UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KG URBAN ENTERPRISES, LLC

Plaintiff,

v.

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

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

Defendants.

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

ORAL ARGUMENT REQUESTED

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

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The Wampanoag Tribe of Gay Head (Aquinnah) and The Aquinnah Gaming Corporation

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The defendants-intervenors, The Wampanoag Tribe of Gay Head (Aquinnah) and The Aquinnah Gaming Corporation, a wholly-owned economic instrumentality of the Tribe (together "Aquinnah") submit this memorandum in support of their motion to intervene.

I. INTRODUCTION

Aquinnah has moved to intervene in this litigation to protect its ability to negotiate a Class III gaming compact with the State of Massachusetts pursuant to § 91 of the Massachusetts Gaming Act.[1] As a federally recognized Indian tribe with trust lands located within the Commonwealth, Aquinnah has the right to engage in gaming activity pursuant to the Indian Gaming Regulatory Act of 1998, 25 U.S.C. § 2701 et seq. ("IGRA"). According to the Commonwealth, § 91 was enacted to effectuate the State's obligations under IGRA, including the State's obligation to negotiate compacts for Class III gaming with tribes that have Indian lands within the Commonwealth. Plaintiff KG Urban argues that § 91 of the Act, which authorizes the Massachusetts Gaming Commission to forego issuance of a Region C license if the Commonwealth enters into a Class III Compact with a federally recognized Indian tribe, constitutes an impermissible race-based classification in violation of the federal and state equal protection clauses.

In its August 1, 2012 decision, the First Circuit expressed serious doubt that § 91 would survive federal or state equal protection scrutiny unless § 91 can be considered "authorized" by IGRA. Op. p. 42. The Panel expressed concern that IGRA appears only to authorize Class III Compacts for federally recognized tribes with "Indian lands" located within the Commonwealth. In this litigation, the Commonwealth has maintained that it only intends to negotiate a Compact

[1] Aquinnah's proposed Answer in Intervention is attached, marked as "Exhibit 1," and incorporated by this reference.

with the Mashpee Wampanoag Tribe, which currently does not have "Indian lands" within the Commonwealth. Under these circumstances, the Panel determined:

> It would be difficult to conclude that the IGRA "authorizes" the Massachusetts statute under these circumstances – where there are no Indian lands in Region C at present within the meaning of IGRA. … KG does not dispute that if a federally recognized tribe in Massachusetts currently possessed "Indian lands" within the meaning of IGRA, § 91 would fall within the scope of the IGRA's authorization and thus be subject to only rational basis review.

KG Urban Enterprises, LLC v. Patrick, F.3d, 2012 WL 3104195, 17 (1st Cir. 2012). Aquinnah is that tribe.

Aquinnah has a significant interest in preventing the near certain demise of § 91. This Court already has determined that the Act " . . . establishes the procedures by which IGRA-authorized compacting may take place under Massachusetts law . . . § 91 of the Gaming Act advances the congressional directive that tribes and states negotiate compacts to govern gaming on tribal lands." Aquinnah must intervene because the relief requested by KG Urban would deny Aquinnah's ability to invoke § 91 to secure an IGRA-compliant compact with the Commonwealth.

Nor can Aquinnah rely on KG Urban or the Commonwealth to protect its interests. KG Urban maintains that its substantial investments in New Bedford will only be spared if § 91 is declared unconstitutional. Meanwhile, the Commonwealth has erroneously maintained throughout this litigation that Aquinnah has "waived" its right to game on its existing trust lands.

The First Circuit's August 1, 2012 decision places Aquinnah's eligibility to game on its existing trust lands directly at issue in a case in which the parties have exhibited their hostility towards Aquinnah's substantial interests. Under these circumstances, the Court should allow Aquinnah to intervene as a matter of right.

II. ARGUMENT

A. Aquinnah Should be Granted Intervention as a Matter of Right.

Federal Rule of Civil Procedure 24(a)(2) provides in relevant part:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Rule 24(a)(2). A party seeking to intervene under Fed. R. Civ. P. 24(a)(2) must satisfy the following prerequisites: (1) a timely motion for intervention; (2) a demonstrated interest relating to the property or transaction that forms the basis of the ongoing action; (3) a satisfactory showing that the disposition of the actions threatens to create a practical impairment or impediment to its ability to protect that interest; and (4) a satisfactory showing that existing parties inadequately represent its interest. *Public Service of New Hampshire v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998). Courts have long employed a flexible approach when applying these prerequisites to the facts and circumstances of each case. *See*, *e.g*, *Id*. at 204. ("the inherent imprecision of Rule 24(a)(2)'s individual elements dictates that they be read not discretely, but together and always in keeping with a commonsense view of the overall litigation"); *International Paper Co. v. Town of Jay*, 887 F.2d 338, 343-44 (1st Cir. 1989) (application of Rule 24(a)(2) "involves the pragmatic balancing of a range of factors that arise in varying factual situations").

