UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KG URBAN ENTERPRISES, LLC	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:11-cv-12070
	)	
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.	)	

THE MASHPEE WAMPANOAG INDIAN TRIBE'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION BY SPECIAL, LIMITED APPEARANCE TO (i) INTERVENE FOR THE SOLE PURPOSE OF SEEKING DISMISSAL; AND (ii) DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(7) AND 19

i. Introduction

The Mashpee Wampanoag Indian Tribe ("the Tribe" or "the Mashpee") respectfully submits this Memorandum in support of its Motion by Special, Limited Appearance to (i) Intervene for the Sole Purpose of Seeking Dismissal; and (ii) Dismiss for Failure to Join the Tribe as a Necessary and Indispensable Party under Fed. R. Civ. P. 12(b)(7) and 19. The Tribe appears here specially and on a limited basis, without waiving its sovereign immunity, seeking to intervene under Fed. R. Civ. P. 24 for the sole purpose of asserting its interest in this case and requesting dismissal as a matter of law based on the failure and inability to join the Tribe as a necessary and indispensable party. The Tribe has an undeniable, protected, and weighty interest in this case and the issues implicated by it, but cannot be joined due to its sovereign immunity. This case must be dismissed because it cannot proceed "in equity and good conscience" without the Tribe.[1] Fed. R. Civ. P. 19(b).

Plaintiff KG Urban Enterprises, LLC ("KG") seeks a declaration that section 91 of 2011 Mass. Acts ch. 194, An Act Establishing Expanded Gaming in the Commonwealth ("the Act") creates an unconstitutional preference for Indian tribes by authorizing the Governor to reach a gaming compact with a federally-recognized Indian tribe and for that compact to be approved by the Legislature by July 31, 2012, in which case such a compact precludes the issuance of a commercial casino license for the region in which the tribe is located. Section 91 of the Act logically reflects legislative recognition that the Tribe will inevitably have land taken into trust by the United States Department of the Interior ("DOI") and will, at that time, be entitled, under the federal Indian Gaming Regulatory Act, 25 U.S.C. §2701 et seq., ("IGRA") to conduct gaming on those lands without any obligation to the Commonwealth and independent of its supervision, and to require the Commonwealth to negotiate a compact for certain forms of gaming. The Tribe is one of only two

[1] The Tribe focuses its brief on a discussion of the Rule 19 factors, but incorporates that discussion in support of its request to intervene under Rule 24 as the factors are overlapping nature. Indeed, Rule 24(a)(2) allows any party 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" to intervene in a pending litigation as a matter of right. Fed. R. Civ. P. 24(a)(2). The Tribe meets all of these elements as discussed herein.

federally-recognized Indian tribes in the Commonwealth, and is the only such tribe that has engaged in negotiations and reached a compact ("the Compact") with the Governor's Office in the time required by section 91 of the Act.[2] KG's effort to invalidate the Act thus takes direct aim at the Tribe's rights and necessarily implicates its interests under federal and state law.

As this case has unfolded, it has become clear that KG seeks, improperly and without joining the Tribe, to put at issue the Tribe's rights and interests, including among other things, its right to negotiate and protect the concessions it received in the Compact, and its right under federal law to have its lands taken into trust by the United States. Indeed, KG has now made it crystal clear that it challenges not only the Act, but also the Compact, KG Opposition to Aquinnah Tribe's Motion to Intervene ("KG Opp.") at 2, 6, and seeks to amend its complaint to add allegations about the Compact itself and the terms of it. KG Memorandum of Proposed Procedures ("KG Mem.") at 1-2. KG even seeks, impermissibly, to conduct discovery that could only be in the Tribe's possession about its trust application and "basis for believing" in that application. *Id.* at 2. KG's efforts to litigate here the Tribe's right to acquire trust lands and to force an interpretation of the applicability to the Tribe of the United State Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), in the absence of both the Tribe and the DOI – as the primary decision maker on those issues – poses the risk of substantial and permanent harm to the Tribe and its members, including interference with critical rights recognized by the Supreme Court, and confirmed and expressly extended by the United States Congress. No party is present that can or will adequately protect the Tribe's interests.

The Tribe, therefore, comes to this Court as a sovereign nation to protect its legally-recognized status by seeking dismissal of this case. This case must be dismissed because the Tribe is a necessary and indispensable party, but it cannot be joined due to its sovereign immunity. Dismissal

[2] The only other federally-recognized Indian tribe in the Commonwealth is the Wampanoag Tribe of Gay Head (Aquinnah) ("the Aquinnah"), but the Commonwealth has taken the position that the Aquinnah have waived any right to conduct gaming in the Commonwealth by agreement. The Tribe is aware that the Aquinnah now seek to intervene and argue that they, in fact, have gaming rights. The Tribe does not address that argument here, but states only that the Aquinnah, even if permitted to intervene, do not and cannot represent or protect the Tribe's interests. *See infra* Argument II.B.

here is consistent with and compelled by well-established federal law. *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999); *Davis v. United States*, 343 F.3d 1282, 1294 (10th Cir. 2003) (affirming dismissal and noting the federal courts' "strong policy that has favored dismissal when a court cannot join a tribe because of sovereign immunity"); *Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir. 1999) (affirming dismissal). Indeed, federal courts routinely dismiss cases where an Indian tribe is a necessary party and cannot be joined because a tribe's "interest in maintaining its sovereign immunity outweighs the [plaintiff's] interest in litigating its claim." *Pit River Home & Agric. Coop. Ass'n v. U.S.*, 30 F.3d 1088, 1102 (9th Cir. 1994); *see also, e.g., Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 n.5 (9th Cir. 2002) ("we have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs.").[3] Dismissal in such cases "turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547 (2d Cir. 1991) (quotation omitted).

