UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
CIVIL ACTION NO. 1:17-cv-11532-ADB

JAMES J. DECOULOS,

Plaintiff,

v.

TOWN OF AQUINNAH, the AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC., and the COMMONWEALTH OF MASSACHUSETTS,

Defendants.

TOWN OF AQUINNAH'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

I. INTRODUCTION

This memorandum supports the Town of Aquinnah's (the "Town") motion to dismiss the Amended Complaint (the "Amended Complaint") (with prejudice)(Ex. #1), brought by James J. Decoulos ("Decoulos"), under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).[1] Judgment dismissing the Amended Complaint is warranted based on the following threshold, dispositive, and jurisdictional grounds:

1.) The *Rooker-Feldman* doctrine deprives this Court of subject matter jurisdiction because the issues presented in the Amended Complaint have already been resolved between the parties by state court judgments in *Maria A. Kitras & James J. Decoulos (and others) v. Town of Aquinnah & others*, 474 Mass. 132, *cert. denied sub nom. Kitras v. Town of Aquinnah, Mass.*, 137 S. Ct. 506, 196 L. Ed. 2d 406 (2016)("*Kitras*")(Ex. #2) and *Frangos & Decoulos, Trustees*

[1] Decoulos sought to amend his complaint the day before the Town's responsive pleading was due and while the parties' scheduled Local Rule 7.1 conference was pending. The "new" allegations contained in Decoulos' Amended Complaint are almost entirely lifted from an affidavit he filed in related litigation in the Land Court in June of 2017 and, in addition to providing no "new" basis for relief, should have been included in the original Verified Complaint if legally significant. (The 2017 Decoulos Affidavit filed in the Land Court is Exhibit # 19.)

of the Brutus Realty Trust v. Town of Aquinnah et al., Land Court Misc. Case No. 299511 (the "*Brutus Case*")(Ex. #3);[2]

2.) The Commonwealth of Massachusetts (the "Commonwealth"), a named party, enjoys sovereign immunity from claims in Federal Court under the Eleventh Amendment to the United States Constitution, a conclusion which Judge Wolf reached in 2003 when he dismissed *nearly identical claims* concerning the *same parcel* brought by a trust in which Decoulos held an interest. *See Frangos, as Trustee of the Brutus Realty Trust v. Town of Aquinnah*, C.A. No. 02-11159-MLW, slip op. (August 22, 2003)(the "*Frangos Case*")(Ex. #6);[3] and

3.) Claim and issue preclusion bar this action because various state and federal lawsuits brought by Decoulos and his wife, Maria A. Kitras ("Kitras"), or trusts in which Decoulos (and Kitras) hold interests, have already resolved these claims, or presented opportunities where these claims could (or should) have been raised, including the claim that the Massachusetts Indian Claims Settlement Act of 1987, 25 U.S.C. § 1771 (the "Settlement Act") operates to "clear" title to Decoulos' land. *See* the *2003 Federal Case;* the *Frangos Case;* the *Brutus Case;* and *Kitras.*

In addition to those jurisdictional and threshold bars, the Amended Complaint is fatally deficient on its merits. As to Count One, the Settlement Act does not afford third-parties, such as Decoulos, private rights of action to sue the Town, as Judge Gorton ruled in the *2003 Federal Case. See id.* at 6 ("[Section] 1771 . . . . does not provide a private cause of action to third parties whose property has some relationship to the Wampanoag Lands."). As to the "takings" claim, neither the Town (nor any of the other defendants) has done anything to "take" Decoulos' property. Instead, in *Kitras*, the Town merely defended itself in a suit brought against it by Kitras and Decoulos. And, as the Supreme Judicial Court ruled in *Kitras*, Decoulos and Kitras

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[2] Remarkably, *Kitras*, first filed in 1997, has already been the basis of a *Rooker-Feldman* doctrine dismissal of federal court claims brought by Decoulos. In 2004, Judge Gorton of this Court dismissed, on the Town's motion, identical claims for relief brought by Decoulos and Kitras under the Massachusetts Indian Claims Settlement Act of 1987, 25 U.S.C. § 1771 regarding other parcels of land they own in Aquinnah. *See Kitras and Decoulos v. Town of Aquinnah (and others),* C.A. No. 03-11590-NMG (slip op. September 30, 2004)(the "*2003 Federal Case*")(Ex. #4)("This Court simply does not have jurisdiction to invalidate civil state court judgments."). *Id.* at 7 (Dkt. Entry No. 55). The First Circuit dismissed Decoulos' and Kitras' effort to appeal because they repeatedly failed to comply with orders requiring them to obtain counsel. *See* United States Court of Appeals for the First Circuit No. 05-2282, judgment entered on May 27, 2004(Ex. #5). Thirteen years later, after the Supreme Judicial Court fully resolved the *Kitras* case – and the Unites States Supreme Court rejected Decoulos' petition for a writ of certiorari – Decoulos again seeks to use this Court to challenge the same unfavorable, and now final, state court judgment collaterally.

