2, pp. 26 – 59.

[3] The Solicitor's opinion is in the record at doc. 21-2.

[4] General Counsel's October 25, 2013 opinion is in the record at doc. 21-3.

[5] IGRA requires the NIGC to review and disapprove a gaming ordinance within 90 days. If the NIGC does not disapprove a gaming ordinance within the 90 day period, the ordinance is deemed approved by action of law. Because NIGC had no reason to disapprove the ordinance, the ordinance was allowed to be approved by operation of law.

[6] The NIGC's approval constituted the final action of the NIGC, making it subject to judicial review in a federal district court under the Administrative Procedure Act ("APA").

Tribal Council, Inc.[7] constituted an enforceable contract *under state law* pursuant to which the Commonwealth acquired regulatory jurisdiction over Aquinnah trust land.[8] The NIGC's approval of the Aquinnah gaming ordinance, however, authorized the Aquinnah to conduct gaming on their trust land pursuant to IGRA. Until that decision is reversed, it supersedes state law, including state contract law, and gives the Aquinnah a federal right to conduct gaming on its trust land. The Commonwealth officials named in this suit have, however, continued to insist that Aquinnah's right to game—or more accurately lack of a right to game—is governed by state law and have sought to prevent the Aquinnah exercise of its federal right, including bringing the present lawsuit, which seeks to enjoin the construction and operation of a gaming facility on Aquinnah's trust land. State officials, who have repeatedly asserted that state law prohibits gaming on Aquinnah trust land, and who have the authority and the responsibility to enforce state law, are proper targets for injunctive relief under the doctrine articulated in *Ex parte Young*, 209 U.S. 123 (1908).

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[7] The Wampanoag Tribal Council, Inc. was a non-profit corporation organized under state law and was the plaintiff in *Wampanoag Tribal Council Inc. v. Commonwealth of Massachusetts*, in which it sought to void the Commonwealth's purported acquisition of the Wampanoag's aboriginal land as inconsistent with the "Non-Intercourse Act." The Non-Intercourse Act provides that only Congress can extinguish Indians' aboriginal title to the land they occupied.

[8] Agreements pertaining to aboriginal title are unenforceable, however, without Congressional action. Since only Congress through implementing legislation could have provided the consideration the Commonwealth sought in the settlement of the land claims suit—the extinguishment of the Aquinnah's aboriginal title to a large part of Massachusetts—the MOU had no, and was intended to have no, independent effect. It was merely an outline for the proposed federal implementing legislation. Federal authority over Indian trust lands—to which the federal government holds legal title—is likewise plenary. Only Congress can authorize the removal of lands from trust status, authorize the grant of any interest in trust land, or restrict a tribe's inherent sovereignty and governmental jurisdiction over its trust land. Only Congress in legislation could, therefore, have provided the Commonwealth with any "jurisdiction" over the land that the federal government eventually took into trust for the Aquinnah after the tribe attained recognition. Neither the Aquinnah—nor, *a fortiori*, the Wampanoag Tribal Council, Inc.—had the ability to affect this result though the execution of the MOU.

DISCUSSION

The Commonwealth makes three main points in support of its motion to dismiss Aquinnah's counterclaim: the Aquinnah have failed to allege "a violation of IGRA or other federal law" (Motion at 7); the Aquinnah have failed to allege facts sufficient to support their general allegations of present and future interference (Motion at 8-9); and the Aquinnah's request for injunctive relief is insufficiently specific. (Motion at 9-10). None of these contentions have any merit.

A. Aquinnah's Complaint Alleges Interference With Its Established Federal Right To Game

The Commonwealth's assertion that Aquinnah does not allege an "ongoing violation of federal law" mis-reads the case law and contradicts its allegations in its own Complaint. Aquinnah is not seeking damages or redress for past grievances. The Tribe seeks only prospective equitable relief, which the Commonwealth concedes is available pursuant to *Ex parte Young*. The State threatens to assert state jurisdiction over Aquinnah's gaming activities, which they assert will prevent the Tribe from offering gaming on Aquinnah lands, yet the State argues in its Motion to Dismiss the Counterclaims that the Tribe has no basis to allege that State officials intend to interfere with the Tribe's gaming activities. The State's analysis is non sequitur.