ii. Background

The Tribe is a federally-recognized Indian tribe, *see* 77 Fed. Reg. 47868, 47870 (Aug. 10, 2012), and a sovereign nation with sovereign immunity that it has never waived. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (Tribe immune from suit brought by tribal member to enforce provisions of Indian Civil Rights Act); *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) **(**Tribe could be sued only because clear waiver of sovereign immunity in arbitration provision**)**.[4] Under IGRA, the Tribe is generally entitled to conduct gaming

[3] *See also United Keetoowah Bank of Cherokee Indians v. Mankiller*, 1993 WL 307937, at *16 (10th Cir. Aug. 12, 1993) (same); *Enter. Mgt. Consultants, Inc. v. United States*, 883 F.2d 890, 894 n.4 (10th Cir. 1989); *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1496 (D.C. Cir. 1995) ("there is very little room for balancing of other factors set out in Rule 19(b) where a necessary party under Rule 19(a) is immune from suit because immunity may be viewed as one of those interests compelling by themselves" (quotation omitted)).

[4] In *Worcester v. Georgia*, Chief Justice Marshall preserved the independence of Indian tribes, stating that tribes are "distinct, independent political communities, retaining their original natural rights." 31 U.S. (6 Pet.) 515, 559 (1832); *see*

on any lands held in trust for it by the United States, so long as such gaming is not otherwise prohibited in the Commonwealth. *See* 25 U.S.C. § 2710(d). The Tribe, pursuant to its rights under IGRA, expects to be able to operate "Class III" [compacted] gaming (i.e., including slots and table games) on its sovereign lands once the federal government takes those lands into trust, now that the Massachusetts legislature has approved expanding gaming in the Commonwealth.

On November 22, 2011, Governor Patrick signed legislation authorizing significant expansion of legalized gaming in Massachusetts. Compl. ¶ 9. The Act authorized the creation of up to three "resort-style" casinos, one each in eastern, western, and southeastern Massachusetts. *Id*. Recognizing the inevitability of Indian gaming and the need to prepare for the likelihood of it, the Legislature identified the southeastern region to be appropriate for gaming by one of the two federally recognized Indian tribes in Massachusetts if a compact for such gaming was reached and approved by the Legislature on a very short timetable. *Id*. ¶¶18-20, 25. This allowed the Commonwealth to address its economic and other interests by entering into a compact with the Tribe, as authorized by IGRA, 25 U.S.C. § 2710(d)(3)(B) and required for class III gaming, to establish the conditions for class III gaming to be in effect once DOI approves the Tribe's land into trust application, rather than waiting until the Tribe has land in trust and seeks to compel negotiations under IGRA. 27 U.S.C. § 2710(d)(3)(A).[5]

KG filed this case on the day the Governor signed the Act into law, raising, among other things, facial constitutional challenges to the Act as a whole, and specifically to the provisions regarding southeastern Massachusetts. *See id*. ¶¶ 54-71. After a hearing on KG's motion for preliminary injunction on January 31, 2012, this Court denied the request for an injunction, Docket

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also Cherokee Nation, 30 U.S. (5 Pet.) at 17 (tribe is "a distinct political society, separated from others, capable of managing its own affairs and governing itself"). The nature of tribal sovereignty within the structure of the United States was stated in *United States v. Wheeler*, 435 U.S. 313, 322 (1978), *superseded by statute on other grounds*: "The powers of Indian tribes are, in general, *inherent powers of a limited sovereignly which has never been extinguished*."

[5] Absent such a compact, once land is in trust, the Tribe has the right to conduct class II gaming immediately with no need for a compact, which would leave the Commonwealth with no input on regulatory or other provisions, and no opportunity to share in any anticipated revenues. 25 U.S.C. § 2710(b).

No. 26, and dismissed the complaint. Docket No. 27. KG appealed to the First Circuit, which affirmed this Court's ruling that KG is not entitled to preliminary injunctive relief and other aspects of the dismissal, but remanded the equal protection claim to this Court for further proceedings. *See KG Enterprises, LLC. v. Patrick*, -- F.3d --, 2012 WL 3104195, *1, *22 (1st Cir. Aug. 1, 2012).

While KG pursued an injunction in this Court and its appeal, the Tribe relied upon and acted in accordance with its rights under the Act. Under section 91, the Tribe: (i) obtained property in Taunton, which it has applied to have taken into trust; (ii) negotiated an intergovernmental agreement ("IGA") with Taunton; (iii) scheduled and held a vote in Taunton, which voted to approve the IGA; and (iv) negotiated a gaming compact with the Commonwealth (the "Compact"), which the Legislature approved on July 30, 2012. *See* Resolves 2012, c. 1. The Tribe has submitted to the DOI for approval both the Compact and its complete land trust application. In short, the Tribe relied upon the Act and has done everything necessary to conduct gaming pursuant to it and IGRA as soon as its trust application is approved, a decision now exclusively in the hands and jurisdiction of the DOI.