[3] The First Circuit dismissed Frangos' appeal because he failed to file an opening brief. *See Frangos v. Town of Aquinnah,* No. 04-1243, judgment dismissing appeal entered on May 27, 2004. (Ex. #7).

have **no** easement rights because the commissioners assigned by the Probate Court in the 1870's to partition the common lands in the Town did not *reserve* any easement rights. Decoulos brought a lawsuit and lost - there has been no "condemnation" or taking - direct or inverse. Count Three – seeking a "declaration" that the Town violated Decoulos' "due process rights" – is similarly meritless as it merely repackages his other claims in the form of "constitutional violations" without any additional basis or statutory grounds to seek relief.[4] [5]

II. FACTUAL BACKGROUND

The following facts are based on the Complaint, and are drawn from pleadings and court decisions in related cases. [6]

(i.) The Town and the "Set Off" lands.

1. The Town is one of six towns on the Island of Martha's Vineyard (Dukes County). The Town changed its name from "Gay Head" to Aquinnah in 1997. The Town has been a home to the Tribe since approximately the seventeenth century. A guardianship system managed the Native American tribes in the Commonwealth until the mid- nineteenth century. *Kitras*, 474 Mass. at 135.

2. The Legislature established the district of Gay Head in 1862, and "appointed

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[4] Finally, on August 7, 2017, nineteen days before filing this action, Decoulos brought a nearly identical complaint in the Massachusetts Land Court (the *"2017 Land Court Case")*(Ex. #8). That case seeks similar declaratory relief and similarly asserts a "taking" based on *Kitras*. Because Decoulos has now asked two courts, one federal and one state, to resolve his land "claims", prudential concerns further weigh in favor of dismissal.

[5] As the myriad jurisdictional and threshold bars make clear, this case is frivolous, is brought without a good-faith basis in law or fact, and warrants an award of costs and fees under Fed. R. Civ. P. 11. Decoulos has brought in excess of thirty cases against the Town and others regarding his Aquinnah properties (both with and without counsel), and has been sanctioned for representing trusts and other parties without being a member of the bar. He understands the costs, and the risks, of litigation. The Town should not be required to spend more of its taxpayers' funds in defending against this case, and this Court should not be tasked with adjudicating these meritless claims, which are barred by the multiple prior rulings and decisions noted above, as a matter of law. The Town reserves all rights to seek sanctions, including attorneys' fees and costs, from Decoulos, by appropriate motion.

[6] As the Town has raised jurisdictional and related questions regarding the propriety of this forum under Rule 12(b)(1), it may point to other sources of facts for purposes of developing the legal arguments advanced in its motion to dismiss and this Court may take judicial notice of proceedings in other courts. *See infra* at 12.

Charles Marston to determine the boundary lines of the land held in severalty by Tribe members and the boundary line "between the common lands . . . and the individual owners adjoining said common lands, and report the details and results of his efforts." *Id.* "The Legislature simultaneously established a process by which the members of the Tribe could choose to partition the common land." *Id.*

3. "In September, 1870, seventeen Gay Head residents petitioned a probate judge in Dukes County to divide the common land for the residents to hold in severalty. . . . Theodore Mayhew, a probate judge in Dukes County . . . [appointed] . . . Joseph L. and Richard L. Pease . . . . [as] commissioners[, and] . . . Richard Pease also was assigned to determine the boundary lines between the common land and the land held in severalty. . . . The land was divided into more than 500 lots. Not one lot included an express easement of access. As a result, the majority of the lots divided from the common land were landlocked." *Id.* at 137-38.

(ii.) Decoulos' properties and the Town's parcel.

4. Decoulos, individually, claims ownership to one-half of (setoff) Lot 557.[7] (Ex. #1 ¶ 5). Decoulos acquired this interest on May 11, 2017, by a conveyance from himself as the sole trustee of the Brutus Realty Trust (the "Brutus Trust"). Brutus acquired its interest in Lot 557 on July 29, 1998. (Ex. #1 ¶57). At the time of the purchase, the late Anthony C. Frangos ("Frangos") was appointed as the sole trustee. (Ex. #1 ¶1). Decoulos became a co-trustee on May 6, 2004. (Ex. #1 ¶2). After Frangos passed away on December 2, 2008, Decoulos became (for all intents and purposes) the sole trustee (although he did not record a death certificate until May 11, 2017). (Ex. #9 – Land Court Order dated 2-14-17, at 1 n.1).

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[7] There is no evidence that Decoulos or Frangos is a Native American, or that a Native American ever owned Lot 557.

5. In an affidavit filed in the *Brutus Case*, on April 20, 2011, Decoulos asserted, under oath, that "my wife Maria A. Kitras and I . . . . hold beneficial interests in Brutus Realty Trust, Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust in the Town of Aquinnah." (Ex. # 10 ¶2). Decoulos has held an interest in Lot 557 since 1998.

