IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

OZETTA HARDY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
	)	
IGT; BALLY GAMING, INC.; MULTIMEDIA GAMS, INC.; ECLIPSE GAMING SYSTEMS, LLC; VIDEO GAMING TECHNOLOGIES, INC.; CADILLAC JACK, INC.; AGS, LLC; NOVA GAMING, LL; GATEWAY, GAMING LLC; WMS GAMING, INC.; ROCKET GAMING SYSTEMS, LLC; KONAMI GAMING, INC.	)	**Case No. 2:10-CV-901-WKW**
Defendants.	)	

ROCKET GAMING SYSTEM, LLC'S BRIEF IN SUPPORT OF MOTION TO DISMISS

COMES NOW defendant Rocket Gaming System, LLC ("Rocket"), and files this brief in support of its Motion to Dismiss.

INTRODUCTION

In their Amended Complaint, Plaintiffs seek reimbursement for money they allegedly lost on games played at facilities operated by the Poarch Band of Creek Indians ("Creek Indian Nation"). Notwithstanding the fact that the Plaintiffs Claim to have lost money on Indian land and at an Indian gaming facility, the Plaintiffs have failed to name the Creek Indian Nation as a party defendant to this lawsuit. Rather,

the Plaintiffs have only named the alleged manufacturers of the gaming machines used at the Creek Indian Nation gaming facilities. Rocket is not a manufacturer of the machines used at the Creek Indian Nation, but without waiving that defense, Rocket is due to be dismissed from the lawsuit at this stage in the litigation for the following reasons: (1) the Creek Indian Nation is an indispensable party; (2) the application of an Alabama statute to conduct which occurred on Indian land is preempted by federal law; and (3)other pleading defects in the Plaintiffs' Amended Complaint.

ARGUMENT

I. The Creek Indian Nation is a necessary party to this lawsuit, and because the Creek Indian Nation has sovereign immunity and cannot be joined, the Complaint must be dismissed.

Rule 19(a)(1), Fed. R. Civ. Pro., provides that a person should be included as a party

to a lawsuit if:

> (A) In that person's absence, the court cannot accord complete relief among existing parties; or
> (B) That 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.
>
> Rule 19, Fed. R. Civ. Pro.

Furthermore, Rule 19 provides that when a person is a necessary party but

cannot be joined, "the court must determine, whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Rule 19(b), Fed. R. Civ. Pro. The factors for the court to consider include:

> (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.
>
> Rule 19, Fed. R. Civ. Pro.

Because the Creek Indian Nation is a necessary party and because it cannot be joined in this lawsuit, Rule 19 dictates that the Complaint should be dismissed.

(A) Because the Plaintiffs' claims require a determination that the gaming activities which occurred at the Creek Indian gaming facilities were illegal gambling transactions, the Creek Indian Nation is a necessary party.

In determining whether a party is "necessary" and should be joined in a lawsuit, the court takes a "pragmatic" approach by evaluating whether it would impossible to grant full relief, whether the absent party would be prejudiced by not being joined, and the potential prejudice to the existing litigants. ALFA Life Insurance Corporation v. Advantage Consulting Group, Inc., 236 F.R.D. 570, 571 (M.D. Ala. 2006).

In this case, the prejudice against the Creek Indian Nation would be significant

if the issues in this litigation were allowed to proceed in its absence. The Amended Complaint alleges that the Creek Indian Nation "operates" a number electronic bingo gaming facilities in Alabama. (Amended Complaint, ¶17). The Amended Complaint further alleges that the Creek Indian Nation allowed the Plaintiffs to play electronic bingo at its gaming facilities and that the Creek Indian Nation collected money from the plaintiffs, who were "customers of the [the Creek Indian Nation]." Id. at ¶18. The Amended Complaint also alleges that the Creek Indian Nation paid the Defendants, the alleged manufacturers of the gaming machines, a percentage of the revenue generated. Id. at ¶18 and 19.