The Compact is the result of substantial arms' length negotiations between two sovereigns. It gives the Tribe bargained-for rights, which it has a paramount interest in protecting. This includes the right to engage in casino gaming on the Taunton property consistent with IGRA as soon as the DOI approves the Tribe's trust application. It includes exclusivity in the southeast region. Other bargained-for provisions are equally important and valuable to the Tribe, including an agreement for the Commonwealth to use best efforts to assist in the land into trust process, and the opportunity to address long-standing issues surrounding the Tribe's aboriginal hunting, fishing and land rights in the Commonwealth. Fundamentally, the Tribe's planned gaming operations under the Compact are expected to generate revenues that will provide the Tribe with economic development and self-determination, after centuries of poverty –which are the express goals of IGRA. *See* 25 U.S.C. § 2701(4). These rights are substantial and meaningful to the Tribe, and, although KG's complaint does not (yet) expressly seek to invalidate the Compact, KG cannot obtain the relief it seeks without directly and substantially affecting the Compact itself as both a now enacted state law and a

government-to-government agreement. If this case is allowed to proceed, KG necessarily seeks to adjudicate and, therefore, directly invade and compromise the Tribe's sovereign right to negotiate the Compact, *as well as its rights under it*, and under federal law, all in the Tribe's absence.

Indeed, KG explicitly and openly challenges the Tribe's ability to have the DOI take its lands into trust and, accordingly, directly implicates the Tribe's rights under federal law. KG states that the Mashpee Wampanoag Tribe possesses no Indian lands in Massachusetts and alleges (incorrectly), for example, that: (i) the Tribe's ability to have land taken into trust and, therefore, its ability to obtain Indian lands under the IGRA is "in a state of paralysis" as a result of the *Carcieri* decision; and (ii) "there is no prospect that the Mashpee Wampanoag will be in a position to engage in casino-style gaming consistent with IGRA in the foreseeable future." Compl. ¶ 22. KG's conclusions about the Tribe's rights and facts surrounding those rights are without merit, but the Tribe is not present in this case to challenge them. The Tribe fully expects to have land taken into trust post-*Carcieri* ***just as the DOI has done since the Carcieri decision for other tribes not formally recognized as of 1934***, and fully expects to game on those lands.[6] These questions of the Tribe's rights are now before, and must be answered by, the DOI in the first instance under the doctrine of primary jurisdiction, and subject only to post-determination judicial review under the Administrative Procedure Act. KG nevertheless has directly injected the Tribe's land and gaming rights into this case and invited this Court and the First Circuit to speculate about what the DOI might decide.

As framed by the First Circuit, the case determinative issue here on remand – the level of review to be applied to examine the constitutionality of the Act – turns directly on factual issues that

[6] KG's representation to this Court that the Supreme Court in *Carcieri* "agreed" with the view that the DOI can only take land into trust for tribes that were both recognized and under federal jurisdiction in 1934 is unfortunate. The DOI has since *Carcieri* agreed to take land into trust for tribes that were not formally recognized in 1934, and has established a body of decisional precedent for so acting. *See, e.g.*, Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe, 76 Fed. Reg. 377 (Jan. 4, 2011); BIA Decision to acquire the Red River parcel into trust for Tunica-Biloxi Indian Tribe, dated Aug. 11, 2011; Memorandum of Michael J. Berrigan, Associate Solicitor, Division of Indian Affairs, on Determination of Whether *Carcieri v. Salazar* or *Hawaii v. Office of Hawaiian Affairs* Limits Authority of the Secretary to Acquire Land in Trust for the Santa Ynez Band of Chumash Mission Indians, dated May 23, 2012.

go to the heart of the Tribe's rights under federal and state law and, therefore, will require adjudication of its interests. Specifically, the First Circuit held that whether the Act can be considered "authorized" by or at least a "temporary accommodation" of IGRA, and thus subject to rational basis review, turns on whether the Tribe is able to: (1) obtain approval from the DOI for the Compact before the Tribe has Indian lands as defined by IGRA; and (2) have land taken into trust by the DOI after the *Carcieri* decision. *KG Urban Enters.*, 2012 WL 3104195, at *16-21. The Court, however, noted the absence of evidence in the record concerning the Tribe's trust application and the DOI's ability to make the proposed trust acquisition, and remanded the case for further proceedings consistent with its decision. *Id.* at *22. The First Circuit thus made explicit that the Tribe's rights must first be determined to adjudicate KG's claims.

On remand, KG has made clear that its "core claim" is a challenge to not only the Act, but also the Compact and its provisions. KG Opp. at 2 ("KG is challenging the Commonwealth's grant of a race-based regional gaming monopoly to a single, landless tribe – the Mashpee Wampanoag."), 6 (same).[7] KG now seeks to amend its complaint to add allegations about the Compact itself and the terms of it. KG Mem. at 1-2. KG even asks the Court to allow it discovery that could only be in the hands of the sovereign Mashpee of, among other things, "What basis the Mashpee have for believing they are eligible to bring the land in Taunton into trust" in light of *Carcieri*, and "the Mashpee's [alleged] failure to address this issue in its land-in-trust application." *Id.* at 2. These issues <u>*cannot*</u> be litigated without the Tribe, and likely also cannot be litigated without the DOI, which has primary jurisdiction to determine whether the Tribe may have land taken into trust. Neither the Tribe nor the DOI has been joined, and the Tribe indisputably cannot be joined. This case must be dismissed.

[7] The fact that no party is present in this case to take on KG's derisive reference to the sovereign-to-sovereign agreement as "race-based" and, therefore, its dismissal of the Tribe as a sovereign nation, only illustrates further why this case cannot proceed without the Tribe.

iii. Argument

I. The Tribe May Intervene On A Special, Limited Basis And Intervene To Assert Its Rights Under Rules 12(b)(7) And 19 Without Waiving Sovereign Immunity.

