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

STATE OF ALABAMA	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
	)	
PCI GAMING AUTHORITY, BUFORD ROLIN, STEPHANIE BRYAN, ROBERT MCGHEE, DAVID GEHMAN, ARTHUR MOTHERSHED, SANDY HOLLINGER, GARVIS SELLS, EDDIE TULLIS, KEITH MARTIN, BRIDGET WASDIN, MATTHEW MARTIN, BILLY SMITH, and TIM MANNING,	)	**Civil Action No. 2:13-cv-00178-WKW-WC**
	)	
	)	
Defendants.	)	

State of Alabama's Brief in Opposition to Motion to Dismiss

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INTRODUCTION

It is telling that Defendants have not argued that their gambling activities, as described in the Amended Complaint, are legal. Defendants have instead raised two procedural arguments in support of their motion to dismiss, neither of which has any merit. First, Defendants argue that they are all shielded by the tribal immunity[1] afforded to the Poarch Band of Creek Indians, a federally-recognized Indian tribe. The motion to dismiss must be denied as to the individual defendants because they can be sued for declaratory and injunctive relief notwithstanding tribal immunity under *Ex parte Young*. As to the corporate defendant, PCI Gaming Authority, the State concedes that erroneous—but binding—Eleventh Circuit decisions require this Court to grant the motion to dismiss. Second, Defendants argue that the State's complaint for public nuisance under federal law fails to state a claim under the Indian Gaming Regulatory Act ("IGRA") and that the State's claim of public nuisance under state law is preempted by an IGRA-based affirmative defense. To the contrary, IGRA specifically provides that, "for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." 18 U.S.C. § 1166(a). There are caveats to this statute, as discussed below. But the upshot is that IGRA requires Defendants to follow state law and authorizes a public nuisance action like this one to

[1] Defendants call this immunity "sovereign immunity." That is a misnomer, which gives the erroneous impression that the Band's immunity is coextensive with the constitutional immunity afforded to States. *Cf. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890–91 (1986) ("[B]ecause of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy."). The State will use the more appropriate term "tribal immunity."

abate an Indian tribe's unlawful slot-machine gambling. For these reasons and others discussed below, Defendants' motion to dismiss must be denied.

BACKGROUND

I. The licensing, regulation, and prohibition of gambling under Alabama law

There are two aspects of Alabama gambling law at issue in this case. First, slot machines—broadly defined—are illegal under Alabama law. Second, for roughly seventy-five years, the Attorney General of Alabama has had the procedural right to enjoin unlawful gambling as a public nuisance if other law enforcement tactics would not work.

A. Slot machines are illegal under Alabama law.

Gambling is generally illegal in Alabama, and slot machines are particularly so. The State's general prohibition on gambling is so fundamental that the People enshrined it in the Constitution. *See* ALA. CONST. art. IV, § 65. The Legislature has specifically criminalized possession of slot machines and other gambling devices. ALA. CODE § 13A-12-27. Nevertheless, because of the immense profits associated with organized gambling, the industry frequently has tried to "evade[]" these prohibitions, as the Alabama Supreme Court put it in *Barber v. Jefferson Cnty. Racing Ass'n*, 960 So. 2d 599 (Ala. 2006), by asserting that "loophole[s]" in Alabama law were much larger than they in fact were. *Id.* at 614. For example, in 2006, the Alabama Supreme Court rejected the industry's attempt to pass off what were really slot machines as machines that were playing a legal "sweepstakes." *Id.* at 603-15. The Supreme Court held that substance is more important than legal technicality; accordingly, gambling devices are illegal if they "look like, sound like, and attract the same class of customers as conventional slot machines." *Id.* at 616.

Three years ago, the Alabama Supreme Court similarly headed off the industry's attempt to evade the law through "electronic bingo." "Electronic bingo" devices are slot machines that, allegedly, play a split-second game of "bingo" in their servers. These slot machines are legal, some claimed, because constitutional amendments make non-profit paper "bingo" legal in certain localities in Alabama. In a case arising from the State's execution of a warrant against so-called "electronic bingo" machines from a casino in Lowndes County, the Supreme Court held that these amendments create only a "narrowly construed" exception to the State's general prohibition on gambling. *Barber v. Cornerstone Outreach, Inc.*, 42 So. 3d 65, 78 (Ala. 2009). The Supreme Court then defined "bingo" in a way that made clear that the fast-paced, highly profitable game the gambling interests were trying to promote was not in fact the "bingo" game the local amendments make legal. *Cornerstone*, 42 So. 3d at 86.

B. The Attorney General can sue in the name of the State to enjoin unlawful gambling as a public nuisance.

Alabama law has long provided that the Attorney General may sue in the name of the State to enjoin unlawful gambling as a public nuisance. "[A] 'nuisance' is anything that works hurt, inconvenience or damage to another," ALA. CODE § 6-5-120 et seq, and a *public* nuisance (as opposed to a *private* nuisance) is an "interference with a right common to the general public." Restatement (Second) of Torts § 821B. Activities are likely to rise to the level of a public nuisance if they are "proscribed by a statute, ordinance or administrative regulation." *Id.* As a procedural matter, "a public nuisance . . . must be abated by a process instituted in the name of the state" by the Attorney General. ALA. CODE § 6-5-121.