6. Lot 557 abuts the ocean, is not "buildable" for multiple reasons, and has no deeded right to reach Moshup Trail. The Town owns Lot 556, which stands between Lot 557 and Moshup Trail, to the north, the nearest public way. (Ex. #6, *Frangos*, slip op. at 1). "The Town's ownership of [Lot 557] is subject to the terms of a Self-Help Program Agreement between the Town and the Commonwealth [, and the parcel] is dedicated for conservation purposes; must be open to the general public; and cannot be used for non-conservation purposes absent a two-thirds vote of the General Court as well as approval of the state Secretary of Environmental Affairs." *Id.* at 10.

7. The various other trusts noted in par. 5 in which Decoulos and Kitras serve as trustees and hold beneficial interests are situated on the opposite side, or to the north, of Moshup Trail.

8. In the *2003 Federal Case* (before Judge Gorton), Decoulos filed an affidavit dated January 2, 2004 asserting that: "Maria and I hold a majority interest in Bear Realty Trust. . . . Maria and I hold a 90% beneficial interest in Bear II. . . . Maria and I currently hold all the beneficial interest in Gorda." (Ex. #11 ¶¶ 7-13).[8] (All of the lots owned or under the control and supervision of Decoulos were created by the land setoff analyzed in *Kitras*.

(iii.) Background on Prior Litigation involving the parties.

a. The *Kitras* Litigation.

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[8] In a 2008 deposition under oath in *Kitras*, Decoulos testified that he and Kitras are beneficial owners in all of these trusts. (Ex. #12).

9. In 1997, Decoulos and Kitras filed *Kitras* in the Land Court, a case that spanned twenty years, including two separate appeals, and involved as many as thirty (30) parties. (Ex. #13). The history is set out in *Kitras*, 474 Mass. at 133-135, and *Kitras v. Aquinnah,* 64 Mass. App. Ct. 285 (2005)("*Kitras I*")(Ex. #14). In a nutshell, Decoulos and Kitras, as the trustees of the Bear, Bear II, and Gorda parcels (which collectively total almost 17 acres), sought a declaratory judgment that "easements by necessity were created [benefitting their lots] as a result of the 1878 partition of Native American common land in the Town . . . ." *Id.* at 133. In 2001, the Land Court dismissed the case, "concluding that the United States was an indispensable party because any easement by necessity found would burden the tribal lands held in trust by the United States." *Id.* at 133.

10. The Massachusetts Appeals Court reversed in *Kitras I,* as follows:

> "The Appeals Court concluded that the United States was not an indispensable party because the lands in question were subject to a 1983 settlement agreement which provided that any land owned by the [Tribe], a federally recognized Native American Tribe, in the town of Aquinnah or in the Commonwealth, would be subject to the civil jurisdiction of the Commonwealth. The Appeals Court reasoned that because the Tribe had waived its sovereign immunity as to these lands in the 1983 settlement agreement,[9] the need to join the United States as a party had been eliminated. Ultimately, the Appeals Court reversed and remanded the matter to the Land Court to determine whether there was an intent to create easements affecting lots 189 and above and, if so, the scope of such easements."

Kitras, 474 Mass. at 134.

11. The Appeals Court, in reaching the conclusion that the Tribe may be joined as a party, explored various provisions of the Settlement Act as follows:

"[W]e express no opinion as to what effect, if any, the Tribe's settlement agreement,

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[9] In 2004, the SJC ruled that the Tribe had waived its sovereign immunity regarding municipal zoning enforcement on a portion of the Tribe's lands known as the Cook Lands. *Building Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1 (2004).

> implementing State and Federal legislation[10], or subsequent conveyances may have had on the continuing status of any claimed easements burdening the Settlement Lands."

Kitras I at 296 n. 8 (emphasis added.) Ultimately, the Appeals Court remanded the case to the Land Court for "thoughtful consideration" as to whether "an easement by necessity for any given lot carved out of the common land either does for does not exist" *Id.* at 300.

b. Decoulos brings two separate Federal Actions.

12. While *Kitras* worked its way through the state court system, Decoulos (or trusts in which he held interests) brought two related federal cases, both of which asserted the claims he now advances. In 2002, Frangos (as trustee of the Brutus Trust, which then controlled the specific lot in issue here),[11] commenced the *Frangos Case* against the Town and a private landowner in this Court seeking to establish an easement by necessity over the Town-owned Lot 556)(Ex. #15). Frangos/Decoulos contended that the Town had "taken" their property by failing to grant it an easement. The case was assigned to Judge Wolf, and the Town moved to dismiss. In a Memorandum and Order(Ex. #6), Judge Wolf ruled that the "Commonwealth is a necessary party because the Commonwealth has a substantial interest in the preservation of [Lot 556] in its natural state free from an easement that would allow [Brutus] to pass an[d] repass with vehicles (slip op. at 11]" because "[t]he Town's ownership of [its] lot . . . is subject to the terms of a Self-Help Program Agreement between the Town and the Commonwealth," *id.* at 10. Since "[t]he Commonwealth cannot be joined without violating the Eleventh Amendment's sovereign immunity bar," *id.* at 11, the easement count

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[10] This is the Settlement Act under which Decoulos claims he has a "new" basis to sue the Town and the Commonwealth.