The Tribe's special and limited appearance here is made to intervene solely to seek dismissal of this suit under Rule 12(b)(7) for failure to join the Tribe as a necessary and indispensable party under Rule 19, and the Tribe expressly retains its sovereign immunity not to be joined in this suit. This is a proper procedural approach to the problem presented by the Tribe's absence from this lawsuit. *See, e.g., Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F. Supp. 2d 995, 1001 (W.D. Wis. 2004) (allowing intervenor Indian tribe's motion to dismiss because tribe was necessary and indispensable party that could not be joined), *aff'd on other grounds*, 422 F.3d 490 (7th Cir. 2005); *Marx v. Gov't of Guam*, 866 F.2d 294, 301 (9th Cir. 1989) (sovereign did not waive sovereign immunity by appearing specially and moving to dismiss under Rule 19 because it "asserted its sovereign immunity in its motion to dismiss, and it carefully restricted the scope of its appearance"). It does not constitute a waiver of the Tribe's sovereign immunity, because "[w]hen sovereign immunity is asserted and not waived, a court has no choice but to recognize it." *Id.* (citing *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir.1979)); *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991) (Indian tribe "did not waive its sovereign immunity merely by filing an action for injunctive relief."); *Contour Spa, Inc. v. Seminole Tribe*, __ F.3d __ , 2012 WL 3740402, *7-8 (11th Cir. Aug. 30, 2012) (tribe's removal of case to federal court did not waive immunity; "Our precedents make it abundantly clear that a waiver of tribal sovereign immunity cannot be implied on the basis of a tribe's actions; rather, it must be unequivocally expressed.");

II. The Complaint Must Be Dismissed Because the Tribe Is a Necessary and Indispensable Party Which Cannot Be Joined Because of Its Sovereign Immunity.

Fed. R. Civ. P. 19 requires the Court to dismiss this action if: (1) an absent party is required; (2) it is not feasible to join the absent party; and (3) it is determined "in equity and good conscience" that the action should not proceed among the existing parties. Fed. R. Civ. P.

19(a) and (b); *see also* Fed. R. Civ. P. 12(b)(7) (dismissal for failure to join an indispensable party); *Rep. of Phil. v. Pimentel*, 128 S. Ct. 2180, 2184 (2008); *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991). The Tribe, as one of two parties to the Compact, and with rights under the Compact and federal law which are central to the adjudication of KG's claims, is a necessary and indispensable party under Rule 19 by virtue of its own unique and significant interests in these proceedings. KG has failed to join, and because of the Tribe's sovereign immunity, it cannot join the Tribe. No party present in the case can or will adequately protect the Tribe's interests, which will be severely impaired if this Court adjudicates its rights under the Compact and under federal law in its absence. As discussed below, without the Tribe, this case cannot proceed "in equity and good conscience," Fed. R. Civ. P. 19(b), and must be dismissed.

A. The Tribe Is a Necessary Party Which Cannot Be Joined Due to Its Sovereign Immunity.

1. The Tribe is a Necessary Party.

A party is necessary and must be joined under Rule 19(a)(1) if:

> (A), in that person's absence, the court cannot accord complete relief among existing parties; ***or*** (B), the person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence ***may***: (i) as a practical matter impair or impede the person's ability to protect the interest, or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1) (emphasis added). A Rule 19 interest need only be a *claimed* interest; the underlying merits are irrelevant unless the claimed interest is patently frivolous. *Davis*, 343 F.3d at 1291 (affirming finding that absent tribe had Rule 19(a) interest). KG seeks to invalidate Section 91 of the Act, which threatens the Compact negotiated by the Tribe and the Commonwealth and the Tribe's rights under it. Further, the First Circuit has framed this case as turning on the Tribe's rights including, fundamentally, its right to have land taken into trust by the DOI. The Tribe's interests are very much at stake, and the Tribe is a necessary party under Rule 19(a)(1).

First, the current parties to this case have injected the Compact and the Tribe's rights under it into this case, and the First Circuit's decision relies upon it and the provisions of it. KG now even

seeks to amend its claim to make explicit that it challenges the Compact. This Court cannot make a ruling that affects the Compact without the presence of the Tribe, as one of the two parties to that sovereign-to-sovereign contract. *See, e.g., Enter. Mgt. Consultants, Inc. v. United States*, 883 F.2d 890, 894 n.4 (10th Cir. 1989) ("*EMCI*") (Tribe was necessary party where validity of bingo management contract between tribe and plaintiff at issue; "The Tribe's interest in the validity of this contract, to which it is a party, would be directly affected by the relief [plaintiff] seeks."). In *EMCI*, the plaintiff sought declaratory and injunctive relief against the tribe and federal government after the DOI disapproved a management contract between the plaintiff and the tribe, pursuant to its authority under 25 U.S.C. § 81. *Id*. at 892. The court, however, upheld the dismissal of the suit because "[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Id*. at 894 (quotation omitted); *see also Blacksmith Investments, LLC v. Cives Steel Co.*, 228 F.R.D. 66, 74 (D. Mass. 2005) ("[I]t is well established that a party to a contract which is the subject of the litigation is considered a 'necessary' party."). [8] The tribe could not be sued without its consent, and without the tribe, the case had to be dismissed. *Id*. The same is true here.