The Alabama Supreme Court first endorsed the use of a public nuisance lawsuit to enjoin unlawful gambling in 1938 in *Try-Me Bottling Co. v. State*, 178 So. 231 (Ala. 1938). There, the State filed a civil action seeking "injunctive relief against defendants charged with conducting, in

connection with their legitimate soft drink business, a lottery or gift enterprise in the nature of a lottery in disregard of the laws of this State." *Id.* at 232. After noting that the Attorney General was the proper officer to bring a suit of this variety and that the defendants' gambling violated state laws, the Court held that the trial court properly enjoined the gambling activities as a public nuisance. *See id.* at 233 ("The bill . . . rest[ed] for its equity upon the well recognized and ancient jurisdiction of equity courts to restrain by injunction public nuisances."). In the years since *Try-Me*, the Alabama Supreme Court has approved several similar nuisance actions. *See McGee v. State ex rel. Sivley*, 179 So. 259 (Ala. 1938); *Young v. State ex rel. Almon*, 45 So. 2d 29 (Ala. 1950); *Carlisle v. State ex rel. Trammell,* 163 So. 2d 596 (Ala. 1964); *Walker v. State ex rel. Baxley*, 231 So. 2d 882, 884 (Ala. 1970).[2]

II. The Indian Gaming Regulatory Act

The Defendants do not dispute any of the foregoing aspects of Alabama law. Instead, Defendants' motion to dismiss implicates three aspects of IGRA.

First, IGRA governs gambling only if that gambling is conducted on "Indian Lands." See 25 U.S.C. §§ 2710(b)(1), (2); 2710(d)(1), (2). IGRA defines the term "Indian Lands" as land within an Indian reservation or "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4).

[2] Several other States have the same rule. *See, e.g., Masterson v. State ex rel. Bryant*, 949 S.W.2d 63, 65 (Ark. 1997); *State ex rel. Prosecuting Attorney v. Alray Northcrest Plaza*, 381 N.W.2d 731, 733 (Mich. App. 1985); *State ex rel. Spire v. Strawberries, Inc.*, 473 N.W.2d 428, 435 (Neb. 1991); *State v. Opelousas Charity Bingo, Inc*., 462 So. 2d 1380, 1385 (La. App. 1985).

Second, IGRA provides for three classes of gambling, which the statute defines and treats differently. "'Class I gaming' means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class II includes bingo, but not slot machines "of any kind":

> The term "class II gaming" means –
>
> > (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)
> >
> > (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
> >
> > (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
> >
> > (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards . . .

Id. § 2703(7)(A). "The term 'class II gaming' does not include . . . (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." *Id.* § 2703(7)(B). "The term 'class III gaming' means all forms of gaming that are not class I gaming or class II gaming." *Id.* § 2703(8).

Third, IGRA provides that Indian Tribes must strictly comply with state law with respect to any gambling that is not class I or class II. IGRA broadly states that, "for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." 18 U.S.C. § 1166(a) (enacted as Section 23 of IGRA, Pub. L. 100-497, 102 Stat. 2487 (Oct. 17, 1988). IGRA sets out

two caveats. The first is that state law applies only to class III gaming: that Tribes do not need to comply with state laws "pertaining to the licensing, regulation, or prohibition of gambling" if the gambling at issue is "class I gaming or class II gaming." *Id.* § 1166(c). The second is that a state Attorney General's powers to enforce state laws against class III operations is limited to civil actions: the United States has the exclusive right to bring "criminal prosecutions" against Indians for violating state gambling laws on Indian Land. *Id.* § 1166(d).

III. The claims and arguments in this lawsuit

The State's Amended Complaint seeks declaratory and injunctive relief to abate the public nuisance of unlawful gambling. *See* Doc. 10. The Amended Complaint names two kinds of parties: PCI Gaming Authority, which is a business entity wholly-owned by an Indian tribe, and individual defendants who are officers of the Indian tribe and who are responsible for the Tribe's gambling operations. Doc. 10 ¶¶4-7. Defendants Buford Rolin, Stephanie Bryan, Robert McGhee, David Gehman, Arthur Mothershed, Keith Martin, Sandy Hollinger, Garvin Sells, and Eddie Tullis are all the members of the PBCI Tribal Council, which is the governing body for the Indian tribe. Buford Rolin is the tribe's chairman and Stephanie Bryan is the vice-chairman and attorney general. Defendants Stephanie Bryan, Keith Martin, Bridget Wasdin, Matthew Martin, Billy Smith and Tim Manning are members of the PCI Gaming Authority, which is the commercial enterprise that operates the tribe's casinos.

The State asserts that Defendants "operate, administer, and control" three casinos in Alabama in a way that violates state and federal laws pertaining to the prohibition of gambling. Doc. 10 ¶9. Specifically, Defendants are alleged to "operate hundreds of slot machines and other gambling devices in open, continuous, and notorious use." Doc. 10 ¶9. The Amended Complaint explains the operation of Defendants' gambling devices in great detail. *See* Doc. 10 ¶¶13-18.

The upshot is that Defendants' gambling devices are slot machines that "replicate a game of chance in an electronic format." Doc. ¶16. These kinds of gambling devices are unlawful under Alabama law and are unlawful for use on Indian Lands without a state compact under federal law. *See* ALA. CODE § 13A-12-20(10); 25 U.S.C. § 2703(7)(b)(2).