[11] As explained, *see supra* ¶ 5, Decoulos was a beneficiary of the Brutus Trust when it acquired Lot 557 in 1998. He became sole trustee when Frangos passed away in December of 2008. In May of 2017, in his capacity as the sole trustee and in an apparent effort to circumvent orders from the Land Court, Decoulos transferred Lot 557 from the Brutus Trust to himself.

was dismissed. As to the Brutus Trust's "takings" claim, Judge Wolf dismissed that claim as well because Brutus had failed "to allege that [it] had availed [itself] of [the Massachusetts inverse condemnation statute]" but noted that it had the right to pursue state court remedies. *Id.* at 13.

13. Undeterred, on August 25, 2003, Kitras and Decoulos brought another action in this Court, the *2003 Federal Case*, and asserted multiple claims against the Town and others on behalf of their other Aquinnah properties. (Ex. #16). The gravamen of that complaint was that the Land Court's decisions in *Kitras* "violate 25 U.S.C. § 1771 [the Settlement Act] by clouding the title to their land . . . ." *Id.* Count One of Kitras' and Decoulos' complaint claimed a "taking", and Count Two claimed a "deprivation of rights" under the Fifth and Fourteenth Amendments of the Constitution (as well as 42 U.S.C. § 1983). *Id.* While Kitras and Decoulos chose not to include Lot 557 in that case, they raised essentially identical claims as they do here.

14. The Town moved to dismiss. On September 30, 2004, Judge Gorton issued a Memorandum and Order granting the Town's motion, and an order of dismissal entered on July 19, 2005. Applying the *Rooker-Feldman* doctrine, Judge Gorton ruled:

> "Counts I and II seek federal review of the actions of the Massachusetts Land Court. This Court simply does not have jurisdiction to invalidate state civil court judgments. Counts I and II are 'inextricably intertwined' with the previous state court action because they seek direct review of state court claims."

(Ex. #4)(slip op. at 7-8.).

15. In the context of his analysis of federal court jurisdiction, Judge Gorton rejected Decoulos' substantive argument under the Settlement Act – the same one he offers up in this case for the third time. Judge Gorton held:

> "Plaintiffs' argument regarding the Supremacy Clause and 25 U.S.C. §1771 is

> unsupportable. The purpose of the [Settlement Act] was to remove all clouds on titles resulting from tribal land claims in Aquinnah (then Gay Head). The [Settlement] Act does not provide a private cause of action to third parties whose property has some relationship to the Wampanoag lands. As such, it cannot provide the plaintiffs with a separate cause of action in this matter."

Id. at 6 (emphasis added.)

16. Judge Gorton also dismissed the civil rights conspiracy claim. The Court of Appeals entered a judgement dismissing the case on March 16, 2006.

c. Decoulos sues in Land Court regarding Lot 557 – the parcel at issue here.

17. In the meantime, in June of 2004, Decoulos and Frangos filed the *Brutus Case* in the Land Court, which contained three counts: easement by necessity (to reach Lot 557 over Town-owned Lot 556); a "property takings" claim under the Massachusetts Declaration of Rights; and a "property takings" claim under the Fifth and Fourteenth Amendments to the United States Constitution.[12] The case languished for years. After the defendants filed dispositive motions in 2011, the Land Court (Sands, J.) stayed the matter by order dated August 17, 2011, "until final disposition of the Kittras [sic][case], with all appeal periods having expired." Thereafter, the parties jointly filed documents in 2012 and 2015 noting that this matter "was stayed pending a resolution in Kitras v. Town of Aquinnah, 18 LCR 424 (August 12, 2010), reversed, 87 Mass. App. Ct. 10, further review granted, 471 Mass. 1108 (2015), which raises issues substantially the same as those raised in this action." Decoulos did not object and agreed with those filings.[13]

18. The SJC decided *Kitras* on April 19, 2016, "conclud[ing] that the plaintiffs failed to meet their burden of establishing that the commissioners intended to create easements by

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[12] Count Three in the *Brutus Case* – filed in 2004 – is almost word-for-word the claim Decoulos "added" in Count Three of his Amended Complaint (here) on September 21, 2017.

[13] *See* Order dated February 14, 2011 (Ex. #9).

necessity." 474 Mass. at 146. The SJC conclusively held:

> "After analyzing the circumstances surrounding the 1878 partition and the information known to the commissioners at the time of the partition, we conclude that at that time the parties did not intend to create easements, and that therefore the defendants presented sufficient evidence to rebut the presumption. . . .
>
> [W]e do not glean from the record the Legislature's intention to create access rights for the purpose of dividing the common lands into salable property. . . . The Legislature merely gave the Tribe the authority to choose to partition their common land . . . . [and] it was the commissioners who carried out the division of the common lands with input from the Tribe. . . .
>
> We infer that the commissioners . . . determined that it was not necessary to include access rights for the partitioned lots."

Id. at 207-08.