The Tribe will be prejudiced by any relief entered by the Court that invalidates the Act, or otherwise affects the Tribe's rights under the Act or the Compact. While KG does not yet expressly seek to invalidate the Compact, it does so indirectly by asking this Court to strike down the Act (and thereby directly affect the Tribe's rights under both the Act and the Compact), and KG has already stated its intention to amend its claim to address the Compact directly. KG does not challenge the statute alone, but its application to the Tribe; the Court simply cannot act on KG's complaint without threatening the Tribe's interests. But no one is present in this case to protect the

[8] The need to join all parties to a contract when suing under a contract is well established. *See Z & B Enters., Inc. v. Tastee-Freez Int'l, Inc.*, 162 Fed. Appx. 16, 20 (1st Cir. 2006) (parties to contracts which plaintiff sought to rescind were necessary parties without whom the case could not proceed); *Acton Co. v. Bachman Foods, Inc.*, 668 F.2d 76, 81-82 (1st Cir. 1982) ("[A]n action seeking rescission of a contract must be dismissed unless all parties to the contract, and others having a substantial interest in it, can be joined."); *Rivera Rojas v. Loewen Group Int'l, Inc.*, 178 F.R.D. 356, 362 (D.P.R. 1998) ("A contracting party is the paradigmatic example of an indispensable party.").

Tribe's rights. *See infra* Argument II(B)(1). Even the possibility that the Tribe's rights under and its interests in enforcing the Compact ***might*** be impaired is sufficient by itself to makes the Tribe a necessary party. Fed. R. Civ. P. 19(a)(1)(B)(i). To the extent KG seeks a ruling that would threaten or affect the terms of the Compact in any way, this case cannot proceed without the Tribe.

Second, KG also put directly at issue the Tribe's sovereign rights to negotiate compacts, to have the DOI consider and approve the Compact and to have land taken into trust under federal law. *See KG Enters.*, 2012 WL 3104195, at *17-18. As framed by the First Circuit, the central issue in this case turns on whether the Tribe is able to have land taken into trust on its behalf by the DOI. *See id*. at *17. No one other than the DOI has the right to make that determination subject only to specific, post-determination judicial review. *See* 25 U.S.C. § 465 (authorizing the DOI to take land into trust); 5 U.S.C. § 704 (stating the procedure for judicial review of an agency action).

The Tribe is entitled under the First Amendment petition clause and under federal law to petition the DOI to take land into trust, to obtain a final determination from the DOI and to exhaust any appeal of it before this Court or anyone else can make a determination about its ability to have land taken into trust. To proceed otherwise would directly violate the Tribe's rights and improperly invade the primary jurisdiction of the DOI.[9] It would also interfere with and undermine the fundamental trust relationship between the Tribe and its fiduciary, the United States. The Tribe's trust application is more than a simple request for government action; it is an invocation of the fiduciary duty -- heightened by the Tribe's landless and reservation-less state -- of the United States, which dates back to the Marshall Trilogy in the early 1800s, *see supra* note 4, and the

[9] The United States Constitution gives Congress sole authority to make decisions regarding Indian tribes and their relationship with the United States. *See* Art. I. § 8, cl. 3; *see also United States v. Lara*, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'") (quotation and citations omitted); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.") (citing *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974)). In its exercise of that power, Congress delegated the authority to make decisions regarding a tribe's application to have land taken into trust exclusively to the DOI. *See* 25 U.S.C. § 465; *County of Charles Mix v. U.S. Dept. of Interior*, 674 F.3d 898, 902 (8th Cir. 2012) (§465 is a constitutional delegation of authority). DOI thus has primary and exclusive jurisdiction to determine whether to take land into trust for the Tribe, subject only to post-determination judicial review under the Administrative Procedure Act, 5 U.S.C. § 704.

Tribe's status as a "domestic dependent nation." *Cherokee Nation*, 30 U.S. (5 Pet.) at 17. Indian Tribes, including the Mashpee, rely on the United States to fulfill the duties of its fiduciary relationship, and the land acquisition process under the Indian Reorganization Act, 25 U.S.C. §461 et seq. ("IRA"), was Congressional recognition and response to the fact that the fiduciary had been failing in its duty, authorizing remedial action. Outside parties may not interfere in the interpretation of such fiduciary obligations, particularly given the Indian law canon of construction that such remedial statutes are to be construed in favor of tribes. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"); *see also Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."). The Tribe and likely the DOI are both necessary parties to this proceeding to the extent it will involve any assessment of the likelihood that the Tribe may have land taken into trust. *See KG Enters.*, 2012 WL 3104195, at *17 (Court did not have "the benefit of any view by the Secretary on any of these issues" relating to Tribe's trust application or DOI's process for reviewing trust applications after *Carcieri*).

Indeed, no court can make any ruling about the outcome of the DOI's final decision regarding the Tribe's land into trust application because, without a "final determination" by the DOI, there is nothing for the Court to review. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977) ("[I]t is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."); *see also St. Croix Chippewa Indians of Wis. v. Kempthorne*, 2008 WL 4449620 (D.D.C. Sept. 30, 2008) *aff'd sub nom. St. Croix Chippewa Indians of Wis. v. Salazar*, 384 F. App'x 7 (D.C. Cir. 2010) (finding that a court may only review a "final" agency decision, and may not "review agency policy choices in the abstract."). Such post-determination

review of the agency's decision is unlikely to occur in this Court and would have to be completed before anyone else could make a finding about the Tribe's ability to transfer land into trust. Before then, any challenge to the Tribe's ability to have land taken into trust on its behalf is not ripe and the Court does not have jurisdiction to entertain it. *Id.*

The question here, however, is not simply one of ripeness, but even more fundamentally whether the Tribe's rights can be adjudicated at all in its absence. Given the Tribe's ward/trustee relationship with the United States, as well as its constitutional right to petition to have land taken into trust and to have DOI make the primary determination on its application, the Court cannot here rule on the likelihood that the Tribe may or will have land taken into trust without the Tribe present. The fact that KG invites and the First Circuit's decision compels the Court to entertain these issues makes the Tribe a necessary party.[10]

