**UNITED STATES DISTRICT COURT**

DISTRICT OF MASSACHUSETTS

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| DAVID LITTLEFIELD et al.,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES OF AMERICA, et al.,<br><br>Defendants. | Case No. 1:16-CV-10184-ADB |

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO CITY OF TAUNTON, MASSACHUSETTS MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE**

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## INTRODUCTION

The main issue *of law* currently pending before this Court is whether the Bureau of Indian Affairs ("BIA") has properly interpreted the statutory language of, inter alia, Section 479 of the Indian Reorganization Act ("IRA"). That pure issue of law is to be tried before this Court on July 11, 2016.

Nevertheless, despite the pendency of this action for several months, only one business day before the "trial" on the merits of Plaintiffs' First Cause of Action, the City of Taunton ("Taunton") has filed a motion to appear as amicus curiae. We refused to consent to the motion and we submit that the motion is "untimely."

Also, due to the narrow issue of statutory interpretation before this Court, relating to how *the BIA* has interpreted certain Indian law statutes – not how Taunton argues they should be interpreted – an amicus brief from Taunton would cause delay and not be useful or provide any unique perspective, expertise, guidance or even supplement the Court's knowledge – particularly where the litigants have highly experienced counsel who have already briefed these issues extensively. Moreover, based on its Memorandum of Reasons In Support of Defendants' Motion For Summary Judgment ("Memorandum of Reasons," Taunton Motion at Ex. 1), Taunton is acting only as a friend of the Defendants, based on its direct pecuniary interest in the outcome – a one billion dollar casino project. Taunton simply has no specialized or unique knowledge or experience with Indian law that would supplement this Court's knowledge beyond those positions fully briefed by the parties' counsel.

More nefarious is the fact that Taunton is simply shilling for the Mashpee Wampanoag Tribe ("the Tribe"), who are evading intervening on their own behalf so as to negate this Court's jurisdiction over them. The Tribe is exploiting Taunton in order to surreptitiously participate in these proceedings by proxy– a contractual obligation of Taunton as part of its Intergovernmental Agreement with the

Tribe. Such an undisclosed, dual pecuniary and direct interest in this matter should make it inappropriate for this Court to allow Taunton (as a stalking horse for the Tribe and a highly partisan entity), to submit a brief as a friend of the Defendants, rather than as a purported friend of the Court.

**STANDARD OF REVIEW**

The First Circuit has held that granting amicus status remains "within the sound discretion of the court." Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970). However, Strasser also cautioned:

> "[W]e believe a district court *lacking joint consent of the parties should go slow in accepting... an amicus brief* unless, as a party, although short of a right to intervene, the amicus has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance." Id., emphasis added. [1]

As set forth below, Taunton has not received joint consent for its motion, and Taunton's motion fails to meet the standards required for an interested party to receive amicus status.

**ARGUMENT**

1. The Motion is "Untimely" and Will Cause Delay.

On June 29, 2016, this Court set a "trial" date on Plaintiffs' First Cause of Action for July 11, 2016, at 9:00 am. On July 6, 2016, Taunton's counsel made *first* contact about conferring on its motion to appear as amicus curiae. On July 7, 2016, in the late afternoon, Taunton filed its motion with its

1 On the other hand, against amici participation is Judge Posner's admonition in Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 544 (7th Cir. 2003):

> "The reasons for the policy [of denying or limiting amici status] are several: judges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process."

Id. (citing Nat'l Org. for Women v. Scheidler, 223 F.3d 615, 616 (7th Cir. 2000)).

proposed brief – just *one business day* prior to the previously scheduled "trial." We submit to the Court that Taunton's choice to wait so long to request amicus status is either rank gamesmanship or certainly the epitome of "untimely" in this context.

