IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT

T.P. JOHNSON HOLDINGS, LLC. JACK M. JOHNSON AND TERI S. JOHNSON, AS SHAREHOLDERS/MEMBERS,	§	
Plaintiffs,	§	**CIVIL ACTION NO. 3:09-CV-305**
v.	§	
POARCH BAND OF CREEK INDIANS, et al.,	§	
Defendants.	§	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants the Poarch Band of Creek Indians, P.C.I. Gaming Authority (f/k/a P.C.I. Gaming) and Creek Indian Enterprises Development Authority (f/k/a Creek Indian Enterprises) (collectively Poarch Band of Creek Indians or the Tribe)[1] submit this memorandum brief in support of their contemporaneously filed motion to dismiss.

I. INTRODUCTION

Plaintiffs filed their complaint against the Poarch Band of Creek Indians, P.C.I. Gaming Authority, and Creek Indian Enterprises Development Authority purporting to invoke this Court's diversity jurisdiction. Plaintiffs' three count complaint brings claims under Ala. Code §§

[1] The defendant P.C.I. Gaming Authority is an unincorporated instrumentality and integral part of the Poarch Band of Creek Indians, and Creek Indian Enterprises Development Authority is a political subdivision of the Poarch Band of Creek Indians. Both are wholly owned by the Tribe. *See Freemanville v. Poarch Band of Creek Indians*, __ F.3d __,No. 08-10602, 2009 U.S. App. LEXIS 6946, at *3 n.1 (11th Cir. March 30, 2009) (Creek Indian Enterprises and P.C.I. Gaming . . . are wholly owned by the Poarch Band and are chartered under its tribal laws); *accord* Doc. # 1 at ¶ 2 ("Defendants, Poarch Band of Creek Indians, P.C.I Gaming and Creek Indian Enterprises, a federally recognized Indian Tribe and two entities wholly owned by the Tribe and chartered under its tribal laws . . .").

6-6-540, 6-6-280(b), and 9-13-62 to quiet title, for ejectment, and for continuing trespass. Plaintiffs allege the Poarch Band of Creek Indians constructed a portion of a parking lot on property Plaintiffs contend they own. Because this Court lacks subject matter jurisdiction and Plaintiffs have therefore failed to state a claim upon which relief may be granted, as the following discussion explains, the complaint must be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure:

II. DISCUSSION

A. No Diversity Jurisdiction

As a threshold matter, Plaintiffs allege that this Court has diversity jurisdiction. Doc. # 1 at ¶ 4. Plaintiffs, however, allege no facts to support this allegation. Indeed, there are no facts which could support an exercise of diversity jurisdiction here. "Indian tribes cannot sue or be sued in diversity because they are not citizens of any state." *Am. Vantage Cos. v. Table Mt. Rancheria*, 292 F.3d 1091, 1095 (9th Cir. Cal. 2002) (citing *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 27 (1st Cir. 2000) (holding that "the presence of an Indian tribe destroys complete diversity" because "an Indian tribe … is not considered to be a citizen of any state"); *accord Romanella v. Hayward*, 114 F.3d 15, 16 (2d Cir. 1997) (per curiam); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974); *Barker-Hatch v. Viejas Group Baron Long Capitan Grande Band of Digueno Mission Indians*, 83 F. Supp. 2d 1155, 1157 (S.D. Cal. 2000); *Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe*, 987 F. Supp. 1321, 1324-25 (D. Kan. 1997) (holding that court lacked diversity jurisdiction over gaming consultant's state law claims against Indian tribe for breach of consulting agreement and default on loan); *Abdo v. Fort Randall Casino*, 957 F. Supp. 1111, 1112 (D.S.D. 1997) (holding that neither Indian tribes nor a tribally owned and operated casino are citizens of state for purposes of diversity); cf. William C.

Canby, Jr., American Indian Law 207 (3d ed. 1998) [hereinafter Canby] ("An Indian tribe that is not incorporated is not a citizen of any state and cannot be sued in federal court on the basis of diversity."); Felix S. Cohen, Handbook of Federal Indian Law 372 (reprint ed. 1988)). Accordingly, this Court has no jurisdiction and Plaintiffs' claims are due to be dismissed.

B. Tribal Sovereign Immunity Bars This Action

Notwithstanding the foregoing, tribal sovereign immunity provides an additional ground for dismissal. Tribal sovereign immunity is well-settled. "Indian tribes retain their original natural rights which vested in them, as sovereign entities, long before the genesis of the United States." *Paraplegic Assoc., Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1130 (11th Cir. 1999) (quotation omitted). This sovereign immunity bars actions – whether for monetary damages or equitable remedies – against Indian tribes. *Id*. (holding tribe was immune from suit seeking injunctive relief to compel tribe to conform a facility to the requirements of the Americans With Disabilities Act). While not absolute, immunity precludes suits against Indian tribes unless the tribe has consented to be sued, the tribe has waived its immunity, or Congress has clearly abrogated its immunity. *See, e.g. Kiowa Tribe v. Mfg Technologies, Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 1702-03 (1998).

The Eleventh Circuit very recently reaffirmed these principles of sovereign immunity in affirming the dismissal of an action brought against the Poarch Band of Creek Indians.