The Amended Complaint asserts two related causes of action to enjoin Defendants from continuing this unlawful gambling activity. First, the Amended Complaint asserts a cause of action for public nuisance *under state law*. Doc. 10 ¶¶19-30. Alabama law gives the State the authority to sue to enjoin the operation of unlawful gambling activity as a public nuisance, and Defendants' activity is unlawful. The Amended Complaint anticipates Defendants' IGRA-related preemption defense to this claim and explains that Defendants have an obligation to comply with Alabama law despite IGRA for two reasons: (1) the gambling activity is not being conducted on properly recognized "Indian Lands" and (2) IGRA expressly provides that "all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." 18 U.S.C. § 1166(a) & (c). Second, the Amended Complaint asserts a cause of action for public nuisance *under federal law*. Doc. 10 ¶¶31-37. IGRA provides that "for purposes of Federal law, all State laws pertaining to the . . . prohibition of gambling" apply to Indian gambling. As the Eighth Circuit has held in a materially identical case, Section 1166(a) incorporates into federal law state laws that allow the filing of a public nuisance suit to enjoin unlawful gambling. *See United States v. Santee Sioux Tribe*, 135 F.3d 558, 565 (8th Cir. 1998). Accordingly, in a State with laws like Alabama's, Section 1166(a) creates a federal public nuisance cause of action. *See id.*

STANDARD OF REVIEW

For purposes of ruling on a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff and all well-pleaded facts alleged by the plaintiff are accepted as true. *Lotierzo v. Woman's World Med. Ctr., Inc.*, 278 F.3d 1180, 1182 (11th Cir. 2002); *United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1236 (11th Cir. 1999). In addition, all reasonable inferences should be drawn in favor of the plaintiff. *Id.*

ARGUMENT

I. This Court cannot dismiss the case on grounds of tribal immunity.

This case cannot be dismissed on the grounds of tribal immunity. There are two types of defendants here: (1) individual officers and members of the Poarch Band and (2) a corporation that is wholly owned by the Poarch Band. The State's lawsuit for declaratory and injunctive relief may proceed against the individual officers under the legal fiction of *Ex parte Young*, 209 U.S. 123 (1908). However, the State concedes that, under erroneously-decided precedent, this Court must dismiss the corporation, PCI Gaming Authority, from this lawsuit.

A. The individual defendants are not immune from the State's request for declaratory and injunctive relief.

It is axiomatic that tribal officers such as the individual defendants can be sued in their official capacity to enjoin ongoing violations of federal law. In *Tamiami II*, a business sued a tribe's officers over the tribe's gambling activity, and the Eleventh Circuit held that the district court properly rejected the officers' claim of immunity. *See Tamiami Partners, Ltd. By and Through Tamiami Development Corp. v. Miccosukee Tribe of Indians of Fla. (Tamiami II)*, 63 F.3d 1030, 1050-51 (11th Cir. 1995). *See also Okla. Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) ("We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State."). The Court in

Tamiami II explained that the doctrine of *Ex parte Young* "applies in suits brought against tribal authorities in their official capacities." *Id.* The D.C. Circuit has recently provided a succinct explanation of how *Ex parte Young* works with respect to tribal immunity:

> To avoid the sovereign immunity bar, the Freedmen plaintiffs sued not only the Cherokee Nation itself but also the relevant executive official, the Principal Chief, in his official capacity. Under Supreme Court precedent, that is the standard approach by which a party may obtain declaratory or injunctive relief with respect to a sovereign entity notwithstanding sovereign immunity . . . The [*Ex parte Young*] doctrine is called a fiction because the suit in effect binds the government entity just as would a suit against the government entity itself. In such suits, the government in question stands behind the official "as the real party in interest." Indeed, an injunction entered against an officer in his official capacity is binding on the officer's successors.

Vann v. U.S. Dept. of Interior, 701 F.3d 927, 928 (D.C. Cir. 2012).

The State has pleaded all the facts that it needs to plead to invoke *Ex parte Young*. The Supreme Court has held that, in determining whether the doctrine of *Ex parte Young* applies, "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (internal quotation marks omitted) (alteration in original). The Amended Complaint alleges that three casinos under Defendants' control are committing notorious ongoing violations of federal law, and the Amended Complaint seeks declaratory and injunctive relief to stop those violations. That is all that is required under the Supreme Court's precedent.

Defendants erroneously argue that, because the Amended Complaint purportedly "identifies no discrete, individual actions or omissions by the individually named tribal officials," the *Ex parte Young* doctrine does not apply. Doc. 14 at 6. Defendants' argument has

been forcefully rejected by the Eleventh Circuit.[3] In *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), the Eleventh Circuit rejected the argument that "the *Ex parte Young* exception requires that the defendants must have taken some action personally that violates [federal law]." *Id.* at 1015. Instead, the Eleventh Circuit explained that "[p]ersonal action by defendants individually is not a necessary condition of injunctive relief against state officers in their official capacity." *Id.* Instead, "[a]ll that is required is that the official be responsible for the challenged action . . . the state officer sued must, 'by virtue of his office, ha[ve] some connection' with the unconstitutional act or conduct complained of." *Id.* at 1015-16 (quoting *Ex parte Young*). *Accord Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007) (explaining that "Defendants are not required to have a 'special connection' to the unconstitutional act or conduct," just "some connection."). The Amended Complaint clearly meets this standard. It specifically alleges that Defendants are the responsible officials who "operate, administer, and control three casinos on purported Indian lands in Alabama" at which they collectively "operate hundreds of slot machines and other gambling devices in open, continuous, and notorious use" in violation of federal law. Doc. 10 ¶9. The named defendants include the board members of the PCI Gaming Authority, which is the entity that conducts the gaming operations at issue here. Doc. 10 ¶7. The named defendants also include the chairman of