Plaintiffs only cause of action in the Amended Complaint is a claim under Alabama Code 1975 §8-1-150(a), whereby the Plaintiffs seek a return of the money they lost at the Creek Indian Nation gaming facilities. Section 8-1-150 provides that "[a]ll contracts founded in whole or in part on a gambling consideration are void." Plaintiffs base their claim, in part, on the allegation that the electronic bingo being played at the Creek Indian Nation gaming facilities was in fact, illegal gambling. (Amended Complaint, ¶35) . A claim under Section 8-1-150 is conditioned on a plaintiff proving that the contract at issue was based on a gambling contract, which is illegal under Alabama law. See generally, Alabama Code 1975 §13A-12-20. Ultimately, this Court is being asked to enter an order, based on a jury finding, that

the games being conducted at the Creek Indian Nation gaming facilities are illegal. The judgment would have a profound impact on the Creek Indian Nation because the tribe is still conducting forms of electronic bingo to this day. The Court's judgment would have a direct impact on the conduct of operations taking place on the Creek Indian Nation reservations.

In a case very similar to the one at hand, the New Mexico Supreme Court determined that an Indian tribe was a necessary party to a lawsuit where casino patrons sought a return of the money lost while gambling at the Indian casinos. In Srader v. Verant, 964 P. 2d 82 (N.M. 1998), the New Mexico Supreme Court dismissed a lawsuit for the inability to join an Indian tribe as a party defendant. Srader, 964 P. 2d at 92. The plaintiffs were customers who allegedly lost money at casinos located on an Indian reservation, which was operated by an Indian tribe. Id. at 85. The plaintiffs sued several non-Indian financial institutions alleging that the plaintiffs and all other individuals similarly situated to themselves were entitled to recoup the money they lost at the casinos. Id. The plaintiffs did not sue the Indian tribe or any related entity. Id. The financial companies provided banking and financial services to the Indian tribe, in part, for the operation of the casinos. Id. The plaintiffs also sought injunctive relief, requesting the court to declare that all gambling transactions at the Indian casino to be void. Id.

On appeal, the New Mexico Supreme Court addressed whether the casino patrons could proceed with their lawsuit in the absence of the Indian tribe being named as a party defendant. Srader, 964 P. 2d at 88-92. The Court determined that the tribe was a necessary party to all claims and should be joined if feasible. Id. at 89. The Court reasoned that continuing forward with the case in the tribe's absence, "as a practical matter could impede the tribe's ability to protect their interests." Id. The court noted that the relief sought by the plaintiffs, including an order that all gambling transactions from the casino be declared void, would "halt the exchange of money upon which the tribes rely for business at their casinos." Id. at 90. The Court determined that the remedies sought implicated the interests of the tribes, and therefore, the Court found that the tribes were parties to be joined if feasible. Id.

Like the Indian tribe in Srader, a judgment entered in this case would have a profound economic impact on the Creek Indian Nation. As mentioned, Plaintiffs allege that the Creek Indian Nation operates the casinos where the plaintiffs claim that they lost money, and the Complaint alleges that the Creek Indian Nation keeps a percentage of the proceeds from the electronic bingo conducted at the Creek Indian Nation gaming facilities. The Creek Indian Nation continues to operate games at its facilities, and a judgment in this case would directly concern the operations and business activities of the tribe. An ultimate judgment against the defendants would

have the effect of declaring that the games being played at the Creek Indian Nation are illegal under Alabama law, which could effect the continued operations of the gaming facilities.

Moreover, the Complaint also declares that the games being played at the Creek Indian Nation violate federal law. The Complaint alleges that the games violate the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C.A. 2701, *et seq.*, the legal framework established by the Federal Government to regulate Indian gaming activities. Because this lawsuit could result in a determination that the activities being conducted at the gaming facilities are illegal under both federal and Alabama law, then the Creek Indian Nation has a vested interest in this lawsuit.

In addition, the outcome of the lawsuit would likely affect the Creek Indian Nation's continued operation of the gaming facilities in regards to its contracts with third parties, including some of the Defendants. A judgment against those Defendants who have contracts with the Creek Indian Nation could have an effect on the continued contractual relations between those Defendants and the Creek Indian Nation. Section 8-1-150 suggests that if the games played at the Creek Indian Nation are illegal, then the contracts entered into between those Defendants and the Creek Indian Nation are potentially void . See also, Meridian Life Ins. Co. v. Dean, 62 So. 90 (Ala. 1913)(Court noted that illegal contracts are void under Alabama law). If the

manufacturers or lessees of the video bingo machines are subject to liability for games played at the Creek Indian Nation gaming facilities, then the possibility exists that those manufacturers/lessees would seek to terminate and/or not extend their contractual relationships with the Creek Indian Nation, thus, effectively shutting down the Creek Indian Nation's gaming operations.

