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

PLAINTIFF'S OPPOSITION TO
AQUINNAH TRIBE'S MOTION TO INTERVENE

Plaintiff KG Urban Enterprises, LLC ("KG") respectfully opposes the Aquinnah tribe's motion to intervene in the above-captioned matter (DN 39).

The Commonwealth has made clear that this case has nothing to do with the Aquinnah. After KG brought its equal protection claim to Section 91, the Commonwealth clarified its view of that provision as facilitating tribal gaming pursuant to IGRA. *See* DN 16 at 16-17. When KG pointed out that viewing Section 91 as a means to the end of an IGRA license was inconsistent with the Commonwealth's stated goal of having no more than three casinos, since there were two federal tribes in the Southeast, the Commonwealth made crystal clear its view that the Aquinnah have no rights to conduct gaming, and that whatever else motivated Section 91, it certainly was not an effort to facilitate the Aquinnah's ability to engage in IGRA-compliant gaming. *See* Mass. First Cir. Br. 38-39 & n.103. Thus, as this case has progressed, and especially in light of the negotiation and approval of the compact between the Commonwealth and the Mashpee and the expiration of

Section 91(e)'s statutory deadline without any action from the Aquinnah, KG is challenging the Commonwealth's grant of a race-based regional gaming monopoly to a single, landless tribe—the Mashpee Wampanoag.

The Aquinnah tribe now seeks to divert KG's suit in order to litigate complex and wholly unrelated issues involving whether the Aquinnah waived their right to engage in gaming as part of a settlement of land claims in the mid-1980s. That dispute involves different facts, different state and federal statutes, and negotiations that transpired nearly 30 years ago—and it has nothing to do with the Equal Protection Clause or the constitutionality of the Massachusetts Gaming Act.

Indeed, the Aquinnah will not even be affected by the outcome of this case. The Aquinnah's intervention motion appears to be premised on its need to defend the constitutionality of Section 91. But the constitutionality of Section 91 is of no consequence to the Aquinnah. The key benefit to the tribes that is independent of federal law and has been the focus of KG's constitutional challenge is Section 91(e). That section provides that a tribe is eligible for an exclusive regional monopoly in Southeastern Massachusetts if, but only if, it negotiates an approved gaming compact by July 31, 2012. That statutory deadline has now passed. Thus, regardless of whether KG prevails on its equal protection challenge, the Aquinnah will be ineligible for the race-based set-aside conferred by Section 91(e).

The balance of section 91 does not provide the Aquinnah with any ability to negotiate a compact that the tribe does not already enjoy under federal law. Simply put, the Aquinnah tribe does not need Section 91 to negotiate with the Governor; it needs the Commonwealth to change its mind on its interpretation of a 30-year-old settlement agreement. The Aquinnah may need a lawsuit to change the Commonwealth's mind, but that lawsuit has nothing to do with KG's equal protection challenge. In any event, to the extent the Aquinnah have an interest in the constitutionality of Section 91 of the Act, the Commonwealth is fully capable of defending that interest. Although the

Commonwealth disagrees with the Aquinnah about whether that tribe waived its gaming rights, the Commonwealth has never wavered in its defense of the Act's constitutionality.

* * *

If the Aquinnah believe they have been wronged by the Commonwealth's refusal to negotiate a gaming compact, they have a number of different avenues through which they can seek relief. Intervening in KG's unrelated suit is not one of them. The motion should be denied.

ARGUMENT

I. THE AQUINNAH DO NOT HAVE A SUFFICIENT INTEREST IN THIS CASE TO WARRANT INTERVENTION AS OF RIGHT

A. The Aquinnah Will Not Be Affected by a Decision Regarding the Constitutionality of Section 91(e)

Throughout their motion, the Aquinnah repeatedly assert that their participation is needed to defend "Section 91" of the Act. But the tribe ignores the critical fact that Section 91 has multiple different provisions, not all of which are at issue in this case and not all of which have any operative effect on the Aquinnah after July 31, 2012.