1. Aquinnah's Motion to Intervene is Timely.

Four factors must be considered when evaluating the timeliness of an intervention motion: (1) the length of time the prospective intervenors knew or reasonably should have known of their interest before they petitioned to intervene; (2) the prejudice to existing parties

due to the intervenor's failure to petition for intervention promptly; (3) the prejudice the prospective intervenors would suffer if not allowed to intervene; and (4) the existence of unusual circumstances mitigating for or against intervention. *R&G Mortgage Corp. and R-G Premier Bank of Puerto Rico v. Federal Home Loan Mortgage Corp.,* 584 F.3d 1, 7 (1st Cir. 2009). The determination of timeliness lies within the sound discretion of the district court. *NAACP v. New York*, 413 U.S. 345, 366 (1973).

The core purpose of the timeliness requirement is to prevent prejudice to the parties. *Caterino v. Barry*, 922 F. 2d 37, 41 (1st Cir. 1990). *See also*, *Fiandaca v. Cunningham*, 827 F.2d 825, 834 (1st Cir.1987) (the purpose of the timeliness requirement is to ensure that existing parties to the litigation are not prejudiced by the failure of would-be intervenors to act in a timely fashion). Consequently, "in stressing the importance of timely filing of a petition to intervene, courts have repeatedly emphasized that the concept of timeliness of a petition is not measure, like a statute of limitations, but rather derives meaning from assessment of prejudice in the context of particular litigation." *Puerto Rico Telephone Co. v. Sistema De Retiro De Los Empleados Del Gobierno Y La Judicatura*, 637 F.3d 10, 15 (1st Cir. 1987).

When assessing potential prejudice to the existing parties, the stage of the litigation is highly relevant, including the absence of discovery and lack of substantive legal progress. *R & G,* 584 F.3d at 7. In *Geiger v. Foley Hoag LLP Retirement Plan*, 521 F.3d 60 (1st Cir. 2008), the First Circuit upheld the district court's determination that the petitioner timely intervened nine months after the complaint was filed because the case had not progressed substantively during that time and because the need to intervene was not apparent at the time the complaint was filed. *Id.* at 64-65.

Under the circumstances in this case, Aquinnah's motion to intervene is timely. Similar to *Geiger*, Aquinnah's need to intervene did not manifest until the First Circuit issued its August 1, 2012 opinion determining that § 91 will avoid strict scrutiny review only if there exists at least one Indian tribe in the Commonwealth eligible to enter into a Compact pursuant to IGRA. Further, given the early stage of this litigation, allowing Aquinnah to intervene will not prejudice the parties. No discovery has been conducted and very little substantive legal progress has been made. Denial of Aquinnah's motion, however, will result in immense prejudice to the Tribe because Aquinnah is uniquely situated to demonstrate its eligibility to game on its existing trust lands. Without intervention, § 91 will likely be struck and Aquinnah will be deprived of the Act's intended benefits.

2. Aquinnah has a Significant Legal Interest in the Subject Matter of the Action, the Disposition of which Will Impair Aquinnah's Ability to Protect Its Interests.

For an applicant to justify intervention as of right, its interests must be "significantly protectable." *Conservation Law Foundation of New England, Inc. v. Mosbacher*, 966 F. 2d. 39, 41 (1st Cir. 1992). While the "there is no precise and authoritative definition of the interest required to sustain a right to intervene" the intervenor's claims must bear a "sufficiently close relationship to the dispute between the original litigants" and that "[t]he interest must be direct, not contingent." *Id.* at 42. "[T]he determination of whether an interest is sufficient for Rule 24(a)(2) purposes is colored to some extent by the third factor – whether disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest." *Id.* This is a very "practical test" of adverse effect. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 110-11 (1st Cir. 1999) (holding that the possibility that the litigation could end with an injunction adversely affecting intervenors' interests was sufficient to meet this requirement).