A state official's conduct does not have to rise to the level of a criminal or civil violation of a federal statute to be the target of injunctive relief. It is sufficient if the state official interferes with, or can be anticipated to interfere with, a plaintiff's federal right. *Timpanogos Tribe v. Conway*, 286 F.3d 1195 (10th Cir. 2002) (injunctive relief sought to stop officials from imposing state hunting, fishing, and gathering regulations on Indian land); *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429 (6th Cir. 2000) (suit against Attorney

General of Ohio to enjoin enforcement of state laws alleged to violate plaintiff's federal constitutional rights). *See also White Earth Band of Chippewa Indians v. Cnty. of Mahnomen, Minn.,* 605 F. Supp. 2d 1034 (D. Minn. 2009). The NIGC's decision affirms Aquinnah's federal right to game under IGRA on its trust land, yet the state officers named here—who are charged with enforcing state law—have acted repeatedly in derogation of that right. In addition, they have repeatedly stated that the tribe must comply with state laws that would prohibit gaming on the Aquinnah trust lands and that, despite the NIGC's decision, the tribe may not legally offer commercial gaming on its trust land. These repeated actions and statements by persons charged with enforcing state law constitute sufficient grounds for Aquinnah to anticipate future actions contravening its federal right, including enforcement actions, and to seek injunctive protection from such future interference.

Although the recently enacted Massachusetts Expanded Gaming Act[9] permits federally-recognized tribes in the Commonwealth to negotiate a compact with the state, Governor Patrick has repeatedly refused to enter into negotiations for a compact with the Aquinnah, while negotiating, and subsequently renegotiating, a compact with the Mashpee Tribe of Wampanoag Indians. Responding to a reporter's question concerning his refusal to negotiate with the Aquinnah, the *Martha's Vineyard Times* quoted Governor Patrick as follows: "They are a federally-recognized tribe," Mr. Patrick said, referring to the Aquinnah Wampanoag. "But we have been advised that legally the Aquinnah have waived their rights to tribal gaming. That doesn't mean they can't apply for a commercial license, get a partner and, you know, compete

[9] Chapter 194 of the Acts of 2011: An Act Establishing Expanded Gaming in the Commonwealth.

for one. But that's what we've been advised as a matter of law."[10] Following the Governor's lead, Attorney General Coakley filed this lawsuit in state court, ignoring the NIGC's decision, and seeking to enjoin pursuant to state contract law Aquinnah's efforts to construct and operate its federally-authorized gaming facility. In its counterclaim, and its request for injunctive relief, Aquinnah seeks only to obtain protection from further such interference with its established federal right to conduct gaming on its trust land.

B. Aquinnah's Allegations Are Sufficient To Defeat A Motion To Dismiss Under FRCP 12(b)(1) or 12(b)(6).

The Commonwealth seeks dismissal of the Counterclaim under 12(b)(1) for failure to make sufficient allegations of fact to fulfill the *Ex parte Young* requirements (Motion at 7). The Commonwealth fails, however, to apply the right standard to its analysis, relying on the familiar standard for bringing a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6). The plausibility analysis required by *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), however, is not applicable here. Different standards apply to a motion to dismiss based on lack of subject matter jurisdiction under rule 12(b)(1) and a motion to dismiss for failure to sate a claim under Rule 12(b)(6). As the Supreme Court explained in *Bell v. Hood*, 327 U.S. 678, 683 (1946). A simple

[10] http://www.mvtimes.com/2012/04/26/governor-says-aquinnah-tribe-forfeited-rights-casino-10456/. "The governor . . . is not interested in picking winners and losers'' among the state's Indian tribes, said Patrick's spokesman, Brendan Ryan, but "it has been the Commonwealth's position that the two tribes are in fundamentally different situations.''
http://www.bostonglobe.com/metro/2012/04/25/governor-patrick-declines-request-from-aquinnah-tribe-negotiate-over-tribal-casino/rs3a0srWiYyfnUfKjB0UQK/story.html

