

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

The COMMONWEALTH OF MASSACHUSETTS,)	
)	
<i>Plaintiff,</i>)	
)	
and)	
)	
The AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. (AGHCA) and TOWN OF AQUINNAH,)	
)	
<i>Intervenor/Plaintiffs,</i>)	
)	
v.)	
)	No: 1:13-cv-13286-FDS
The WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), et al.,)	
)	
<i>Defendants</i>)	
)	
and)	
)	
DEVAL PATRICK, in his official capacity as GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, et al.)	
)	
<i>Third-Party Defendants.</i>)	

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

The Tribe continues to fail to identify allegations supporting its claims for relief against the Commonwealth and the individual third-party defendants. The amended counterclaims are devoid of allegations that any of the individual third-party defendants are violating or will violate federal law, and the Tribe itself acknowledges that its claims against the Commonwealth are improper. Therefore, the amended counterclaims should be dismissed.

I. The Tribe Concedes Dismissal of its Claims Against the Commonwealth.

The Tribe agrees that the Commonwealth should be dismissed from the Tribe's counterclaims in the absence of its waiver of sovereign immunity. Dkt. # 87, p. 10. The Tribe does not argue that the Commonwealth has waived its sovereign immunity. Rather, it asserts that, because the Intervenor AGHCA has argued in a separate motion that the Tribe waived its sovereign immunity by entering into the MOU, any such waiver should apply equally to the Commonwealth. *Id.*, pp. 10-11. The flaw in the Tribe's argument is that any waiver of the Commonwealth's sovereign immunity would extend only to suit in state court -- where the Commonwealth initially brought this action and where it could have been made subject to related counterclaims -- and not to suit in federal court. *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."). The Tribe presents no other grounds for finding a waiver of the Commonwealth's sovereign immunity. Accordingly, the Tribe's amended counterclaims against the Commonwealth should be dismissed in accordance with the Tribe's concession.

II. The Tribe Has Failed to Identify any Conduct by any of the Individual Third-Party Defendants That Constitutes a Present or Imminent Violation of Federal Law.

The only action that the Tribe has been able to proffer in support of its counterclaims against the individual third-party defendants is the Commonwealth's filing of this case. Neither the Commonwealth nor any individually named Commonwealth official has taken any enforcement action to prevent the Tribe from proceeding with its plans to open a gaming establishment. Instead, the Commonwealth filed this case so that a court could declare the

disputed rights of the parties. It has consistently stated that it intends to comply with the rights of the parties as finally declared – an intention it expects of the Tribe as well.

The assertion that the Attorney General has subjected herself to suit merely by bringing an action for declaratory judgment in the name of the Commonwealth (*see* Dkt. # 87, p. 7) lacks merit. The Attorney General represents the Commonwealth in all suits in which it is a party. Mass. G. L. c. 12, § 3. The Tribe has identified no authority to support the proposition that the Attorney General – or any attorney representing any client, for that matter – steps into the role of all parties she represents and can be held personally responsible for the actions of her clients. The Tribe has failed to identify any facts to support an allegation that the Attorney General is violating or is likely to violate any federal law or anyone’s federal rights.

The Tribe further asserts that the Governor has refused to enter into compact negotiations with the Tribe. *See* Dkt. # 87, p. 8. However, the Tribe is not seeking to compel the Governor to enter into compact negotiations. In fact, compact negotiations pertain only to Class III gaming, *see* 25 U.S.C. § 2710(d), while the Tribe has consistently maintained that the gaming establishment it seeks to open is for Class II gaming. *See* Dkt. # 74, p. 10, ¶ 87 (“The Tribe intends to establish a Class II gaming facility[.]”). Therefore, the Tribe’s contentions regarding the Governor’s declination to enter into compact negotiations are wholly irrelevant.

Finally, the Tribe’s opposition is silent as to Massachusetts Gaming Commission Chairman Stephen Crosby and thus has conceded his dismissal as well. *See Day v. Dept. of Consumer and Regulatory Affairs*, 191 F. Supp. 2d 154, 159 (D.D.C. 2002) (“If a party fails to counter an argument that the opposing party makes in a motion, the court may treat that argument as conceded.”). The Court should therefore dismiss the Tribe’s counterclaims against Chairman Crosby without further analysis.

Respectfully submitted,

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

By and through their attorney,

MARTHA COAKLEY
ATTORNEY GENERAL

/s/ Juliana deHaan Rice

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Dated: December 10, 2014

CERTIFICATE OF SERVICE

I, Carrie Benedon, hereby certify that on this 10th day of December, 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