2. Joinder Is Not Feasible Because the Tribe Is a Sovereign Nation with Sovereign Immunity That It Has Not Waived.

While the Tribe is a necessary party to this litigation, it cannot be joined because it enjoys sovereign immunity that it has not waived. Fundamental to sovereignty is sovereign immunity – the right not to be sued without its consent. *See Three Affiliated Tribes of Fort Berthold v. Wold Eng'g*, 476 U.S. 877, 890 (1986); *see also Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 756 (1998) ("As a matter of federal law, an Indian Tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); *Nev. v. Hall*, 440 U.S. 410, 414-15 (1979) ("'Sovereign immunity' is shorthand for the common-law concept that the sovereign cannot be sued without its consent."). Tribal sovereign immunity applies to the on- and off-reservation activities of a tribe, *id.* at 756, to money damages as well as to equitable relief, *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991), and in federal and state courts. *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989). At least one

[10] And to the extent that the Court is asked or required to speculate on the DOI's decision-making process or its likely decision, it cannot do so without circumventing the DOI's exclusive authority. The First Circuit itself acknowledged its inability to make decisions based on the incomplete factual and legal record because of the Tribe's and DOI's absence. *KG Enters.*, 2012 WL 3104195, at *17.

Massachusetts court has explicitly held that the Mashpee Wampanoag Tribe in particular "is immune from suit absent a clear waiver by the Tribe or congressional abrogation." *Bingham v. Maushop, LLC*, No. BACV2006-00736 (Mass. Super. Ct. June 26, 2007). To relinquish its immunity, a tribe's waiver must be "clear." *C & L Enters.*, 532 U.S. at 418 (internal citations omitted). The Tribe here has not waived its sovereign immunity, nor has Congress abrogated it, and neither the Court nor the parties can join the Tribe as a party to this case, i.e., joinder is not feasible under Rule 19(a).

"[W]hen a necessary party is immune from suit there is little need for balancing the Fed. R. Civ. P. 19(b) factors because 'immunity itself may be viewed as the compelling factor.'" *Washoe Tribe of Nev. & Calif. v. Brooks*, 175 F. Supp. 2d 1255, 1258 (D. Nev. 2001) (quoting *Confederated Tribes of the Chehalis Indian Reservation*, 928 F.2d at 1499); *see also EMCI*, 883 F.2d at 893 (dismissing suit where tribe was necessary party to action seeking to validate contract with the tribe). This Court may and should, therefore, dismiss the case based solely on the Tribe's sovereign immunity and need not analyze the factors under Rule 19(b). Even if the Court reaches the Rule 19(b) factors, however, they, too, show that dismissal is proper.

B. This Case Cannot Proceed "In Equity and Good Conscience" Without the Tribe and Must, Therefore, Be Dismissed.

If the Court reaches the issue at all, the Rule 19(b) factors demonstrate conclusively that this case cannot proceed "in equity and good conscience" without the Tribe. Fed. R. Civ. P. 19(b). Courts examine four factors to determine whether to dismiss:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b); *see also Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968). An analysis of these factors here requires dismissal.

1. The Tribe Will Be Prejudiced if This Case Proceeds in Its Absence.

The analysis of prejudice to the absent party under Rule 19(b) often, as here, tracks the Rule 19(a) analysis. *See EMCI,* 883 F.2d at 894 n.4 (prejudice test under 19(b) is essentially the same as inquiry under 19(a)); *see also Kickapoo Tribe of Indians*, 43 F.3d at 1498 n.9 ("The inquiry as to prejudice under Rule 19(b) is the same as the inquiry […] regarding whether continuing the action will impair the absent party's ability to protect its interest.") (citations omitted); *Acton Co.*, 668 F.2d at 81; *Rivera Rojas*, 178 F.R.D. at 362. This factor focuses on the preclusive effect of a judgment to the absent party. *See B. Fernandez & HNOS, Inc. v. Kellogg USA, Inc.*, 516 F.3d 18, 23-24 (1st Cir. 2008) (finding prejudice where injunctive and even monetary relief would have preclusive effect on absent party's contract claims); *Acton*, 668 F.2d at 78; *Rivera Rojas,* 178 F.R.D. at 362-63 (prejudice where ruling for plaintiff would necessarily be unfavorable to absent party). A judgment affecting the Compact in any way will prejudice the Tribe which has a strong interest in protecting the validity of the contract it made and the concessions it obtained.

The First Circuit has framed the case as one in which the Tribe's rights and the provisions of the Compact are central to the outcome. *See, e.g.*, *KG Enters.*, 2012 WL 3104195, at *3 (discussing exclusivity provision of both section 91 and the Compact), *21 (discussing provisions of the Compact relating to the timing of the DOI's decision on the Tribe's trust application and the Tribe's ability to renegotiate the Compact if the DOI rejects it). The First Circuit's decision thus requires this Court to examine not only the Act, but also the Compact, which it cannot do without affecting the Tribe's rights under it. The First Circuit also instructs that the Tribe's ability to: (i) have the Compact approved by DOI before it has land in trust; and (ii) have land taken into trust at all, are central issues that must be decided to determine whether the Act is subject to rational basis or some more searching review. *See id*. at *19-20. This Court is further tasked with evaluating the timing of the Tribe's trust application, or perceived "delay" in a final determination on it. *See id*. at *21. A decision by this Court on these issues would invade DOI's primary jurisdiction and substantially impair the Tribe's rights to obtain these decisions from DOI based on its process and timetable without outside interference. It would also put at risk the Tribe's rights that depend upon

the DOI's approval of its trust application. Indeed, a ruling now of whether the Tribe is likely to have its land taken into trust is mere speculation, but if incorrectly answered in the negative, would put the Tribe's rights under the Compact and federal law in jeopardy.[11]

