UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KG URBAN ENTERPRISES, LLC

Plaintiff,

vs.

DEVAL L. PATRICK, in his official capacity as governor of the Commonwealth of Massachusetts, and

CHAIRMAN AND COMMISSIONERS OF THE MASSACHUSETTS GAMING COMMMISSION, in their official capacities.

Defendants.

CASE NO. 1:11-CV-12070-NMG

AQUINNAH'S REPLY IN SUPPORT OF MOTION TO INTERVENE

On September 19, KG Urban Enterprises, LLC ("KG") filed an opposition to the Wampanoag Tribe of Gay Head (Aquinnah) and the Aquinnah Wampanoag Gaming Corporation (collectively "Aquinnah") motion to intervene. KG's opposition rests primarily on its asserted intention to amend its complaint and the alleged impact that the proposed, but not yet accomplished, amendment would have on Aquinnah's interest in the outcome of this litigation. KG 's argument that this Court should deny Aquinnah its present right to intervene based on the alleged impacts of actions yet to be taken is without merit, and indeed, Aquinnah has a right to be present to assess the value of the amendments, if any, that are actually made. Moreover, with respect to its contention that Aquinnah lacks a substantial interest in the outcome of the case, for the reasons set forth below, KG is incorrect.

First, KG mischaracterizes the First Circuit's August 1, 2012 decision. The First Circuit did not say that Mashpee must possess existing Indian lands for section 91 of 2011 Mass. Acts ch. 194, An Act Establishing Expanded Gaming in the Commonwealth ("Act"), to be considered authorized under the Indian Gaming Regulatory Act, 25 U.S.C. §§2701 – 2721 ("IGRA"). The First Circuit said that if *any* tribe possessed existing Indian lands within the Commonwealth, then *all* of section 91 should be reviewed under the rational basis standard. *KG Urban Enterprises, LLC v. Patrick*, -- F.3d --, 2012 WL 3104196, p. 17 (1st Cir. 2012). Thus, if Aquinnah's Settlement Lands qualify as existing Indian lands under IGRA, then this Court should employ rational basis review of section 91 irrespective of whether DOI ultimately approves Mashpee's compact and ultimately succeeds in placing the Taunton lands into trust.

Second, KG's portrayal of the Act's tribal compacting provisions as inconsequential ignores the crippling effects of the U.S. Supreme Court's decision in *Seminole* upon the ability of tribes of enjoy the benefits Congress intended when enacting IGRA. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47, 116 S. Ct. 1114 (1996). In *Seminole*, the Supreme Court ruled that the IGRA provision allowing tribes to sue states to force compact negotiations was unconstitutional. After *Seminole,* some states simply refused to enter into good faith negotiations for Class III compacts. In Massachusetts, section 91 puts to rest lingering questions surrounding the Governor's authority to enter gaming compacts with tribes and the need for legislative approval – an issue that derailed the approval of Aquinnah's compact it negotiated in the mid-1990s with Governor Weld. Far from being inconsequential, the Act's tribal compacting provisions will allow federally recognized tribes within the Commonwealth to finally realize the benefits of IGRA. As one of those tribes, Aquinnah has a substantial interest in defending those compacting provisions against KG's sweeping equal protection claim.

Third, KG's portrayal of its equal protection claim as a surgical attack on section 91(e) cannot be squared with the Complaint, which contains a broadly framed facial attack on section 91 and a sweeping prayer for relief. KG requests the Court to "declare that the Act violates the federal Equal Protection Clause and Massachusetts Declaration of Rights, and is thus invalid, null, and void in its entirety." *Doc.* 1, p. 19 (Complaint). At "a minimum," KG requests the Court to declare the Act invalid to the extent it "allows Indian tribes to engage in gaming without meeting the same substantive requirements that non-tribal license applicants must meet." *Id.* Rather than a surgical severance of section 91(e), KG's Complaint seeks to undermine the entire tribal compacting process set forth in the Act - no doubt to eviscerate any possibility of competing tribal gaming operations even if the Commission ultimately issues a Category 1 license for Region C. As it now stands, KG's Complaint imperils the entire Act and, "at a minimum" the entire tribal compacting process.

Fourth, Aquinnah has its own stake in ensuring that a Category 1 license is not issued in Region C since an Aquinnah gaming facility will also be competing with an inevitable Mashpee facility and other licensed facilities within the state, in addition to facing intense regional competition. Thus, Aquinnah has an interest in maintaining the constitutionality of section 91(e), regardless of the fact that it is a Mashpee compact that met the July 31, 2012 deadline.

Fifth, KG argues that the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379, 129 S.Ct. 1058 (2009) precludes the Secretary from placing any lands into trust for Mashpee pursuant to section 465 of the Indian Reorganization Act ("IRA"). *See e.g. Doc.* 57, p. 2-4 (Plaintiff's Memorandum of Proposed Procedures). While it is true that the Mashpee do not have existing trust land within the Commonwealth, Aquinnah does. Aquinnah's Settlement Lands were placed into trust in 1988 pursuant the Massachusetts Indian Claims Settlement Act,

25 U.S.C. §§ 1771-1771i, as opposed to the Secretary's general authority to place lands into trust under section 465. Aquinnah's Settlement Lands therefore lie beyond *Carcieri's* reach. Assuming arguendo KG is correct that *Carcieri* will forever forestall Mashpee's ability to place lands into trust, Aquinnah's existing trust lands may be the *only* defense to KG's equal protection claim.

Finally, KG incorrectly claims that Aquinnah's defense would require extensive discovery concerning events that occurred over thirty years ago. As with *State of Rhode Island v. Narragansett Tribe of Indians*, 19 F.3d 685, 700 (1st Cir. 1994) and *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 791 (1st Cir. 1996), a determination of the eligibility of the Aquinnah's Settlement Lands for gaming under IGRA will turn on fundamental principles of contract construction and statutory construction and is capable of resolution by cross motions for summary judgment. Importantly, Aquinnah's defense does not rely upon decisions yet to be made by DOI, which may be particularly important given the First Circuit's concerns about the potential delay in awaiting those decisions. *KG Urban Enterprises, LLC v. Patrick*, -- F.3d --, 2012 WL 310495, p. 21 (noting that "lengthy delays" in the DOI decision making process "would undercut the argument that section 91 is meant as a temporary accommodation to the IGRA process"). Indeed, granting intervention and resolving the Aquinnah lands issue in the Tribe's favor would result in quick and judicially prudent resolution of the entirety of the instant litigation.

CONCLUSION

Of the parties to this case, and of the stakeholders who would be parties to this case, KG stands alone in opposing the merits of Aquinnah's motion to intervene. KG's opposition must fail because it is prefaced upon a misstatement of Aquinnah's interests in this litigation, a

mischaracterization KG's equal protection claim and a misunderstanding of the First Circuit's August 1, 2012 decision. Particularly in light of *Seminole*, Aquinnah maintains a substantial interest in defending the Act's historic tribal compacting provisions by demonstrating that its Settlement Lands are "Indian lands" for purposes of IGRA. Aquinnah should be allowed to intervene.

Dated this 25th day of September, 2012.

Respectfully Submitted,

s/ John R. Casciano
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CERTIFICATE OF SERVICE

I, Scott Wheat hereby certify that this Motion to Intervene, filed through the ECF System, will be sent electronically to registered participants as identified on the Notice of Electronic Filing and paper copies will be sent by mail to those indicated as non-registered participants on September 25, 2012.

/s/ Scott Wheat
Scott Wheat