Moreover, the Creek Indian Nation is a necessary party to this lawsuit because the Plaintiffs cannot receive complete relief in its absence. The Amended Complaint alleges that the Creek Indian Nation split the revenue with the Defendants based on a percentage. This is important because a Defendant's level of liability under Ala. Code §8-1-150 is dependant upon the amount it received from the individual who lost money. Under the predecessor to §8-1-150, the Alabama Supreme Court determined that a plaintiff is not entitled to joint and several liability among all defendants who may have received some portion of money from an illegal gambling transaction. Motlow v. Johnson, 39 So. 710, 711 (Ala. 1905). Rather, the Court in Motlow determined that a plaintiff "may recover against [the defendant] for the amount received by him of the winnings," but the Court refused to hold that a plaintiff may recover the entire amount jointly and severally among multiple defendants. Id. In Motlow, the Court reasoned that the purpose of the statute was to return the parties to the status quo, not to penalize a defendant by requiring it to pay more than the amount

it received from the gambling transaction. Id.; see also, Wright v. Dept. of Alabama Veterans of Foreign Wars, No. 07-S-2071-NE, slip. op. at 22-23 (N.D. Ala. Mar. 24, 2010)(Judge Lynwood Smith noted that there is no joint and several liability under an action based on §8-1-150).

The Plaintiffs are not entitled to joint and several liability under §8-1-150, and assuming the bingo games were illegal (an assumption which Defendants contest) the liability of any Defendant requires an individualized analysis of which machine each Plaintiff played and lost money. However, by the Plaintiffs own allegations, the Creek Indian Nation retained some percentage of the revenue at the gaming facilities. Therefore, because joint and several liability is not available in this action, Plaintiffs will not be able to get their full relief in the absence of the Creek Indian Nation.

Overall, because the Creek Indian Nation has a significant interest in the issues that will be litigated in this lawsuit and because full relief cannot be afforded to the Plaintiffs in the Creek Indian Nation's absence, the Creek Indian Nation is a necessary party to this lawsuit.

B. Because the Creek Indian Nation enjoys sovereign immunity, joinder of the Creek Indian Nation is not feasible.

The Creek Indian Nation is a sovereign Indian nation, recognized by the federal government. "As sovereigns, Indian tribes are immune from suit absent congressional

authorization or an effective waiver in tribal, state, or federal court." Kiowa Tribe v. Manufacturing Techs., Inc., 523 U.S. 751 (1998); Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 890 (1986); Florida v. Seminole Tribe of Florida, 181 F. 3d 1237 (11th Cir. 1999). In this case, the United States Congress has not authorized the Plaintiffs to proceed with their suit against the Creek Indian Nation. Furthermore, the Creek Indian Nation has not waived its immunity. See, Seminole Tribe of Florida, 181 F. 3d at 1243 ("waivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed"). Therefore, the Creek Indian Nation has maintained its sovereign immunity, and as such, cannot be joined as a party defendant in this lawsuit.

C. Because of the impact the judgment would have in this case on the Creek Indian Nation, the case should be dismissed for the inability to join the Creek Indian Nation as an indispensable party.

One of the primary considerations in determining whether to dismiss an action when a necessary party cannot be joined is the extent the judgment rendered in the person's absence might be prejudicial to him and those already parties. See, Rule 19(b), Fed. R. Civ. Pro. In Srader, the New Mexico Supreme Court determined that

the case filed by the casino patrons was required to be dismissed because the Indian tribe was an indispensable party that could not be joined. Srader, 964 P. 2d at 92. The New Mexico Supreme Court reasoned that a judgment in the plaintiffs' favor would have a prejudicial effect on the Tribe's financial operations. Id. at 90-92.

As mentioned, a final judgment as to Plaintiffs' claims in this case would have a significant impact on the Creek Indian Nation's interests. Even if a judgment in favor of the plaintiffs does not have preclusive affect for future litigation involving the current patrons of the Creek Indian Nation gaming facilities, such a judgment would have an impact on the operations of those facilities as it would impact the business relationships of those Defendants that have a contractual relationship with the Creek Indian Nation.[1] A majority of federal appellate courts have determined that when a Tribe is a necessary party and has a substantial interest in the litigation, then the complaint should be dismissed. See, United States ex rel. Hall v. Tribal Development Corp., 100 F. 3d 476 (7th Cir. 1996); Keweenaw Bay Indian Community v. Michigan, 11 F.3d 1341 (6th Cir.1993); Shermoen v. United States, 982 F.2d 1312 (9th Cir. 1992); Pembina Treat Comm. v. Lujuan, 980 F.2d 543 (8th Cir.1992); Fluent v. Salamanca Indian Lease Auth., 928 F.2d 542 (2nd Cir. 1991); Enterprise Management

[1] However, the U.S. Supreme Court has indicated that a party could be collaterally estopped from re-litigating certain issues even in the absence of mutuality of the parties. See generally, Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322, 326 (1979).