Section 91 marks the first time the Commonwealth has agreed, by statute, that tribes can game under IGRA and provides a procedure by which eligible tribes may negotiate an IGRA-compliant compact with the Commonwealth. Aquinnah is a federally recognized Indian tribe with existing "Indian lands" as defined by IGRA that are located within the exterior boundaries of the Commonwealth. The remedy KG Urban seeks would effectively deprive Aquinnah of the right to negotiate and enter into an IGRA-compliant compact with the Commonwealth.[2] The Court of Appeals noted that "[a]t the heart of this case are the provisions of the IGRA which make clear that tribal gaming can only be conducted by an 'Indian tribe" on 'Indian lands," as both terms are defined in the IGRA." *Id.*, No. 12-1233 at 5. It is undisputed that the Mashpee Tribe does not have Indian lands as defined by IGRA. However, the factual issue regarding whether the Aquinnah's land is Indian lands as defined by IGRA has not been decided by this Court. KG Urban itself has acknowledged that if a tribe in the Commonwealth possessed Indian lands, § 91 would be authorized by IGRA and subject only to rational basis review.

a. *As a Tribe Eligible to Negotiate a Compact with the Commonwealth under IGRA, Aquinnah has a Substantial Interest in Maintaining § 91*.

Aquinnah is a federally recognized Indian tribe with "Indian lands" as defined by IGRA located within the exterior boundaries of the Commonwealth of Massachusetts. In 1974, the Tribe filed a suit against the town of Gay Head to recover almost 4,000 acres of land. *Wampanoag Tribal Council of Gay Head v. Gay Head*, No. 74-5826 (D. Mass filed December 26, 1974). The lawsuit claimed that action taken by Massachusetts under legislation enacted in 1870 to incorporate the Indian district of Gay Head as a town, terminate Indian title to the land

[2] Because states may invoke 11th Amendment immunity against claims by alleging a failure to negotiate an IGRA compact in good faith, § 91 is critical to Aquinnah's efforts to negotiate a gaming compact with the Commonwealth. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1995).

and transfer some of the land to the town, and allot the remaining land to the Indian residents, violated the Non-Intercourse Act. Act of July 22, 1790, Pub. L. No. 1-33, § 4, 1 Stat. 137, 138. Sen. R. 100-238, 3 (July 27, 1987). The lawsuit resulted in the Tribe, the town, the Commonwealth and the intervener Taxpayers Association signing of the "Joint Memorandum of Understanding Concerning Settlement of the Gay Head Massachusetts Indian Land Claims" ("MOU"), in which the Commonwealth agreed to convey certain parcels of land to the Tribe in exchange for the Tribe extinguishing all aboriginal title and claims. The Commonwealth signed the agreement on November 22, 1983. On September 18, 1985, the General Court enacted "An Act to Implement the Settlement of Gay Head Indian Land Claims", Mass. Gen. Laws ch. 278, § 5 (1985). Thereafter, in 1987 Congress enacted the "Massachusetts Indian Land Claim Settlement Act", Public Law 100-95, 25 U.S.C. §1771 et seq. ("Settlement Act").

The Settlement Act included parcels identified as the Common Lands, the Cook Lands, and the Strock Estate and provided an appropriation of $2,250,000, to be matched by the Commonwealth, to be expended to acquire those lands. 25 U.S.C. §1771f (8), 25 U.S.C. §1771a(b). The Settlement Act defines the Common Lands and the Strock Estate as "Settlement Lands," excluding the Cook Lands from the definition. 25 U.S.C. § 1771f (6), (8) (referencing MOU Section 4; Section 6). The Settlement Act mandated the United States to acquire the Settlement Lands "into trust" for the benefit of the Tribe, while the Cook Lands remained fee lands subject to taxation and foreclosure. 25 U.S.C. § 1771d. The United States placed the Settlement Lands into trust on December 21, 1988, and March 2, 1993.

The Settlement Act also placed the following restrictions on the Tribe's jurisdiction over land within the Town of Gay Head:

> Except as otherwise expressly provided in this subchapter or in the State Implementing Act, the settlement lands and any other land

> that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance).

25 U.S.C. § 1771g. This particular language appears to be the basis of the Commonwealth's position that the Tribe is unable to game on its Settlement Lands. What has been overlooked, however, is the effect of IGRA on the Settlement Act.