[3] Defendants' argument is based on loose language from a single inapposite 20-year-old case from the Ninth Circuit. *Cf. Comstock Oil & Gas Inc. v. Alabama and Coushatta Indian Tribes*, 261 F.3d 567, 570 n.2 (5th Cir. 2001) (questioning the Ninth Circuit's reasoning in that case); *Davids v. Coyhis*, 869 F. Supp. 1401, 1410 (E.D. Wis. 1994) (prospective relief available against tribal officers under Indian Gaming Regulatory Act). That Ninth Circuit case was about a single past act—the closure of a road—not a continuing violation of federal law. The Court ultimately resolved the case on the grounds that the plaintiffs "fail[ed] to allege facts giving it any property right in the road at all." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 (9th Cir. 1991). And, of course, this Court is obliged to follow the Eleventh Circuit and U.S. Supreme Court, not the Ninth Circuit.

the PCI tribal council (Buford Rolin), the tribal council's vice-chairman (Stephanie Bryan), and the other members of the tribal council. Doc. 10 ¶6. The tribal council is the tribe's only government body; the tribal council controls all "tribal assets," "[e]ngage[s] in any business," "make[s] and perform[s] contracts," and "exercise[s] all inherent powers of the Poarch Band of Creek Indians not expressly excluded from its authority by the US Congress." *See* Constitution of the Poarch Band of Creek Indians, art. IV, §§ 3 & 4.[4] The members of the PCI Tribal Council and the PCI Gaming Authority also take public credit for administering the gambling activities at issue in this case. *See, e.g., PCI Gaming Authority announces plans for Wind Creek Wetumpka casino*, ALEX CITY OUTLOOK (July 16, 2012)[5] (quoting Chairman Rolin and the CEO of the PCI Gaming Authority). In short, Defendants are the officials responsible for the tribe's gambling activities, they have the power to abate the tribe's gambling activities, and they are proper defendants in a suit under *Ex parte Young*.

The Eleventh Circuit has also previously rejected Indian tribes' attempts to avoid *Ex parte Young* based on the fact that they are governed by multi-member quasi-executive councils, instead of individual executive officers. In *Hollywood Mobile Estates Ltd. v. Cypress*, 415 Fed. Appx. 207 (11th Cir. 2011), the plaintiff sued the members of a tribal council "to return possession of [plaintiff's] leased premises." The defendants argued that the claim was barred because the council members had no individualized "nexus to the official actions which Lessee contends are on-going violations of federal law" and the remedy would require collective action by the council as opposed to any specific executive official. Brief of Appellees, *Hollywood Mobile Estates v. Cypress*, 2010 WL 5064659. The Eleventh Circuit rejected those arguments

[4] available at http://www.narf.org/nill/Constitutions/poarchconstitution/poarchconst.htm

[5] at http://www.alexcityoutlook.com/2012/07/16/pci-gaming-authority-announces-plans-for-wind-creek-wetumpka-casino

and held that "[t]he fact the tribal officials may have to take a vote to effect compliance with [] an injunction" does not preclude relief under *Ex parte Young*. *Hollywood Mobile Estates*, 415 Fed.Appx. at 211. The State can sue the members of the PCI council and PCI Gaming Authority in order to compel them to bring their gambling activities into compliance with state and federal law. The individual defendants cannot avoid *Ex parte Young*.[6]

B. PCI Gaming Authority has tribal immunity only because of wrongly-decided Eleventh Circuit precedents.

PCI Gaming Authority must be dismissed from this lawsuit because of erroneous Eleventh Circuit precedents. The Eleventh Circuit held that PCI Gaming Authority shares in the Poarch Band's tribal immunity in *Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205 (11th Cir. 2009), and the Eleventh Circuit held that Indian tribes can argue tribal immunity even after removing to federal court in *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200 (11th Cir. 2012). Those decisions are wrong. But the State recognizes that this Court must follow the Eleventh Circuit's decisions, even when they are wrong. For the purposes of preserving this issue for litigation in the Supreme Court or the *en*