19. Notably, the SJC addressed the issue of whether the Settlement Act, enacted in 1983, had an impact on the plaintiffs' titles, and concluded that it did not. The SJC reasoned that, when analyzing easement by necessity claims, courts "look to the condition and circumstances at the time of the partition and not subsequent events." *Id.* at 143. The SJC held:

> "In 1987, aboriginal title was extinguished retroactive to the date of transfer by a member of the Tribe. 25 U.S.C. § 1771b(b) (2012). Title 25 U.S.C. § 1771 (2012) was passed in response to the 1983 settlement when the Tribe agreed to extinguish all aboriginal claims. See *Building Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.,* 443 Mass. 1, 3–7, 818 N.E.2d 1040 (2004). Subsequent events that render a lot landlocked do not give rise to an easement by necessity. See *New England Continental Media, Inc. v. Milton,* 32 Mass. App. Ct. 374, 378, 588 N.E.2d 1382 (1992); *Swartz v. Sinnot,* 6 Mass.App.Ct. 838, 838, 372 N.E.2d 282 (1978). The necessity must have existed at the time of the division. *Viall v. Carpenter,* 80 Mass. 126, 14 Gray 126, 127 (1859)."

Kitras, 474 Mass. at 143 n.18.

20. Kitras and Decoulos filed a petition for a writ of certiorari to the United States Supreme Court on July 16, 2016, seeking review of the SJC's decision. (See Ex. #17 (dockets)).

21. At a status conference held on September 6, 2016, in the *Brutus Case*, the defendants requested that the matter continue to be stayed until resolution of the plaintiffs' petition for a writ of certiorari in *Kitras*. Decoulos, representing himself, "[i]nstead requested that the court enter judgment immediately based on the holding in Kitras, notwithstanding the fact that Kitras [was] potentially subject to reversal." The court (Sands, J.) deferred action on that request.[14]

22. The Supreme Court denied the Kitras and Decoulos petition for a writ of certiorari on September 15, 2016.

23. Thereafter, Decoulos, acting *pro se*, filed a motion for entry of judgment in the *Brutus Case*. In an order dated December 14, 2016, the court (Sands, J.) directed Decoulos to retain counsel to represent the Brutus Trust in the action, stating that "[i]n the event that counsel has not filed an appearance on behalf of the Trust within such thirty days, this case will be dismissed, with prejudice." After a status conference held on January 10, 2017, at which no representative of the Trust appeared, the court (Sands, J.) issued a 15 day nisi order, requiring that the plaintiff show good cause for its failure to appear at the status conference, in the absence of which the complaint would be dismissed on January 27, 2017. Decoulos appealed to a single justice from that order, which was denied. (*See* Exs. #'s 9 & 18).

24. On January 27, 2017, the court (Sands, J.) issued a judgment of dismissal, with prejudice, in the *Brutus Case*.[15] (Ex. #9).

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[14] These orders are not attached, but the facts cannot be disputed.

[15] Decoulos filed two motions for relief from that judgment, which were denied by the court (Sands, J.) by orders dated February 14, 2017 and February 24, 2017. Decoulos filed a notice of appeal from the judgment dismissing the *Brutus Case*. Ultimately, because of his failure to retain counsel to represent the Brutus Trust, the lower court's denial of his motion to substitute parties (Decoulos apparently having subsequently transferred the real estate out of trust and to himself individually), and the Appeals Court's June 27, 2017 order that the Trust proceed

25. On August 7, 2017 – nineteen days before filing this case – Decoulos filed an action in the Land Court with almost identical claims presented here and in the *Brutus Case*. There, Decoulos claims that, as owner of Lot 557, he enjoys an easement by necessity over Town property (Count One) and, in Count Two, asserts a "property taking". (Ex. #8).

III. ARGUMENT.

A. Standard of Review

"Challenges to the Court's subject matter jurisdiction, such as assertions of sovereign immunity, are brought under Federal Rule of Civil Procedure 12(b)(1)." *Harihar v. Bank Nat'l Assn.*, 2017 WL 1227924 (D. Mass. March 3, 2017), at *5 (citing *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 362–63 (1st Cir. 2001))("*Harihar*"). A motion to dismiss under Rule 12(b)(6) should be allowed if the plaintiff "fails to state a claim upon which relief can be granted." In order "to survive a motion to dismiss, a complaint must allege 'a plausible entitlement to relief." *Rodriguez–Ortiz v. Margo Caribe, Inc.*, 490 F.3d 92, 95 (1st Cir.2007). In evaluating a Rule 12(b)(6) motion, a district court may consider "documents incorporated by reference in [the complaint], matters of public record, and other matters susceptible to judicial notice." *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 20 (1st Cir. 2003).