In *State of Rhode Island v. Narragansett Tribe of Indians*, 19 F.3d 685, 700 (1st Cir. 1994), the First Circuit was required to determine IGRA's effect upon the Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 et seq. Similar to the Massachusetts Indian Land Claim Settlement Act, the Rhode Island Indian Claims Settlement Act vests state and local authorities with the jurisdiction to enforce its gaming laws over the Narragansett. The court noted that the literal terms of the two statutes created incoherence by subjecting Indian gaming to two mutually exclusive regulatory environments. Because the court could find no feasible way to give full effect to both acts, it concluded that an implied repeal had transpired. *Id.* at 704-5. Accordingly the court held that IGRA repealed the jurisdictional limitations included in the Rhode Island Indian Claims Settlement Act that relate to gaming activities on the Narragansett Tribe's settlement lands. *Id.* The court also determined that any reestablishment of those jurisdictional restrictions on Narragansett gaming activities would require an IGRA compact. *Id.* *See also*, *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994) (state criminal jurisdiction over gaming that previously existed under Public Law 280 was nullified by the passage of IGRA and can only be re-established by a mutually-agreed upon Tribal-state compact under IGRA).

In *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 791 (1st Cir. 1996), the First Circuit was called upon to determine IGRA's effect upon the Maine Indian Claims Settlement Act. Unlike the Rhode Island Claims Settlement Act, the Maine Indian Claims Settlement Act contains a "saving clause." Section 16(b) of the Maine Indian Claims Settlement Act states:

> The provisions of any federal law enacted after October 10, 1980 [the effective date of the Settlement Act], for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, ... shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

25 U.S.C. §§ 1735(b) (emphasis added). The court distinguished *Narragansett* because "… in contradistinction to the situation that obtained in Rhode Island, section 16(b) satisfactorily harmonizes the Settlement Act and the Gaming Act, and prevents any incoherence." *Passamaquoddy*, 75 F.3d at 791.

As with the Rhode Island Indian Claims Settlement Act, the Massachusetts Indian Land Claim Settlement Act does not contain a savings clause. Therefore, as in *Narragansett*, there is not a way to reconcile the Massachusetts Settlement Act and IGRA to give full effect to both acts and it must be concluded that an implied repeal has transpired. If Congress had intended to save the restrictions against Aquinnah's jurisdiction over gaming activity on its Settlement Lands from repeal by subsequent federal legislation, Congress would have included a savings clause similar to the Maine Indian Claims Settlement Act.

As with this case, the court in *Narragansett* was also required to determine whether the tribe exercised sufficient governmental jurisdiction over its Settlement Lands to qualify as "Indian lands" under IGRA. *Narragansett*, 19 F.3d at 702-3. In reviewing the Rhode Island Indian Claims Settlement Act, the First Circuit noted that "Indian sovereignty is 'a backdrop against which the applicable … federal statutes must be read'," and that jurisdiction is an integral

aspect of retained sovereignty. *Id.* (quoting *McClanahan v. State Tax Commission*, 411 U.S. 164, 172 (1973)). The court determined that "so long as the portion of jurisdiction encompassed by the natural rights of the Narragansetts is substantial enough to satisfy the Gaming Act's 'having jurisdiction' prong, our inquiry is satisfied." *Id.* Second, the court must evaluate whether a statute, treaty or agreement expressly strips the Tribe of jurisdiction. *Id.* Finally, the Settlement Act must be analyzed against other settlement acts to determine whether the federal acts contemplated and presumed some quantum of tribal jurisdiction was always retained by the tribes, even when the settlement acts granted concurrent jurisdiction to the states. *Id.* at 702. In applying these factors against the Rhode Island Indian Claims Settlement Act, the First Circuit determined that the Narragansett's exercise of concurrent jurisdiction over its settlement lands met IGRA's jurisdictional requirements. *Id.*

The First Circuit also determined that Narragansett was, in fact, exercising governmental jurisdiction over its Settlement Lands. *Id.* at 702. The Narragansett had established a housing authority; recognized as eligible to participate in the Indian programs of the federal Department of Housing and Urban Development; obtained status as the functional equivalent of a state for purposes of the Clean Water Act, after having been deemed by the Environmental Protection Agency as having "a governing body carrying out substantial governmental duties and powers," and as being capable of administering an effective program of water regulation; taken considerable advantage of the Indian Self-Determination and Education Assistance Act ("ISDA"); administers health care programs under an ISDA pact with the Indian Health Service, and, under ISDA contracts with the Bureau, administers programs encompassing job training, education, community services, social services, real estate protection, conservation, public safety, and the like. *Id.* The court determined that "these activities adequately evince that the