[6] *Ex parte Young* applies by its terms to suits alleging ongoing violations of federal law, and Count 1 by its terms asserts claims that are based in part on state law. But to be clear, tribal immunity does not bar that claim for two reasons. First, IGRA incorporatates this state law as "a matter of federal law." 18 U.S.C. §1166(a). Accordingly, the claims asserted in Count 1 are federal in nature and thus fall squarely within the *Ex parte Young* exception. Second, even if Count 1 were solely a state-law claim, it would not be barred under the doctrine of tribal immunity. This is so because the State originally filed this action in state court, and it could have proceeded with a claim against the defendants under Alabama's equivalent of *Ex parte Young*. *See Ala. Dep't of Transp. v. Harbert Int'l, Inc.*, 990 So. 2d 831, 840 (Ala. 2008) (explaining that governmental immunity does not apply, in Alabama state court, to a plaintiff's suit seeking a declaratory judgment about the meaning of state law). When governmental officers remove a case from state court (where they would have no sovereign immunity) to a federal court, they waive any immunity they otherwise would have had in federal court but for the removal. *See Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002). Defendants cannot obtain a strategic advantage with respect to state-law claims for injunctive relief under Alabama's equivalent of *Ex parte Young*—to which defendants would be subject in state court—by removing those claims to federal court.

banc Eleventh Circuit, the State named PCI Gaming Authority as a defendant. For the purposes of preserving these arguments for future proceedings, the State will briefly explain why the Eleventh Circuits' decisions in *Freemanville* and *Contour Spa* were wrongly decided.[7]

First, there should not be any tribal immunity at all. The U.S. Supreme Court has recognized that "[t]here are reasons to doubt the wisdom of perpetuating" tribal immunity. *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 758 (1998). The doctrines of state sovereign immunity and Eleventh Amendment immunity arise from the federal and state constitutions. The doctrine of tribal immunity, by contrast, arises from judge-made common law, "developed almost by accident," and is not suited for a world in which tribes operate everything from "ski resorts" to "gambling" halls, both on and off of Indian Lands. *Id.* at 756-58. The U.S. Supreme Court explained the unjustified nature of tribal immunity as follows:

> At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce.

Id. The State notes that the U.S. Supreme Court granted certiorari in 2010 to consider the following question: "Whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes." *Madison County v. Oneida Indian Nation of New York*, 131 S. Ct. 704 (2011). After full briefing on the merits, the tribe voluntarily waived its immunity in order to avoid a Supreme Court decision on the question of whether tribal immunity "should continue to be recognized." *Id* .

[7] These are also additional reasons for denying the motion to dismiss as to the individual defendants.

Second, and at the very least, tribal immunity should not extend to *business entities* like PCI Gaming Authority, which have nothing to do with self-government. If a State engages in economic activities that harm the citizens of another State, the law allows it to be haled into the courts of the second State and be found liable for damages. In *Nevada v. Hall*, the Supreme Court held that Nevada's sovereign immunity did not bar the courts of California from holding a Nevada university liable for the tortious actions of one its employees, which severely injured two California citizens. 440 U.S. 410 (1979). The Court explained that the doctrine of sovereign immunity means that "no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts." *Id.* at 416. This same reciprocity should exist between Indian tribes and States, but it does not. *See Kiowa*, 523 U.S. at 754 (holding that tribal businesses cannot be sued). In fact, tribal businesses enjoy greater immunity than the commercial arms of *foreign nations*. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983) (foreign sovereign immunity does not extend to "actions based upon commercial activities of the foreign sovereign"). By holding tribal *businesses* liable for their actions, courts would eliminate the unprincipled disparity in the treatment of tribal immunity, state sovereign immunity, and foreign sovereign immunity.

Finally, PCI Gaming Authority has waived its claim to tribal immunity by removing this case to federal court. In *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002), the Supreme Court held that a State waives it sovereign immunity by removing a claim to federal court, when the State has waived its sovereign immunity in state court. The Court explained that it was "anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the Judicial power of the United States extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the Judicial power of the United

States extends to the case at hand." *Id.* at 619. The Court explained that permitting litigants "to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results." *Id.* The Eleventh Circuit has erroneously held that *Lapides* does not apply when tribal immunity is asserted in response to claims for money damages, to which an Indian tribe has not waived immunity in state court. *See Contour*, 692 F.3d at 1208.

* * *

This Court cannot dismiss the lawsuit because of tribal immunity. The State's action against the individual defendants should proceed under *Ex parte Young*.

II. This Court cannot dismiss the case for failure to state a claim under Rule 12(b)(6).

Defendants' motion to dismiss under Rule 12(b)(6) should also be denied. The Amended Complaint asserts two related causes of action to enjoin Defendants from continuing their unlawful gambling activity: public nuisance under state law (Doc. 10 ¶¶19-30) and public nuisance under federal law (Doc. 10 ¶¶31-37). Both of these counts invoke Section 23 of IGRA, Public Law 100–497 (1988), which was codified at 18 U.S.C. § 1166. That Section incorporates state law into IGRA and requires Indian gambling to comply with all state laws that "pertain[] to the licensing, regulation or prohibition of gambling." Specifically, the Amended Complaint explains that (1) Section 1166 allows a public nuisance action to proceed under state law despite the otherwise preemptive aspects of IGRA and/or (2) by incorporating state gambling law into federal law, Section 1166 creates a federal-law cause of action when such a cause of action is allowed by the relevant state law. Defendants have not contested the fact that state law provides the State a cause of action to enjoin the public nuisance of unlawful gambling. Defendants have

also not contested the State's allegations that their gambling devices are unlawful slot machines that do not play the game of "bingo."