Moreover, if this Court allows Taunton's motion, then a response to that motion by Plaintiffs' would be required, thus adding further documentation and arguments into an already extensive record. This Court has already recognized the urgency of this matter and has put the disposition of this case on a fast track. Taunton's motion here now threatens to delay this matter further, while the Tribe continues to fast track construction. Taunton should not be allowed to derail the fast track this Court and the parties have chosen.

2. The Motion is a Subterfuge by the Tribe to Evade this Court's Jurisdiction.

Conspicuously absent from Taunton's proposed Memorandum of Reasons is any reference to Section 18(C) of the Intergovernmental Agreement Between The City of Taunton and The Mashpee Wampanoag Tribe ("IGA") – which is odd, considering the many references to that document made in the Memorandum of Reasons relating to other sections of the IGA. (See Taunton Memorandum of Reasons at 4-5) Concealed from this Court is Section 18(C) of the IGA, which provides the motive and the context for Taunton's sudden desire to participate in this case, as that section states the following:

> "Upon written request of the Tribe, the City shall defend, intervene in or participate as *amicus curiae* in any lawsuit challenging any City, Commonwealth or federal approvals necessary for gaming to occur on the Subject Property including an appeal of or legal challenge to, this Agreement, *provided, however,* that if the Tribe shall request the City to defend, intervene or participate in any such lawsuit, the Parties shall agree upon a budget for the costs of such defense, intervention or participation (such costs to include disbursements and fees for outside attorneys and consultants), and the Tribe shall be responsible for the payment of all such budgeted costs."

(Emphasis in original).

It should be obvious from this contractual language that The Tribe has invoked

Taunton's obligation to "participate as *amicus curiae* in any lawsuit challenging any ...federal approvals necessary for gaming to occur on the Subject Property." It should be equally obvious that this is motion a tactical move *by the Tribe* so that the Tribe can – without subjecting itself to the jurisdiction of this Court – offer the Tribe's analysis of, inter alia, Section 479 of the IRA. This contractual provision in the IGA was a built in end run around the rules for participation and intervention by the Tribe. The Tribe does not want to intervene and waive its sovereign immunity, as it does not want this Court to have the power to enjoin the Tribe's activities, so it has used Taunton to be its puppet. This is a clear abuse of the amicus process and should not be rewarded.

If the Tribe wishes to intervene, as is its right, it should do so in a manner which is above board and subjects it to the full jurisdiction of the Court. To allow Taunton's motion to participate as an amicus in order for Taunton to do the Tribe's bidding would simply be a further manner in which Plaintiffs' rights would be prejudiced. If the Tribe would like to intervene in order to make its arguments on its own, Plaintiffs would welcome the opportunity to have the Tribe subject to this Court's jurisdiction.

3. The City of Taunton Has Nothing to Offer that is New or Helpful.

Taunton provides two basic areas of discussion in its Memorandum of Reasons: (1) a description of its own direct pecuniary interests concerning what the casino project means to Taunton (Mem. at 3-6) ; and (2) a somewhat off topic argument concerning Taunton's/the Tribe's arguments on Indian law (id. at 6-15). Neither section of the proposed Memorandum of Reasons is appropriate to allow Taunton to participate as amicus curiae in this case.

a. Taunton's Economic Interests and "Puppet" Status Should Preclude Amicus Status

As set forth above, an amicus participant is supposed to be a friend to the Court, not a friend to a particular party in the action, and Taunton is NOT, by any stretch of the imagination, acting as a friend of the Court. Indeed, many courts have refused to permit interested non-parties to file amicus briefs, on the theory that only the disinterested are eligible to become amici. As one federal district judge reasoned in 1999, it would be improper to allow a non-party to participate as an amicus where the non-party "has a specific pecuniary interest in the defendant's perspective," or where the non-party "makes no attempt to present itself as a neutral party." Sciotto v. Marple Newtown Sch. Dist., 70 F. Supp. 2d 553, 555 (E.D. Pa. 1999); see also Goldberg v. City of Philadelphia, 1994 U.S. Dist. LEXIS 9392 (E.D. Pa. 1994); United States v. Andrews, 1993 U.S. Dist. LEXIS 860 (N.D. Ill. 1993); American Satellite Co. v. United States, 22 Cl. Ct. 547 (1991); United States v. Gotti, 755 F. Supp. 1157 (E.D.N.Y. 1991); Tiara Corp. v. Ullenberg Corp., 1987 U.S. Dist. LEXIS 8102 (N.D. Ill. 1987); Leigh v. Engle, 535 F. Supp. 418 (N.D. Ill. 1982).