> "'Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Florida v. Seminole Tribe*, 181 F.3d 1237, 1241 (11th Cir. 1999) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978)). Thus, "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Mfg. Techs., Inc*., 523 U.S. 751, 754, 118 S. Ct. 1700, 1702, 140 L. Ed. 2d 981 (1998). Tribal sovereign immunity, where it applies, bars actions against tribes regardless of the type of relief sought. *See, e.g., id.* at 760, 118 S. Ct. at 1705 (barring suit for money damages); *Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1127 (11th Cir. 1999) (barring suit for injunctive relief).

> When Congress intends to abrogate tribal sovereign immunity, it must do so expressly, with clear and unequivocal language. *See, e.g., Santa Clara*, 436 U.S. at 58-59, 98 S. Ct. at 1677; *Seminole Tribe*, 181 F.3d at 1241-42. We have held that abrogation requires "the definitive language of the statute itself [to] state[] an intent either to abolish Indian tribes' common law immunity or to subject tribes to suit under the act." *Miccosukee Tribe*, 166 F.3d at 1131. Where congressional intent is ambiguous as to Indian rights, those ambiguities "must be resolved in the Indians' favor." *Seminole Tribe*, 181 F.3d at 1242. Although Congress does not have to state its intent to abrogate in a single provision of the Act, whether it is drawn from one or several provisions, that intent must be "unmistakably clear." *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73, 120 S. Ct. 631, 640, 145 L. Ed. 2d 522 (2000) (evaluating state sovereign immunity and noting the "simple but stringent test" courts apply to determine whether Congress has abrogated sovereign immunity: "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." (internal quotation marks omitted)); *Miccosukee Tribe*, 166 F.3d at 1131 (noting that the unmistakably clear standard applies to both tribal and state sovereign immunity).

Freemanville Water Sys. v. Poarch Band of Creek Indians, ___ F.3d ___, No. 08-10602, 2009 U.S. App. LEXIS 6946 at *6-8 (11th Cir. Mar. 30, 2009). Moreover, the *Freemanville* Court recognized that this protection of sovereign immunity is not limited by the location of the action at issue.

> That sovereign immunity has not been abrogated generally in this kind of lawsuit almost ends this appeal, but one contention remains. Freemanville contends that tribal sovereign immunity does not extend to activities or conduct occurring outside tribal lands. This matters because, as we mentioned earlier, some of the tribe's water system will have to run through non-tribal land. The Supreme Court, however, has "sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred." *Kiowa Tribe*, 523 U.S. at 754, 118 S. Ct. at 1703. The Court declined its last opportunity to limit tribal immunity to activities occurring only on tribal lands, preferring instead to "defer to the role Congress may wish to exercise in this important judgment." *See id.* at 758, 118 S. Ct. at 1705. Being bound to follow the Supreme Court's decision, we cannot draw a distinction based on where the tribal activity of providing water service to all of its lands occurs.

Id. at *13-14.

The Poarch Band of Creek Indians has not consented to suit and has not waived its immunity. In fact, the Poarch Band of Creek Indians has adopted a Tribal Constitution and a

Tribal Code specifically reserving sovereign immunity. *See Powell v. Tallapoosa Entertainment Center*, No. 06-55, 2007 WL 439057, at *1 (Poarch Band of Creek Indian Tribal Court February 2, 2007). Moreover, the immunity extends to defendant tribe-run business enterprises. *See Miccosukee Tribe of Indians of Florida*, 166 F.3d at 1129-35. The defendant P.C.I. Gaming Authority is an unincorporated instrumentality and integral part of the Poarch Band of Creek Indians, and Creek Indian Enterprises Development Authority is a political subdivision of the Poarch Band of Creek Indians. Both are wholly owned by the Tribe. These enterprises are for the benefit of the tribe and are, therefore, instrumentalities of the tribe, which enjoy tribal immunity. *See Freemanville*, __ F.3d at __, 2009 U.S. App. LEXIS 6946, at *3 n.1.

Similarly, Congress has not abrogated the Tribe's immunity to allow suit under Ala. Code §§ 6-6-540, 6-6-280(b), and 9-13-62 under which Plaintiffs purport to bring their action to quiet title, for ejectment, and for continuing trespass. Congressional abrogation of Indian tribunal sovereignty "cannot be implied but must be unequivocally expressed. . . [Congress must] mak[e] its intention unmistakably clear in the language of the statute." *Florida Paraplegic Assoc., Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1130-31 (11th Cir. 1999) (quotations and citations omitted). Plaintiffs can point to no language in a federal statute (or in these Alabama statutes) that purports to abrogate tribal sovereign immunity. Accordingly, Congress has not expressed an unequivocal intent, or any intent, to waive tribal immunity to allow suit under the theories and statutes alleged in Plaintiffs' complaint.

III. CONCLUSION

Based upon the foregoing, the Tribe's sovereign immunity bars all of Plaintiffs' claims against it. For this reason, these claims must be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

Respectfully submitted this 4th day of May, 2009.

/s/Kelly F. Pate
One of the Attorneys for Poarch Band of Creek Indians

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing and/or that a copy of the foregoing has been served upon the following by placing a copy of same in the United States mail, properly addressed and postage prepaid, on this 4th day of May, 2009:

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