Instead, Defendants' motion to dismiss relies on two related theories of the Indian Gaming Regulatory Act. Neither theory grapples with the *text* of IGRA in general or Section 1166 in particular. Defendants also ignore these facts:

- The United States has at least twice successfully sued tribal officials for public nuisance under Section 1166 where state law allowed such a suit.
- Both the Eleventh Circuit and Sixth Circuit have expressly reserved judgment about whether *States* can also sue tribal officials for public nuisance under Section 1166.
- The State of Michigan is currently litigating a public nuisance lawsuit against tribal officials under Section 1166.
- The U.S. Department of Justice and National Indian Gaming Commission recently advised the Supreme Court that it would be "incorrect" to conclude that States have "no federal-court remedy to stop illegal tribal gaming," and expressly recognized the possibility of a Section-1166 claim against "the members of [a tribe's] executive council in their official capacities."

Defendants' motion to dismiss under Rule 12(b)(6) must be denied.

A. The State Can Bring a Public Nuisance Claim *under Federal Law* to Enjoin Unlawful Gambling.

The State can bring a claim for public nuisance Section 1166 of IGRA. The text of IGRA explains that Indian tribes are able to conduct gambling only "if the gaming activity is not specifically prohibited by Federal law *and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity*." 25 U.S.C. § 1701(5). To that end, IGRA expressly requires Indian casinos to comply with state laws "pertaining to the licensing, regulation or prohibition of gambling." It does so in 18 U.S.C. § 1166, the text of which Defendants do not meaningfully discuss in their brief:

> **(a)** Subject to subsection (c), **for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.**
>
> **(b)** [discussing how criminal penalties will work]
>
> **(c)** For the purpose of this section, the term "gambling" does not include--
>
> > **(1)** class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or
> >
> > **(2)** class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.
>
> **(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country**, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

18 U.S.C. § 1166 (emphasis added). Defendants concede that Section 1166 "was a part of the bill that became IGRA and was passed by Congress as a constituent part of the larger Act." Doc. 14 at p. 13 n.10.

By incorporating all state laws "not limited to criminal sanctions," Section 1166 authorizes the filing of public-nuisance suits to enjoin unlawful class III gambling on Indian lands, where those suits are recognized by applicable state law. In the 1990s, the United States invoked this provision to file several public-nuisance actions to enjoin unlawful tribal gambling. *See United States v. Santee Sioux Tribe*, 135 F.3d 558 (8th Cir. 1998); *United States v. Seminole Tribe*, 45 F. Supp. 2d 1330 (M.D. Fla. 1999). Although the defendants in those cases argued that "the only authorized federal remedies [were] a civil enforcement by the National Indian Gaming Commission (NIGC) under 25 U.S.C. § 2713, or criminal prosecution and/or seizures under

IGRA, the Johnson Act, and/or [other federal laws]," *Seminole Tribe of Florida*, 45 F.Supp.2d at 1331, the courts rejected those arguments and enjoined the unlawful gambling under a public nuisance theory because the state law that Section 1166 incorporated allowed the State to enjoin unlawful gambling as a public nuisance. The Eighth Circuit in *Santee Sioux Tribe*, for example, explained that Section 1166 allowed for civil enforcement through a public nuisance action because such an action was allowed under Nebraska law:

> The government argues that the language of 18 U.S.C. § 1166(a), which makes "all State laws" pertaining to gambling applicable in Indian country, encompasses the State's civil and criminal statutory and case law. According to the government, **"all State laws" necessarily includes Nebraska civil case law authorizing injunctive relief to effectuate the closure of gambling establishments determined under State law to be public nuisances**. We agree.
>
> The IGRA incorporates by reference "all State laws pertaining to the licensing, regulation, or prohibition of gambling . . . in the same manner and to the same extent as such laws apply elsewhere in the State," 18 U.S.C. § 1166(a), and does not distinguish between case law and statutory law. The Rules of Decision Act, 28 U.S.C. § 1652 (1994), provides that the "laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." The United States Supreme Court has pronounced that "judicial decisions" are laws of the state within the meaning of the Rules of Decision Act. **We hold that the IGRA's incorporation of "all State laws" includes both state statutory and case law**.

Santee Sioux Tribe, 135 F.3d at 565 (emphasis added, some citations omitted). Similarly, a Florida District Court explained that "[t]he scope of section 1166 is clearly broad, assimilating all state laws governing regulation of gambling, including those which are civil, as well as those which are criminal." *Seminole Tribe of Fla.*, 45 F. Supp. 2d at 1331. Indeed, Section 1166(a) expressly says that Indian gambling is subject to "all State laws . . . including *but not limited to* criminal sanctions."

Again, Defendants have not argued that Alabama law, as incorporated by Section 1166, does not provide the State with a public nuisance cause of action. It quite clearly does. *E.g. Try-*

Me Bottling Co. v. State, 178 So. 231 (Ala. 1938). Because Alabama law indisputably provides a cause of action through which the State can enjoin unlawful gambling as a public nuisance, the State can file that cause of action to enjoin illegal gambling on Indian Lands as well.

1. The federal government does not have the exclusive right to file civil actions under Section 1166.

Defendants do not meaningfully contest the reasoning of the Eighth Circuit in *Santee Sioux Tribe* or the Florida District Court in *Seminole Tribe*. Instead, the crux of Defendants' argument is that, although Section 1166 may allow the federal government to sue Indian tribes based on a state-law public nuisance cause of action, it does not allow *States* to sue Indian tribes as well. That erroneous argument is entirely unsupported by the text of IGRA or the inapposite Indian-law cases upon which Defendants rely.