B. Governing Law.

1. Rooker-Feldman.

The *Rooker-Feldman* doctrine precludes a Federal Court from exercising jurisdiction over a challenge to a state court judgment to which the challenger was a party. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005); *Puerto Ricans for P.R. Party v. Dalmau,* 544 F.3d 58, 68 (1st Cir. 2008). Only the Supreme Court of the United States may

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with its appeal with a licensed attorney, Decoulos filed a motion to dismiss the Trust's appeal. The Land Court judgment of dismissal is final. (The dockets from the Appeals Court are attached collectively as Ex. #18).

invalidate state court civil judgments. *See Exxon Mobil Corp.*, 544 U.S. at 292; *see also Miller v. Nichols*, 586 F.3d 53, 59 (1st Cir. 2009). Application of the *Rooker-Feldman* doctrine by a Federal Court "does not depend on what issues were actually litigated in the state court." *Maymó–Meléndez v. Álvarez–Ramírez,* 364 F.3d 27, 33 (1st Cir. 2004). Rather, *Rooker-Feldman* bars jurisdiction whenever "parties who lost in state court . . . seek[ ] review and rejection of that judgment in federal court." *Puerto Ricans for P.R. Party,* 544 F.3d at 68 (quotation omitted).

2. Claim/Issue Preclusion.

There are two-levels of claim and issue preclusion operating here: the preclusive effect of the judgment in the *2003 Federal Case* and the preclusive effect of the state court judgments. When the preclusive effect of a federal judgment by a court exercising federal question jurisdiction is at issue, the court applies federal law of claim preclusion. *See Maher v. GSI Lumonics, Inc.*, 433 F.3d 123, 126 (1st Cir. 2005). "Under the federal law of claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were raised or could have been raised in that action." *Hatch v. Trail King Indus., Inc.*, 699 F.3d 38, 45 (1st Cir. 2012)(quotation omitted). "Claim preclusion applies if (1) the earlier suit resulted in a judgment on the merits, (2) the causes of action asserted in the earlier and later suits are sufficiently identical or related, and (3) the parties in the two suits are sufficiently identical or closely related." *Airframe Sys., Inc. v. Raytheon Co.,* 601 F.3d 9, 14 (1st Cir. 2010).

"Under the full faith and credit statute, 28 U.S.C. § 1738, a judgment rendered in a state court is entitled to the same preclusive effect in federal court as it would be given within the state in which it was rendered." *In re Sonus Networks, Inc.,* 499 F.3d 47, 56 (1st Cir. 2007).

Therefore, Massachusetts' law determines the preclusive effect of the judgments entered in the *Kitras* and *Brutus cases. Id.*[16]

C. The Complaint Should Be Dismissed.

1. Rooker-Feldman.

Application of the *Rooker-Feldman* doctrine is straightforward here. Decoulos lost *Kitras*, a twenty year effort in state court to establish easement rights over Town property under various theories, including that the Settlement Act afforded him rights as a third-party. because "[t]his Court simply does not have jurisdiction to invalidate civil state court judgments." *2003 Federal Case,* at 7 (Dkt. Entry No. 55). Now that the SJC has conclusively held that Decoulos has no easement rights based on the 1878 Partition – and that the Settlement Act has no bearing on that conclusion – and now that the Supreme Court has refused to review the SJC's decision – there is absolutely no basis for Decoulos to escape the *Rooker-Feldman* jurisdictional bar. Further, the dismissal with prejudice of Decoulos' three counts – including deprivation of Federal Constitutional Rights in the *Brutus Case* – establish that the his claims have been considered in state court. This Court does not have subject matter jurisdiction.

2. Preclusion.

a. Count One – the Settlement Act.

Judge Gorton explicitly ruled that the Settlement Act afforded Decoulos no private right of action to claim that it clouded his title and that any claim under the Settlement Act was

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[16] In Massachusetts, res judicata encompasses both claim preclusion and issue preclusion. *Kobrin v. Board of Registration in Med.*, 444 Mass. 837, 832 N.E.2d 628, 634 (2005)). Claim preclusion prevents the re-litigation of all claims that a "litigant had the opportunity and incentive to fully litigate . . . in an earlier action." *Id.* Massachusetts evaluates three elements under the doctrine of claim preclusion: "(1) the identity or privity of the parties to the present and prior actions; (2) identity of the cause[s] of action; and (3) a prior final judgment on the merits." *McDonough v. City of Quincy*, 452 F.3d 8, 16 (1st Cir. 2006). When assessing the second element of claim preclusion, Massachusetts courts find "[c]auses of action [to be] identical if they 'derive [ ] from the same transaction or series of connected transactions. " *Id.*

"inextricably intertwined" with his claims, as a Trustee, in the *Kitras* case – even before that case had reached the SJC. The elements of *res judicata* or claim/issue preclusion are satisfied here, under both Federal and State law precedents. Since the SJC ruled in the *Kitras* case that the Settlement Act has no impact on land use rights created under the nineteenth century setoff in Aquinnah – and since Decoulos/Frangos and the Brutus Trust are bound by the dismissal in the *Brutus case* where the identical easement claim was raised – Decoulos is barred from re-litigating the adverse decisions rendered in the *2003 Federal case* and the two final state court judgments in *Kitras* and the *Brutus case*.