The Patrick administration is trying to block the Wampanoag Tribe of Aquinnah from opening a small casino on tribal land on the western edge of Martha's Vineyard. This isn't a "position on the substance," Patrick told the Globe. "It's a position on what the law provides."
http://www.bostonglobe.com/opinion/2013/12/05/why-deval-patrick-casino-supporter-getting-aquinnah-wampanoags-way/GZdRL3p8T2y7QS93vPR1eJ/story.html

allegation of a violation of federal law is sufficient. The "ongoing and continuous" requirement is satisfied where there is a threat of future enforcement that may be remedied by prospective relief. *Summit Med. Assocs., P.C. v. Pryor,*180 F.3d 1326, 1338 (11th Cir. 1999).

In any event, the Aquinnah's Counterclaim sets forth sufficient facts of the named state officials' intentions to interfere with its right to game to state a claim upon which relief can be granted. It, therefore, overcomes a motion to dismiss under Fed. R. Civ. P. 12(b)(6). As the Supreme Court noted in *Iqbal*, supra, "determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense." *Id.* at 556. The Governor has repeatedly said that state laws regulating commercial gaming apply on Aquinnah trust land. The Governor has acted in the past on this erroneous legal conclusion, which directly contravenes the determination of the NIGC, the federal agency empowered by IGRA to make such determinations. The Governor has refused, for example, to engage in compact negotiations with the Aquinnah and has presumably sanctioned the present lawsuit seeking to enforce state law against the tribe. *See Summit Med. Assocs., P.C.*, 180 F.3d at 1338. *Ottawa Tribe of Okla. v. Speck*, 447 F. Supp. 2d 835 (N.D. Ohio 2006), is instructive. In *Ottawa* the Tribe advised the Director of the Ohio Department of Natural Resources that it intended to purchase fishing boats and gill nets, hiring crews and arranging docking and processing facilities to engage in commercial fishing in its treaty fishing area. That same day, the state's Attorney General issued a press release stating that he was rejecting the Ottawa Indian Tribe's claim for fishing rights. In light of this press release, the court permitted an *Ex parte Young* suit against the Attorney General. *Id.* Like the Ottawa Tribe, the Aquinnah seek to engage in necessary preparations for the exercise of their federally-authorized right to offer commercial gaming on their trust land. They seek to obtain financing, to make investments in real property

improvements, to purchase necessary equipment and to hire qualified persons to operate the facility. And, as happened with the Ottawa Tribe, state officials with the power to enforce state law have declared the proposed exercise of federal rights to be illegal under state law. The actions and statements of the Massachusetts officials named here as defendants have already interfered with Aquinnah's efforts to commence gaming pursuant to its federal authorization, which, unless overturned, is the governing law. The actions and statements previously made by the Massachusetts officials have, specifically, discouraged investors, equipment suppliers and potential employees, who have reasonably concluded that the state intends to enforce state law, including criminal penalties, against the Aquinnah if it moves forward with its gaming pursuits. By obtaining injunctive relief to prevent such actions in the future, Aquinnah seeks to reassure current and future investors, and secure some degree of certainty for itself.[11]

C. Aquinnah's Request For Injunctive Relief Is Sufficiently Specific At This Stage In The Proceeding.

The Commonwealth asserts that the Aquinnah's request for injunctive relief is insufficiently specific, but at the pleading stage, plaintiffs need not craft specific requests for injunctive relief. *See, e.g.*, *City of New York v. A–1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 353–54 (E.D.N.Y. 2007); *Bayaa v. United Airlines, Inc.*, 249 F.Supp.2d 1198, 1205 (C.D.Cal. 2002). Aquinnah's complaint makes clear that it seeks only prospective relief requiring state officials to conform their behavior to federal law, and specifically, to honor the NIGC's decision as to the validity of the Aquinnah's gaming ordinance.