The Tribe's rights cannot be protected by any of the parties already in this case or by the Aquinnah. While the Commonwealth and the Tribe both have an interest in upholding the Act and the Compact, the Tribe's interests are unique to it and the Commonwealth is not in a position to protect them. The Commonwealth and the Tribe were on opposite sides of the negotiating table vis-à-vis the Compact and do not have the same interests in ensuring it is enforced as written. What may be of utmost importance to the Tribe – e.g., its sovereign rights, exclusivity in the southeastern region, the ability to negotiate for an agreement to facilitate exercise of its aboriginal fishing and hunting rights and its land claims – may not be as important to the Commonwealth. Only the Tribe is positioned to assert and protect its interests. The Commonwealth, as its negotiating adversary, is not.

The Commonwealth also does not have the same trust relationship that exists between the United States and the Tribe and, therefore, the Commonwealth is neither obligated nor situated to protect the Tribe's interests. *See Am. Greyhound Racing*, 305 F.3d at 1023 n.5 (state's presence in case did not adequately protect tribes because state owed no trust duties to the tribe, and state and tribes were often adversaries in gaming matters). Nor does the Commonwealth share the Tribe's vital interest in both establishing its trust land base and using it for tribal specific economic development. Indeed, the ramifications to the Tribe and the Commonwealth of a negative outcome are entirely distinct. Each would lose the benefit of the contract they made, but the Commonwealth could seek to fill the economic gap by establishing a third commercial casino in

[11] In *Am. Greyhound Racing*, plaintiff dog and race track owners brought suit challenging on equal protection grounds an Arizona law that authorized the governor to enter into compacts with Indian tribes to permit gaming on their trust lands. 305 F.3d at 1021. The Ninth Circuit reversed the trial court and concluded the tribes were necessary and indispensable parties because "the amount of prejudice to the tribes from termination of existing compacts and inability to enter new ones would be enormous." *Id*. at 1025. The same is true here. The Tribe would suffer enormous prejudice if the rights and benefits it relied upon, acted in reliance upon, and already have under the Act and Compact were deemed unconstitutional or restricted in any way.

the southeastern region. While this would leave the Commonwealth vulnerable to contend with the fact that the Tribe under IGRA may game on its trust lands once established, the Tribe would lose the valuable substantive rights of exclusivity and timing gained under the Compact. This would undermine the remedial action authorized by Congress under the IRA and IGRA because the Tribe's economic potential and, therefore, its economic development, would be diminished.

If allowed to intervene, the Aquinnah also will not and could not adequately protect the Mashpee's interests. It is clear from the Aquinnah's motion to intervene that it seeks to *compete* with the Mashpee for the right to negotiate with the Governor under section 91. The Mashpee need not comment on the Aquinnah's assertion of its ability to game on lands it holds or obtains in the Commonwealth. It suffices to say that the Aquinnah have no incentive to uphold or protect the provisions of the Compact because the Aquinnah has informed this Court that it is their existing trust lands that underlie their right to a compact, noting that the Mashpee have no such Indian lands, thus pitting themselves against the Mashpee. The Mashpee and the Aquinnah are also not similarly situated because the Mashpee already have the Compact with the Commonwealth, while the Aquinnah seek to gain a right to negotiate a compact. No one but the Mashpee is positioned to protect the Mashpee's rights and interests.

2. Prejudice to the Tribe Cannot Be Lessened Through Protective or Crafted Relief.

The second Rule 19(b) factor also weighs in favor of dismissing the suit because there is no way to limit, lessen, or eliminate the harm to the Tribe. KG challenges the Act on its face and, because the Tribe acted in reliance on the Act, and entered into a separate agreement with the Commonwealth pursuant to it, the Court cannot grant KG the relief it seeks without affecting the Tribe's interest in the validity of the Act and the Compact as they are written. There is also no way, under the First Circuit's decision, for this Court to determine what level of review to use to evaluate the constitutionality of the Act without making improper findings about the Tribe's rights to negotiate with the Governor, enter into the Compact and to conduct IGRA gaming at the appropriate time. Again, the Tribe is entitled to have the DOI determine whether to approve the

Compact and take land into trust for the Tribe without interference and before this Court or anyone else makes rulings on those issues that substantively affect the Tribe's rights.

In *Kickapoo Tribe of Indians*, once the court determined that an absent party would be prejudiced by a judgment, and that there was no way to avoid such prejudice by shaping the relief, there were "grounds to dismiss the complaint for failing to join an indispensable party *without consideration of any additional factors*." *Kickapoo Tribe of Indians*, 43 F.3d at 1498 (emphasis added). The same is true here. The Court need go no further. If the Court examines the remaining Rule 19(b) factors, however, they only further demonstrate that this case cannot proceed in equity and good conscience without the Tribe and that dismissal is the only proper remedy.

3. A Judgment Rendered in the Tribe's Absence Will Be Inadequate.

An adequate judgment is one which furthers the public interest in "complete, consistent and efficient" resolution of controversies. *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 111. No such adequate judgment is possible here absent the Tribe. *See Dawavendewa v. Salt River Project Agr. Imp. & Power Dist*., 276 F.3d 1150, 1162 (9th Cir. 2002) ("No partial relief is adequate. Any type of injunctive relief necessarily results in the above-described prejudice to [Defendant] and the Nation."). The Compact is a contract between two sovereigns and a stand alone state law that supersede section 91 of the Act. The Tribe has established rights under it, including exclusivity in the southeastern region, which cannot be eliminated by a judgment in this case. Even if KG is correct about the Act, it could not obtain the relief it seeks because the Compact would prevent it. And the Court cannot modify or invalidate the Compact without the Tribe present.