Indeed, if Taunton's significant economic interest alone is not enough to convince the Court of Taunton's obvious partisanship towards the Defendants, then Section 18(C) of the IGA should be enough to alert the Court to the fact that Taunton is simply the vehicle through which the Tribe – not Taunton – is trying to insert itself into this case without putting the Tribe's shield of sovereignty at risk.

Moreover, considering the issues in this case – statutory interpretation of specific language in a statute – Taunton's economic interests are irrelevant. Whether Taunton receives an economic benefit from the proposed casino or not, is not properly a factor in this Court's determination of what a series of words mean in a federal statute. For example, the phrase “such members” in Section 479 of the IRA will not suddenly mean something completely different because Taunton stands to gain if it does.

b. “Taunton's” arguments on Indian law are redundant and not their own.

Since Taunton is the party attempting to participate in this matter (while the Tribe lurks in the background feeding it arguments), this Court must assess what Taunton alone would "bring to the party." Taunton, a municipality, has no special expertise, unique experiences or guidance it can provide to supplement this Court's analysis of specific statutory language contained in the federal statutes at issue. If Taunton were instead some Indian law association seeking to participate, one might understand how the Court's knowledge might be enhanced or supplemented by an amicus brief from such an "industry" association with an extensive knowledge and experience in the area of Indian law – as long as the arguments offered also actually supplemented and enhanced the record in a useful way for the Court, beyond that which competent counsel have already provided.

Here, however, Taunton has no such expertise in Indian law, has no such unique insight into what Congress intended, has no unique guidance to provide the Court regarding the interpretation of federal statutes, and Taunton's economic interest in these proceedings alone is not a basis to elevate its pedestrian legal arguments to an amicus level. Indeed, Taunton's proposed submission is no more significant to this Court than just another brief from another party to these proceedings, with nothing more to offer than what has already been briefed extensively by the parties' more than competent counsel in this litigation.

Commonsense should lead to the conclusion that the amicus participant should not only have an interest in the matter, but also some independent level of knowledge or expertise in the area of law at issue, more significant than simply being able to hire outside counsel to provide arguments. Indeed, here, Taunton is not even providing its own arguments, it is simply a stand in for the Tribe's arguments, so that the Tribe may avoid submitting to the jurisdiction of the Court.

4. Defendants are represented by competent counsel.

In its Memorandum of Reasons, Taunton does not allege, nor could it reasonably allege, that "existing counsel may need supplementing assistance." See Strasser, supra, 432 F.2d at 569. On the contrary, the counsel in this case are all competent attorneys who are well aware of the arguments relating to the Indian law issues currently at before this Court. The Department of Justice attorneys for the Defendants have argued and briefed cases such as this in the past, and Plaintiffs' attorneys are well versed in Indian law. There is no basis to question the competency of the attorneys involved, and Taunton makes no assertion that the attorneys for Defendants have somehow left out crucial arguments. The Memorandum of Reasons simply makes redundant arguments from a different angle, and there should be no need, at this juncture, for additional arguments beyond what the current counsel have placed in the record.

Accordingly, Plaintiffs respectfully request that this Court deny the City of Taunton's motion in its entirety.

Dated: July 8, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Matthew J. Frankel, hereby certify that this document was filed through the Court's 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 via first class mail to those indicated as non-registered participants, if any.

*/s/ Matthew J. Frankel*