Tribe exercises more than enough governmental power to satisfy the second prong of the statutory test." *Id.*

Under the Massachusetts Indian Land Claim Settlement Act, Aquinnah maintains concurrent jurisdiction with the Commonwealth over its Settlement lands.[3] As with Narragansett, Aquinnah has consistently exercised governmental authority over its Settlement Lands. For instance, Aquinnah: administers federal programs under the ISDA through its "self-governance" annual funding agreement with the United States; has developed a tribal court, and; has enacted and enforced numerous ordinances, including a land use ordinance, zoning ordinance, Tribal Historic Preservation ordinance, tribal judiciary ordinance, a building, health fire and safety ordinance, and a gaming ordinance.[4] Aquinnah also has entered into Memoranda of Agreement with federal and state agencies including the U.S. Environmental Protection Agency, the National Parks Service, the Massachusetts National Guard, the Town of Aquinnah, the Massachusetts Department of Social Services and Public Health, the Massachusetts Bureau of Substance Abuse Services, and the Massachusetts Juvenile Court.[5]

Here, the First Circuit's decisions in Narragansett and Passamaquoddy compel a determination that Aquinnah retains sufficient jurisdiction under IGRA for its Settlement Lands to qualify as "Indian lands" under IGRA. In enacting IGRA, Congress repealed the restrictions on Aquinnah's gaming rights contained in the Massachusetts Claims Settlement Act. Further, consistent with Narragansett under the Rhode Island Indian Claims Settlement Act, the

[3] The legislative report accompanying the Settlement Act states that "… the tribe will be able to assume concurrent jurisdiction over its own members with the State and the town as long as such jurisdiction is consistent with the civil and criminal laws of the State and the Town." Sen. R. 100-238, 5.

[4] Collectively marked as "Exhibit 2," attached and incorporated by this reference.

[5] The Memoranda are collectively marked as "Exhibit 3," attached and incorporated by this reference.

Massachusetts Indian Land Claim Settlement Act provides for Aquinnah's retention of concurrent jurisdiction over its Settlement Lands, and Aquinnah in fact exercises that jurisdiction.

Because its Settlement Lands qualify as "Indian lands" under IGRA, Aquinnah has a significant stake in defending § 91 against KG Urban's equal protection claims. IGRA entitles Aquinnah to a gaming compact with the Commonwealth, and § 91 is the vehicle by which to arrive at that compact – which is particularly valuable in the wake of the Supreme Court's decision in *Seminole*. Because Aquinnah is eligible under IGRA to negotiate a compact with the Commonwealth, § 91 was clearly intended to benefit the Tribe. As such, Aquinnah should be allowed to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2).

3. The Parties do not Adequately Represent Aquinnah's Interests.

"An intervenor need only show that representation may be inadequate, not that it is inadequate." *Conservation Law Foundation of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992). *See also, Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). Further, "the burden of making that showing should be treated as minimal." *Id.* at 538 n.10. However, where the applicant is seeking to intervene as a defendant and the government is defending a statute, the First Circuit starts with a "rebuttable presumption "that the government in defending the validity of the statute is presumed to be representing adequately the interests of all citizens who support the statute." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999). Rebuttal requires a "strong affirmative showing" that the government is not fairly representing the applicant's interest, *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 207 (1st Cir. 1998), or a demonstration of adversity of interest, collusion, or nonfeasance. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999). *See also, Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49,

54 (1st Cir. 1979). This "trilogy" is not, however, exclusive. The First Circuit recognized that it is unlikely that there are only three circumstances that would make governmental representation inadequate. *Id.*