While neither Decoulos individually nor the owners of Lot 557 were parties to either the *2003 Federal case* or *Kitras*, there can be no doubt that Decoulos, as a named plaintiff in the *Kitras* case with **both** legal and beneficial interests in all of the properties at issue there - and as a named plaintiff in the *Brutus Case* – enjoyed, and enjoys, sufficient privity, or identity of interests, with the plaintiffs in the *2003 Federal Case* and in *Kitras* to be bound under claim preclusion principles. Decoulos, in the *2003 Federal Case*, as noted in the fact section, swore that he and his wife are beneficiaries of the Bear, Bear II, and Gorda trusts, and has testified to those facts under oath. Decoulos, in his capacity as a trustee of various parcels, as well as being a beneficiary, asserted an identical claim under the Settlement Act in the *2003 Federal Case* and had the opportunity to do so in both the *Kitras* and *Brutus Cases*, which concerned claims similar to those he asserts here. Even a cursory comparison of the allegations in the *2003 Federal Case* and in the instant action shows that Decoulos' claims are identical. Indeed, a significant amount of the text appears simply to be cut and pasted between the two complaints. The claims are the

same and the parties have privity and identity of interest for purposes of claim preclusion, as a matter of state and Federal law.[17]

Further, the Land Court treated the claims in the *Brutus Case*, and the parties (including Decoulos as trustee) as if they were governed by the *Kitras* case. As noted, the Land Court stayed, without objection from Decoulos, the *Brutus Case* litigation pending the outcome of the *Kitras* for the obvious reason that the SJC's decision would control whether Lot 557 enjoyed any implied rights of access over adjoining parcels under the 1870's partition. Had Decoulos or Brutus objected to the stay – or had Decoulos wished to show that Lot 557 is *not* somehow governed by the *Kitras* decision – then he, as trustee or individually, was required to litigate that claim or issue in the Land Court to a conclusion.[18] When Decoulos failed to proceed with litigating the *Brutus Case* after the Supreme Court had denied his petition for a writ of certiorari in *Kitras*, Judge Sands dismissed the *Brutus Case*, with prejudice (and, indeed, found Decoulos had acted in bad faith in causing delay and ignoring court orders). Decoulos cannot now have a *third-bite* at the apple in Federal Court and seek to re-litigate claims or issues that he advanced in the *2003 Federal Case*, *Kitras*, or had the opportunity to advance in the *Brutus Case*.

Decoulos, and the related trusts in which he is either a trustee or a beneficiary, had both the incentive and opportunity to raise the claim – or the issue – on which he has founded this action in the *Brutus Case*: namely, that the Settlement Act somehow afforded him rights which

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[17] Decoulos is also estopped on whether the jurisdictional defense that the *Rooker-Feldman* doctrine bars re-litigating the impact of the Settlement Agreement on his title, as Judge Gorton ruled against him, as a beneficiary and as a trustee of three other trusts, on that issue. In addition to "claim preclusion", Decoulos is barred under issue preclusion here as well.

[18] Given that Frangos passed away in 2008, Decoulos was both the sole trustee and a beneficiary.

the SJC determined do not exist under Massachusetts law.[19] Since the judgments in the *Kitras Case* and the *Brutus Case* are final – and since Decoulos in a related capacity explicitly raised the impact of the Settlement Act on easement rights in Aquinnah in *Kitras* and had the opportunity to raise the question in the *Brutus Case* – 28 U.S.C. § 1738, and principles of Massachusetts estoppel law, bar this action.

b. The Takings Claim.

Similar principles bar Decoulos' "takings" claim -- a claim which he already raised regarding Lot 557 in the *Brutus Case*. As noted, Judge Gorton also dismissed a takings claim tied to the Settlement Act regarding Decoulos' other properties in the *2003 Federal Case*. While Decoulos is now the record owner of Lot 557, during the state court litigation he was a trustee and a beneficiary of the Brutus Trust. The distinction is one of form, not substance. The parties, the claim, and the relief sought are identical. The claim is, therefore, conclusively barred by principles of claim preclusion – under state and Federal law.

c. Deprivation of Rights.

Decoulos brought an identical claim in the *Brutus Case* (Count Three). He also sued for deprivation of the Federal Constitutional rights in the *2003 Federal Case* (Count Two). The claim is barred.

3. The Eleventh Amendment bars this action in Federal Court.

The Eleventh Amendment provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced . . . against any one of the United

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[19] In 2005, the Appeals Court, as noted, looked to the Settlement Act in analyzing whether the Tribe was a necessary party and whether its purported immunity required dismissal of the *Kitras* plaintiffs' claims. As noted, the Land Court stayed the *Brutus* litigation in 2011 and it did not dismiss the case until 2017. The SJC considered whether the Settlement Act altered its analysis of Massachusetts real property law and concluded that it did not. Decoulos had ample time and opportunity to raise the questions he has presented here in the *Brutus Case.*

States by Citizens of another State . . . ." . It is well established that any federal court lawsuit "in which the State or one of its agencies is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Pennhurst,* 465 U.S. 89, 100 (1984); *see also O'Neill v. Baker*, 210 F.3d 41, 47 (1st Cir. 2000).[20]