Consultants, Inc. v. U.S. ex rel. Hodel, 883 F. 2d 890 (10th Cir. 1989); Jicarilla Apache Tribe v. Hodel, 821 F.2d 537 (10th Cir. 1987).

The Creek Indian Nation's interests in the subject-matter of this lawsuit make it an indispensable party, and therefore, the Amended Complaint should be dismissed.

II. The Plaintiffs' claims under Alabama Code §8-1-150 are due to be dismissed because the cause of action is preempted by the Indian Gaming Regulatory Act, 25 U.S.C.A §2701, *et seq*.

Plaintiffs' claims are due to be dismissed because Ala. Code §8-1-150 is preempted by the IGRA because that the money Plaintiffs allegedly lost occurred on Indian land. In enacting the IGRA, Congress "intended to expressly preempt the field of governance of gaming activities on Indian lands." S.Rep. 446, 100th Cong. 2d Sess. 6 (1988), reprinted in U.S.C.C.A.N. at 3071-3076. Plaintiffs' claims impermissibly interfere with Congress's intent in regulating gaming on Indian land, and the Plaintiffs seek to use a state statute to collect money on activities that are controlled by and approved by federal law. The 11th Circuit Court of Appeals has not specifically addressed the scope of IGRA's preemption over state law, but this Court should follow the law of the Eighth Circuit Court of Appeals, which has determined that

IGRA completely preempts all state laws which would seek to regulate gaming on Indian lands. See, Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536, 543 (8th Cir. 1996)(Court found that IGRA "completely preempts state laws regulating gaming on Indian lands").

Ala. Code §8-1-150 has the practical effect of regulating gaming on Indian land. As mentioned, one of the elements to a claim under Ala. Code §8-1-150 is that the contract at issue must involve an illegal gambling transaction. By allowing the Plaintiffs' claims to proceed in this case, the ultimate fact-finder would determine whether conduct on Indian land is legal or illegal based on Alabama law. Such a finding impermissibly interferes Congressional intent to create a framework under the IGRA, which allows gaming on Indian land under established circumstances. Because the application of this statute interferes and likely conflicts with the IGRA, the plaintiffs' claims are preempted by federal law and should be dismissed with prejudice.

III. Because there is no contract between the Plaintiffs and Rocket, the Plaintiffs' claims are due to be dismissed for failure to allege a claim from which relief could be granted.

As mentioned, Alabama Code 8-1-150 provides that "all contracts founded in whole or in part on a gambling considerations are void." Alabama Code 8-1-150(a)(emphasis added). In order to sustain an action under Section 8-1-50, a plaintiff must prove the existence of a contract. However, the Plaintiffs in this case have failed to allege that there was any contract between them and Rocket. In contrast, the Alabama Supreme Court has recognized the existence of a gaming contract only between the patron and the casino. See, Macon County Greyhound Park, Inc. v. Knowles, 39 So. 3d 100, 110 (Ala. 2009)(the Court notes that the general rule is that casino-style wagering is essentially an adhesion contract between the casino and its patrons). In the absence of a contractual relationship between the Plaintiffs and Rocket, the Amended Complaint fails to state a claim upon which relief can be granted, and therefore, the Amended Complaint should be dismissed.

CONCLUSION

The Creek Indian Nation has a profound interest in the issues to be litigated in this lawsuit, and because it is an indispensable party, the Amended Complaint should be dismissed with prejudice. In addition, the Amended Complaint should be dismissed because the application of Ala. Code §8-1-150 to gaming activities on Indian land is preempted by federal law and because the Plaintiffs fail to allege a

contractual relationship with Rocket.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following via CM/ECF and/or First Class U.S. Mail, properly addressed and postage prepaid, on this the 14th day of December, 2010:

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