In contrast to the broad language of Section 1166(a), which incorporates *all* civil, regulatory, and criminal laws "including *but not limited to criminal sanctions*," Section 1166(d) gives the United States a limited degree of "exclusive jurisdiction over *criminal prosecutions* of violations of State gambling laws." 18 U.S.C. § 1166(d) (emphasis added). The plain meaning of the term "criminal prosecutions" does not extend to cover civil lawsuits like this one; a "criminal prosecution" is "[a]n action or proceeding . . . for the purpose of securing the conviction and punishment of one accused of crime." Black's Law Dictionary "Criminal Prosecution" (6th ed. 1990). The text of Section 1166 is unambiguous that the United States has exclusive jurisdiction only over criminal prosecutions, not civil actions like this one. "[A]bsent the need to avoid absurd consequences, we generally may not reinterpret the plain meaning of a statute." *United States v. Keen*, 676 F.3d 981, 990 (11th Cir. 2012). *See also Stansell v. Revolutionary Armed Forces of Colombia*, 704 F.3d 910, 915-16 (11th Cir. 2013) (A "statute's legislative history may not be used to create an ambiguity where none exists."); *Iberiabank v.*

Beneva 41-I, LLC, 701 F.3d 916, 924 (11th Cir. 2012) ("If the text of the statute is unambiguous, we need look no further."); *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225 (11th Cir. 2001) ("Where the clear and unambiguous language of a statute provides a bridge to Congress' intent, we need not and will not wade into the brackish waters of legislative history.").

But, even if the text of Section 1166 were ambiguous, rules of statutory construction would point to the same result. By specifying that the United States would have exclusive jurisdiction over "criminal prosecutions," Congress necessarily implied that the United States would *not* have "exclusive jurisdiction" to bring other kinds of state-law actions incorporated into federal law by Section 1166. *See United States v. Castro*, 837 F.2d 441, 442 (11th Cir.1988) ("the mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius*"). Moreover, one of Congress's express findings in IGRA was that Indian tribes should "have the exclusive right to regulate gaming activity on Indian lands *if* the gaming activity is not specifically prohibited by Federal law *and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity*." 25 U.S.C. § 1701(5). Accordingly, Section 1166 does not extend state law to class I or class II gambling—only the kind of class III gambling where Defendants admit "States potentially have a larger role." Doc. 14 at 11. As one district court put it, the "structure of §1166 suggests strongly that Congress intended to distinguish civil enforcement to prevent future acts of non-conforming gaming from criminal enforcement efforts to punish past acts." *United States v. Santa Ynez Band of Chumash Mission Indians of Santa Ynez Reservation*, 983 F. Supp. 1317, 1322 (C.D. Cal. 1997), *abrogation recognized* by *id*. at 1324-26. The most natural reading of Section 1166—which comports with Congress's intent to treat class III gambling differently from class I and class II

gambling—is that States cannot bring criminal prosecutions based on unauthorized gambling in the past, but can bring civil suits to enjoin unlawful class III gambling going-forward.

Because Congress broadly provided that *all* state laws apply to Indian gambling and then narrowly provided the United States exclusive jurisdiction over "criminal prosecutions" *only*, it stands to reason that Congress envisioned State involvement in civil cases even though it wanted to prevent States from putting Indians in jail. The cases that Defendants cite for the contrary proposition are inapposite; they do not actually consider whether Section 1166 allows the State to file a lawsuit. For example, Defendants rely extensively on *United Keetoowah Band of Cherokee Indians v. State of Okla. ex rel. Moss*, 927 F.2d 1170 (10th Cir. 1991), but the litigants in that case did not allege that tribal officials were conducting unlawful class III gambling and the injunction in that case was entered pursuant to the Assimilative Crimes Act, 25 U.S.C. § 81, not Section 1166. The Tenth Circuit makes that limitation clear throughout its decision. *See, e.g., id.* at 1174 ("[T]he State's election not to appeal necessarily limits the State's arguments to supporting application of the Assimilative Crimes Act, 18 U.S.C. § 13—the only other federal law expressly at issue in the record below."). *See also Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th Cir. 1997) (dispute about compact, not Section 1166); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994) (dispute about jurisdiction under Settlement Act, not Section 1166). Similarly, Defendants cite a few cases in which a State attempted to initiate a *criminal* action based on unlawful gambling on Indian Lands—something clearly barred by the text of Section 1166(d) and something that the State of Alabama has not attempted to do here. *E.g. Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1254 (10th Cir. 2006) (enjoining State from executing warrant and seizing gambling devices and money on Indian lands). The most instructive case cited by Defendants may be *Sycuan Band of Mission Indians v.*

Roache, 54 F.3d 535 (9th Cir. 1995) (Doc. 14 at p. 15). In that case, the Ninth Circuit held that California "was without jurisdiction to prosecute the Bands' officials for the Bands' conduct of gaming on their reservations," but the Ninth Circuit affirmed the trial court's "ruling that operation of the Bands' electronic pull-tab machines constituted Class III gaming under IGRA" and held that "[t]he Band cannot employ them in the absence of a Tribal-State compact." *Id.* at 543-44. That is the same result the State is seeking here.