The Aquinnah are flatly wrong to suggest (at 2, 6) that KG seeks to "deprive Aquinnah of the right to negotiate and enter into an IGRA-compliant compact with the Commonwealth." From its very first filings in this case, KG has made clear that it is *not* challenging the constitutionality of Section 91(a) of the Act, which provides that "[n]otwithstanding any general or special law or rule or regulation to the contrary, the governor may enter into a compact with a federally recognized Indian tribe in the Commonwealth." KG has readily conceded that, "[i]n limited circumstances, IGRA provides for negotiated compacts between tribes and states that are overseen and ultimately approved by federal authorities." DN 9 at 5; *see also* KG First Cir. Reply Br. at 16 ("KG does not dispute that IGRA authorizes states to enter into compacts with tribes for IGRA-compliant gaming on Indian lands"). If a tribe has "Indian lands" that are eligible for IGRA-compliant gaming, KG's

suit will not affect that tribe's ability to negotiate a compact with the Governor. Those rights already exist as a matter of federal law under IGRA. *See* 25 U.S.C. § 2710(d)(3)(A) (any state receiving a request from a tribe "shall negotiate with the Indian tribe in good faith to enter into such a [gaming] compact"). To the extent Section 91(a) adds anything to the Aquinnah's existing federal rights—and it does not appear to add anything—it is not the subject of KG's challenge.

KG's primary challenge is to the constitutionality of Section 91(e) of the Act, which allows an Indian tribe to obtain a gaming monopoly throughout the entire Southeastern region if the tribe meets the Act's unique state-law conditions, such as the July 31, 2012 deadline for a compact to be signed and approved. As KG has explained at length, that provision is a race-based exclusion of competition that is not in any way authorized by IGRA and is unable to satisfy strict scrutiny. *See* KG First Circuit Br. 27-47.

Even if KG prevails on its constitutional challenge to Section 91(e), however, this will have no effect on the Aquinnah. The Act's July 31, 2012 deadline for signing a compact has now passed. Thus, regardless of whether Section 91(e) is ultimately upheld or struck down in the context of the Mashpee compact, the Aquinnah have already missed their chance to obtain a regional, race-based monopoly of their own. The Aquinnah surely have no interest in whether the reason they cannot benefit from Section 91(e) is because they missed the statutory deadline or because the set-aside is unconstitutional. Either way, the Aquinnah are in no position to benefit. Tellingly, the Aquinnah fail to identify any specific way in which they would be injured by a ruling from this Court regarding the constitutionality of Section 91(e).

B. The Commonwealth is Fully Capable of Defending the Act's Constitutionality

The Aquinnah tribe's intervention is also unnecessary because the Commonwealth has vigorously defended the constitutionality of the Gaming Act *in its entirety*. The First Circuit has refused to allow private parties to intervene to defend the constitutionality of a state statute when

the Attorney General was "prepared to defend the constitutionality of the [act] in full," and had shown "no indication that he is proposing to compromise or would decline to appeal if victory were only partial." *Daggett v. Commission on Gov't Ethics*, 172 F.3d 104, 112 (1st Cir. 1999).

The Aquinnah contend (at 13) that "the Governor has repeatedly demonstrated his adversity to Aquinnah's gaming rights." It is true that the Commonwealth is adverse to the Aquinnah on the specific question of whether the tribe has waived any right to engage in gaming on the Martha's Vineyard parcel. But that dispute has nothing to do with whether the race-based regional monopoly authorized by Section 91(e) is constitutional. While the Commonwealth is "adverse" to the tribe on the waiver issue, the Governor and Attorney General have steadfastly defended the constitutionality of each and every provision of the Act. And, especially in light of the passage of the July 31st deadline, the status of the Aquinnah has nothing to do with the Commonwealth's defense of Section 91(e).

The Aquinnah are also wrong to suggest (at 13) that there is relevant evidence "only Aquinnah can provide." While the Aquinnah surely possess evidence relevant to their waiver claim, they fail to identify any evidence in their possession—but not the Commonwealth's—that would be relevant to KG's constitutional challenge to Section 91(e). And, to the extent they have any evidence or perspective that sheds light on the Mashpee's ability to bring land-into-trust—such as a belief in a superior claim to the lands in Taunton—the Aquinnah are free to bring those arguments to the Court's attention via amicus brief.