In addition, the factual issues the First Circuit identified as unknown cannot be determined without the presence of the Tribe and without a final determination from DOI. These include questions about the contents and status of the Tribe's trust application, and the timing and likelihood of the Tribe having its land taken into trust. *See, e.g., KG Enters.*, 2012 WL 3104195, at *7, 17. Any ruling from this Court about what DOI is likely to do is mere speculation and any judgment based upon it is not "complete" and would have to be reopened once the DOI acts if this Court

guesses wrong. As a practical matter, facts that are only in the possession of the Tribe will remain unknown because the Tribe cannot be subpoenaed.[12] This adds to the lack of reliability of any prediction of the DOI's future action and, therefore, to the inadequacy of any judgment that could be entered here.

4. The Tribe's Interest in Maintaining Its Sovereign Immunity Outweighs KG's Interest in Litigating Its Claims.

Finally, even if dismissal leaves KG with no other forum to obtain the relief it seeks, "this result is a common consequence of sovereign immunity," and courts have consistently held that a tribe's interest in maintaining its sovereign immunity outweighs the plaintiff's interest in litigating its claims. *See, e.g.*, *Am. Greyhound Racing,* 305 F.3d at 1025 ("With regard to the fourth factor, however, we have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs."); *Davis*, 343 F.3d at 1294 (affirming dismissal); *Clinton*, 180 F.3d at 1090 (same); s*ee also United Keetoowah Bank of Cherokee Indians*, 1993 WL 307937, at *16 (same). Federal courts demonstrate a "strong policy that has favored dismissal when a court cannot join a tribe because of sovereign immunity." *Davis*, 192 F.3d at 960; *see also Pit River Home & Agric. Coop. Ass'n*, 30 F.3d at 1102 (tribe's interest in maintaining sovereign immunity outweighed plaintiff's interest in litigating claim). There is "very little room for balancing of other factors set out in Rule 19(b) where a necessary party under Rule

[12] Sovereign immunity is not merely a defense to liability, but complete immunity from suit. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002). It includes the right to be free from <u>all</u> court processes and the attendant burdens of litigation, including subpoenas. *See United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992), *cert. denied*, 510 U.S. 838 (1993) (upholding on the basis of sovereign immunity a district court order quashing a subpoena issued to the Quinault Indian Nation Department of Social and Health Services); *Quair v. Bega*, 388 F. Supp. 2d 1145, 1148 (E.D. Cal. 2005) (granting a tribe's motion to quash subpoenas on the ground of sovereign immunity); *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 204 F. Supp. 2d 647 (S.D.N.Y. 2002) (quashing a subpoena issued to a tribe's Executive Director). Subpoenas present a direct threat to tribal sovereignty because the intended effect of a subpoena is to compel the sovereign to act. *Dugan v. Rank*, 372 U.S. 609, 620 (1963) ("The general rule is that a suit is against the sovereign if . . . the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'") (citations omitted). As the United States Supreme Court has stated, there are "the strongest reasons of public policy" for the rule that a court may not compel a sovereign possessing sovereign immunity to act. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

19(a) is immune from suit because immunity may be viewed as one of those interests compelling by themselves." *Kickapoo Tribe of Indians*, 43 F.3d at 1496 (quotation omitted).

As the Second Circuit Court of Appeals has explained:

> The rationale behind the emphasis placed on immunity in the weighing of rule 19(b) factors is that the case is not one "where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent."

Fluent, 928 F.2d at 547 (quoting *Wichita & Affiliated Tribes of Oklahoma*, 788 F.2d at 777 n.13). The Court is thus "confronted with a more circumscribed inquiry" when it assesses whether a lawsuit should continue when a necessary party is immune from suit. *Kickapoo Tribe of Indians*, 43 F.3d at 1497. Given "the paramount importance afforded the doctrine of sovereign immunity under [r]ule 19," *Fluent*, 928 F.2d at 547 (quotation omitted), the Court should dismiss the suit because the importance of preserving the Tribe's sovereign immunity outweighs the KG's interest in litigating its claims. *See Downing v. Globe Direct LLC*, 806 F. Supp. 2d 461, 469 (D. Mass. 2011) ("But Plaintiff's lack of all means of redress under 'this factor is outweighed by the 'paramount importance' to be accorded to the [Commonwealth's] immunity from suit.'") (quoting *Seneca Nation of Indians v. New York*, 383 F.3d 45, 48 (2d Cir. 2004)). This case cannot proceed "in equity and in good conscience" without the Tribe, and should be dismissed. To hold otherwise would undermine the very nature of sovereign immunity and the Tribe's status as a sovereign nation.

iv. Conclusion

For all of the reasons set forth above, the Tribe by special limited appearance, respectfully requests that the Court (i) allow it to intervene for the sole purpose of seeking dismissal and (ii) dismiss this case under Fed. R. Civ. P. 12(b)(7) and 19 for failure to join the Tribe as a necessary and indispensable party, and grant such other and further relief as the Court deems proper.

Respectfully submitted,

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Dated: September 21, 2012

CERTIFICATE OF SERVICE

I, Heidi A. Nadel, hereby certify that this document has been filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on September 21, 2012.

/s/ Heidi A. Nadel
Heidi A. Nadel