In this litigation, the Governor has repeatedly demonstrated his adversity to Aquinnah's gaming rights. *See e.g.*, *KG Urban Enterprises, LLC v. Patrick*, __F.3d__, 2012 WL 3104195, 9 n.10. ("while the Aquinnah possess a small parcel of land, the Commonwealth has taken the position that they have waived their right to conduct gaming on that land"). Furthermore, under the unique facts, circumstances, and litigation posture of this case, only Aquinnah can adequately represent its interests, because the Tribe's defense to KG Urban's constitutional claims turn on evidence only Aquinnah can provide. *See Mass. Food Assoc. v. Mass. Alcoholic Beverages Control Comm'n*., 197 F.3d 560, 567, *cert denied*, 529 U.S. 1105 (2000) (distinguishing between a case where intervenors sought only to offer other legal arguments to sustain the constitutionality of the statute and a case where the complaint was framed so as to require an evidentiary determination and the intervenors had information that could only be presented by their participation as parties). Aquinnah's interests cannot be adequately represented by KG Urban, who has requested a remedy that would eviscerate Aquinnah's ability to game in the Commonwealth. Aquinnah accordingly should be allowed to intervene to assert its eligibility to game under IGRA as a defense to KG Urban's equal protection challenge to § 91.

B. <u>Aquinnah Should be Granted Permissive Intervention.</u>

If the Court determines that Aquinnah is not entitled to intervene as a matter of right under Fed. R. Civ. P. 24(a), the Court should exercise its discretion to grant Aquinnah permissive intervention under Fed. R.Civ. P. 24(b). Rule 24(b) provides in relevant part, "on timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Unlike intervention as of right, the applicant

need not show a protectable interest, instead, Rule 24(b)(1)(B) gives the court discretion to allow intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." *Daggett*, 172 F.3d at 112-13. The Court must also consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Fed. R. Civ. P. 24(b). Permissive intervention is allowable where there are independent jurisdictional grounds for the applicant's proposed claims and defenses. *Int'l Paper Co. v. Inhabitants of Town of Jay*, 887 F.2d 338, 346 (1st Cir. 1989). *See also, Moosehead Sanitary Dist. v. S.G. Philips Corp.*, 610 F.2d 49, 52 n.5 (1st Cir. 1979). "[T]he district court can consider almost any factor rationally relevant but enjoys very broad discretion in granting or denying the motion." *Daggett*, 172 F.3d at 113. *See also Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78, 83-84 (D. Me. 1988), *aff'd*, 884 F.2d 629 (1st Cir. 1989).

Here, the First Circuit's August 1, 2012 decision places Aquinnah's eligibility to game under IGRA squarely at issue. Aquinnah is the only potential party that can provide the Court with the evidence and argument necessary to determine whether § 91 is authorized under IGRA. *Daggett*, 172 F. 3d at 113 ("the fact that the applicants may be helpful in fully developing the case is a reasonable consideration in deciding on permissive intervention"). Further, given the lack of substantive legal progress in this litigation – including lack of discovery - the Tribe's intervention would not unduly delay or prejudice the parties. Rather, the Tribe's participation would assist the Court in developing the case.

Finally, Aquinnah's defense to KG Urban's equal protection claim falls within this Court's 28 U.S.C. § 1331 jurisdiction. Aquinnah's defense rests on the assertion of substantial rights arising from federal law, namely the Massachusetts Indian Land Claim Settlement Act, 25 U.S.C. § 1771, et seq. and IGRA, 25 U.S.C. §§ 2701 et seq. As a Tribe eligible to game under

IGRA with existing Indian lands within the Commonwealth, Aquinnah is the intended beneficiary of § 91. KG Urban's equal protection claims imperil Aquinnah's ability to negotiate an IGRA-compliant compact with the Commonwealth and further imperil Aquinnah's ability to game pursuant to § 91.

III. CONCLUSION

Under the First Circuit's August 1, 2012 decision, without a determination that a tribe in the Commonwealth possesses Indian lands as defined by IGRA, § 91 is not "authorized" by federal law and will be subject to strict scrutiny review and likely struck down as unconstitutional. As the only tribe with existing trust lands in the Commonwealth, Aquinnah's eligibility to game on those lands is directly at issue. Without Aquinnah's intervention to demonstrate its eligibility to game on its Settlement Lands, Aquinnah's ability to obtain a compact pursuant to § 91 will evaporate, leaving the Tribe to once again tread in Seminole's wake. Finally, the current parties have demonstrated they will not adequately represent Aquinnah's interests. The Court accordingly should permit Aquinnah to intervene to protect its significantly protectable interest in the outcome of this litigation.

Dated this 7th day of September, 2012.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, John R. Casciano, hereby certify that this Memorandum in Support of Motion to Intervene, filed through the ECF System, will be sent electronically to registered participants as identified on the Notice of Electronic Filing on September 7, 2012.

/s/ John R. Casciano
John R. Casciano