There are two exceptions to a State's Eleventh Amendment immunity: first, "Congress may abrogate a State's immunity by expressly authorizing such a suit pursuant to a valid exercise of power," and second, "a State may waive its sovereign immunity by consenting to be sued in federal court." *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 49 (1st Cir. 2003). Neither exception applies here. The Settlement Act did not abrogate the Commonwealth's immunity in these circumstances, and the Commonwealth has not waived its sovereign immunity. In addition, Judge Wolf, in the prior Federal case against the Town, found that "this action cannot proceed without the Commonwealth." Slip Op., at 11. Judge Wolf then concluded that "[t]he absence of the Commonwealth would unavoidably prejudice the Town because if the Town were required to allow an easement over its lot, the Commonwealth would require the Town to pay monetary damages or dedicate other Town land for conservation purposes." *Id.* Judge Wolf dismissed Brutus' easement claims "because in equity and good conscience this action cannot proceed in the absence of a party this court cannot bring before it, the Commonwealth of Massachusetts." *Id.* at 11. The action cannot proceed.

4. Decoulos' claims lack any substance on the merits.

a. **The Declaratory Judgment Claim.**

As Judge Gorton ruled regarding Decoulos' other properties, the Settlement Act provides no basis for Decoulos to claim easement rights, to assert a cloud on his title, or to seek relief.

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[20] *See Greenless v. Almond*, 277 F.3d 601, 608 (1st Cir.2002) (where there is a "merits issue" that is dispositive, the "wiser approach" is to avoid reaching the constitutional issue of Eleventh Amendment immunity).

Congress enacted the Settlement Act to consummate resolution of a longstanding dispute among the Town, the Commonwealth, and the Tribe, and to effectuate a Settlement Agreement among those parties. The Legislation affords no private right of action to a non-party to that Agreement, such as Decoulos. In addition to being barred by claim and/or issue preclusion based on the SJC's decision in the *Kitras* – and the Supreme Court's denial of Decoulos' petition for a writ of certiorari – the claim has absolutely no legal basis.

b. **The Takings/Deprivation of Rights Claims.**

"The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). "Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Id.* (citing *Penn Central Transp. Co. v. City New York,* 438 U.S. 104, 124 (1978)). The operative allegations on which Decoulos rests his takings claims are set out in ¶¶ 74-80 of the Amended Complaint. He asserts that he acquired his lands between 1993 and 1997 without "the benefit of an express easement of access" (¶ 74); that the SJC determined there were no access easements benefitting his lots in *Kitras* (¶ 76); that the defendants "joined in opposing access to [his] lots" (¶ 77); and that "the presumptions and inferences by the SJC in Kitras have caused a complete destruction of [his] property rights." (¶ 80). Based on those facts, Decoulos alleges in ¶ 86 that "[t]he actions by the defendants to allege a tribal custom of access that was in existence in the [sic] 1878 has made the lots partitioned from the common land inalienable . . . and as a result

thereof, [his] property has been inversely condemned . . . ." Notably, there are no other allegations as to what and how the Town actually condemned Lot 557 or other lands under Decoulos' control.

The Town has obviously not "occupied" Lot 557. Further, there is no "regulation" at issue here: the Town has not denied Decoulos a permit and has not enacted a regulation, by-law, or rule limiting his property rights. Decoulos made the Town a party in *Kitras* and claimed that he – and others – enjoyed easement rights over Town parcels. The Town simply took the reasonable position in court that Decoulos and Kitras could not establish that the 1870's partition afforded them implied easement rights in various locations throughout Town – a position with which the SJC concurred and which the Supreme Court refused to review. Perhaps more fundamentally, the Amended Complaint is devoid of any allegations describing Town action which could be construed as a "taking" of Decoulos' property. The commissioners' decision in 1878 **not** to create easement rights for the partitioned lots *is* the decision with which Decoulos takes issue – but that decision *has nothing to do with the Town* or action it took. Nor could any action by the Town after the 1870's partition – and Decoulos cites none – effect a "taking" of property rights, or deprived him of his Fifth or Fourteenth Amendment rights, because the Courts have conclusively determined that Decoulos *had no rights in the first place.* Decoulos' "takings" claim collapses under its own weight.[21]

IV. CONCLUSION

For all of the foregoing reasons, the Town respectfully submits that the Court should dismiss the Complaint with prejudice.

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21 Rule 12(b)(9) the Massachusetts Rules of Civil Procedure provides that a court should dismiss an action if there is a "prior pending [one] in Massachusetts." There is no direct analogue in the Federal rules. However, given that Decoulos is forum shopping, and given that he filed his 2017 Land Court action first, this Court should dismiss this action should it elect not to reach any of the arguments the Town has advanced.

TOWN OF AQUINNAH

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Dated: October 3, 2017

CERTIFICATE OF SERVICE

I, Michael A. Goldsmith, certify that the above document will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be served upon any party or counsel of record who is not a registered participant of the Court's ECF system upon notification by the Court of those individuals who will not be served electronically.

/s/ Michael A. Goldsmith
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