[11] In any event, if this Court believes Aquinnah has failed to make sufficiently detailed allegations to support the injunctive relief it seeks here, the proper remedy is to give Aquinnah leave to amend.

The Commonwealth also contends that the Counterclaim is unnecessary. According to the Commonwealth, its request—that the Court declare that Aquinnah has no right to conduct gaming on the Settlement Lands except under Massachusetts law, and that its gaming ordinance is void because it is in conflict with the Settlement Agreement and Massachusetts law—is sufficient. It is not. The Commonwealth continues to rely solely on the Memorandum of Understanding, which Aquinnah believes does not, and cannot, control Aquinnah's activities undertaken on Indian lands. If the Court agrees with Aquinnah on the applicability of the MOU, its judgment will not provide an affirmative decision on Aquinnah's rights. A declaration that the Tribe has breached the MOU is not a declaration that the MOU trumps federal law. The Commonwealth also ignores the NIGC's decision, which Aquinnah believes controls, pursuant to the Supremacy Clause of the United States Constitution. Aquinnah seeks to enjoin continued interference with its rights under the NIGC's decision, which the Commonwealth has chosen not to challenge, and which it may not be able to challenge collaterally in this proceeding. Thus, the Counterclaim is necessary to frame the issues in this case in the manner best suited to present Aquinnah's theory of the case and achieve its desired relief.

D. The State's Position on Eleventh Amendment Immunity Contradicts Intervenor AGHCA's Position Regarding Waivers of Immunity.

Aquinnah agrees that the actions against the Commonwealth as the named-party defendant must be dismissed absent an effective waiver of sovereign immunity. Accordingly, the Tribe framed the counterclaims to include appropriate state officials in their official capacity per *Ex parte Young*, which claims are not subject to an Eleventh Amendment immunity defense. However, Intervenor AGHCA contends that the MOU constitutes an effective waiver of sovereign immunity as against the Tribe (Dkt.# 67). AGHCA contends the parties that entered into the MOU have impliedly waived immunity defenses in order to enforce the MOU's

provisions, including resolution of jurisdictional disputes. Aquinnah believes the better-reasoned position is that the MOU contains no such waivers (Dkt.#s 59 and 72). However, if AGHCA is correct that the MOU must be read to include a waiver of the Tribe's immunity, then it follows from the exact same analysis, that it must be read to include a waiver of the Commonwealth's immunity. Accordingly, if this Court denies the pending motion to dismiss filed by the Tribe against AGHCA's Complaint (Dkt.# 59), it should also deny the Commonwealth's motion to dismiss the counterclaims as against the Commonwealth as the named party defendant.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(d), Aquinnah respectfully submits that oral argument will assist the Court's resolution of these issues.

DATED: December 3, 2014

Respectfully Submitted,

/s/ Scott Crowell
SCOTT CROWELL *(pro hac vice)*
TRIBAL ADVOCACY GROUP LLP
1487 W. State Route 89A, Suite 8
Sedona, Arizona
Telephone: 425-802-5369
Facsimile: 509-290-6953

BRUCE SINGAL (BBO #464420)
ELIZABETH MCEVOY (BB) # 683191)
DONOGHUE, BARRETT & SINGAL
One Beacon Street, Suite 1320
Boston, MA 02108-3106
Telephone: 617-720-5090
Facsimile 617-720-5092

LAEL R. ECHO-HAWK (*pro hac vice)*
GARVEY SHUBERT BARER
1191 Second Ave. 18th Floor
Seattle, Washington 98101
Telephone: 206-816-1355
Facsimile: 206-414-0125

JOHN DUFFY (*pro hac vice)*
JOHN R. CASCIANO, BBO #634725
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, DC 20036
Telephone: 202-429-6268
Facsimile: 202-429-3902

Attorneys for Proposed Defendants

CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that the DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' AMENDED COUNTERCLAIMS 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: December 3, 2014

/s/ Scott Crowell
SCOTT CROWELL