C. The First Circuit's Decision Does Not Support the Aquinnah's Motion

The Aquinnah suggest several times in their motion (at 1, 5, 14) that the First Circuit's decision in this case necessitated their intervention. But the First Circuit barely addressed the Aquinnah, other than to note (accurately) that "[w]hile 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." *KG Urban Enterprises v. Patrick*, No. 12-1233, 2012 WL 3104195, at *9 n.10 (1st Cir. 2012). The court did not suggest in any way that it was taking sides in that dispute, or that the waiver issue would somehow become relevant to the resolution of this case on remand.

What was relevant to the First Circuit and should be dispositive here is that the Commonwealth was *not* suggesting that Section 91(e) had anything to do with facilitating gaming by the Aquinnah. Thus, any issues concerning the Aquinnah were entirely beside the point—worthy of a footnote, not party status. Indeed, after summarizing KG's argument that "a tribe must *currently* possess Indian lands in order for § 91 in any relevant sense to be authorized by Congress," the First Circuit added a footnote stating that "we distinguish the Aquinnah for the reasons stated." *Id.* at *17, n.20. The court thus made crystal clear that any holding about the constitutionality of Section 91(e) would be limited to the unique circumstances of a regional set-aside for a *landless* tribe, such as the Mashpee. Whether Section 91(e) could have been constitutionally applied to a tribe that already possessed IGRA-compliant Indian lands and complied with the Act's statutory deadline was a theoretical question that the First Circuit did not address, and that this Court need not resolve here.

II. THE AQUINNAH ARE NOT ENTITLED TO PERMISSIVE INTERVENTION

Permissive intervention is largely within the discretion of the district court, and turns on whether the movant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). The court must also consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.* R. 24(b)(3). The Aquinnah cannot satisfy either criterion.

The Aquinnah's claims do not in any way share a "common question of law or fact" with KG's equal protection claim. KG's core claim is that the Commonwealth has violated the Equal Protection Clause by granting a landless tribe (the Mashpee) a race-based gaming monopoly

throughout an entire region. Yet the Aquinnah seek to use this case to litigate whether a *different* tribe waived its gaming rights as part of a settlement of land claims in the mid-1980s. The Aquinnah's waiver dispute turns on: a Massachusetts statute from 1870 that terminated Indian title to certain land; a lawsuit that was litigated from 1974 to 1983; a multi-party settlement agreement terminating that case; and federal and state statutes designed to implement the settlement agreement. *See* Aquinnah Mem. 6-8. That dispute has nothing to do with *either* the law or the facts at issue in this case. Indeed, it does not involve the Equal Protection Clause at all.

For the same reasons, allowing the Aquinnah to inject their dispute with the Commonwealth into this proceeding would result in severe prejudice to KG. KG has raised a relatively narrow set of constitutional claims, which can be resolved with limited discovery, as detailed in KG's concurrently filed Memorandum of Proposed Procedures. In contrast, the question whether the Aquinnah waived their right to engage in gaming on the Martha's Vineyard parcel is a fact-intensive dispute that would likely involve massive discovery into a land settlement that took place more than 25 years ago; it would also involve briefing of countless legal issues that have nothing to do with the Gaming Act or KG's equal protection claims.[1] And all the while, KG will continue to suffer irreparable injury. This Court correctly recognized in its February 16, 2012 opinion that the Act's effects are "felt acutely by KG Urban, which must decide whether to expend substantial resources to exercise options on and redevelop the Cannon Street Property." DN 26 at 10. Additional delay resulting from the litigation of extraneous claims would undermine KG's ability to go forward with its redevelopment project, even if KG ultimately prevails on the merits of its equal protection claims.

[1] Indeed, the Aquinnah's intervention motion has already drawn a conditional cross-motion from the Aquinnah/Gay Head Community Association (DN 53). If the Court allows the tribe to intervene, this will surely trigger additional intervention motions from other parties that have expressed no interest at all in KG's suit over the constitutionality of Section 91(e), but are keenly interested in the Aquinnah's land dispute.

CONCLUSION

The Aquinnah tribe's motion to intervene should be denied.

Respectfully submitted,

September 19, 2012

/s/ Paul D. Clement

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CERTIFICATE OF SERVICE

I, Jeffrey M. Harris, hereby certify that on September 19, 2012, Plaintiff KG Urban Enterprises, LLC's Opposition to the Aquinnah Tribe's Motion to Intervene was filed through the ECF System and will be sent electronically to registered participants as identified on the Notice of Electronic Filing.

/s/ Jeffrey M. Harris