In the two most analogous circuit court cases to this one, the Eleventh Circuit and Sixth Circuit expressly recognized the possibility of state lawsuits brought under a public-nuisance theory pursuant to Section 1166. In *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1246 (11th Cir. 1999) ("*Seminole II*"), the Eleventh Circuit held that IGRA did not provide a freestanding implied right of action that would allow a State to sue to compel tribal officials to comply with IGRA. But the Court noted that IGRA might provide an "express right to sue" tribal officials under Section 1166. *See Seminole II*, 181 F.3d at 1246 n.13. The Court observed in a footnote that, like Alabama law, "Florida law expressly provides that an action may be brought in state court to enjoin the continuation of a 'common nuisance'" and that the district court might "entertain an action for injunctive relief pursuant to this provision 'as incorporated into federal law by 18 U.S.C. § 1166.'" *Id.* Because Florida did not pursue its Section 1166 claim on appeal, the Court in *Seminole II* did not resolve the issue. *Id.* (The United States later filed a public nuisance suit under Section 1166 to enjoin the same activity in *United States v. Seminole Tribe*, 45 F. Supp. 2d 1330 (M.D. Fla. 1999), which explains why the State dropped that claim.)

The Sixth Circuit recently issued a similar decision in *Mich. v. Bay Mills Indian Cmty.*, 695 F.3d 406 (6th Cir. 2012), which Defendants cite extensively in their brief. Doc. 14 at 15-16.

There, the State of Michigan sued a tribe, arguing that Section 1166(a) authorizes States "to bring a civil-nuisance suit" under state law "to enjoin 'any person' from allowing a building to be used for gambling." *Id.* at 415. The Sixth Circuit held that Section 1166(a) was not clear enough to abrogate the tribe's tribal immunity, but the court acknowledged that "Michigan's statute authorizing civil suits to abate a nuisance is a 'State law[] pertaining to the . . . regulation . . . of gambling.'" *Id.* (quoting 18 U.S.C. § 1166(a)). The Sixth Circuit also noted that "the State has already amended its complaint" to avoid tribal immunity by suing "various Bay Mills tribal officers as defendants," just as the State of Alabama has done in this case. *Id.* The Sixth Circuit made it very clear that its decision on sovereign immunity "express[es] no opinion as to whether, or under what circumstances, those officers may be sued" and "is not to the exclusion of other remedies that might (or might not) be available to the plaintiffs." *Id.* at 416. Accordingly, Michigan's public-nuisance lawsuit against the tribal officers is still being litigated in the district court. *See State of Mich. v. Bay Mills Cmty., et al.*, No. 1:10-cv-01273-PLM (W.D. Mich).

Interestingly, the United States Solicitor General and the National Indian Gaming Commission have also recognized the possibility that a State like Alabama may be able to pursue a public-nuisance cause of action against tribal officials under Section 1166. Michigan appealed the Sixth Circuit's sovereign-immunity ruling in *Bay Mills* to the U.S. Supreme Court, and the Supreme Court ordered the U.S. Solicitor General to respond to Michigan's petition for a writ of certiorari. The SG and the National Indian Gaming Commission's brief argues that the Supreme Court should not take the case, in part, because Michigan may be able to enjoin the tribe's gambling through its Section 1166 lawsuit against the tribe's officials. The SG and NIGC noted that Michigan's "Count VI alleged that operation of the Vanderbilt Casino was a public nuisance

under state law." Brief for the United States as Amicus Curiae at 10, *Michigan v. Bay Mill*s (No. 12-515) (U.S. 2013).[8] The SG and NIGC explained that, "although the court of appeals held that all claims against respondent itself . . . were barred by tribal sovereign immunity, it instructed the district court to consider on remand whether counts IV-VI . . . may proceed against respondent's tribal gaming commission, or against the commission's members or members of respondent's executive council in their official capacities." *Id.* at 21. Accordingly, the SG and NIGC concluded that it would be "incorrect" to argue that Michigan has "no federal-court remedy to stop illegal tribal gaming that takes place on Michigan's own sovereign territory."

Finally, by removing this case to federal court under the doctrine of "complete preemption," Defendants effectively conceded that IGRA provides the State a cause of action. *See* Doc. 1 (notice of removal). The complete-preemption doctrine provides federal jurisdiction only when a federal statute "provide[s] the exclusive cause of action for the claim asserted." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). Since the Supreme Court's decision in *Beneficial Nat'l Bank*, federal appellate courts have uniformly held that a viable federal cause of action must exist for there to be jurisdiction on a theory of complete preemption. *See Johnson v. MFA Petroleum Co.*, 701 F.3d 243, 252 (8th Cir. 2012) ("Other circuits generally agree that the lack of a federal cause of action is fatal to a complete preemption argument."); *Lontz v. Tharp*, 413 F.3d 435, 442 (4th Cir. 2005) ("[T]he sine qua non of complete preemption is a pre-existing *federal* cause of action that can be brought in the district courts.") (emphasis in original); *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 276-77 (2d Cir. 2005) (complete-preemption removal when there is no federal cause of action "is internally inconsistent."); *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 788 (7th Cir. 2002) ("Logically, complete preemption would not be

[8] Available at http://sblog.s3.amazonaws.com/wp-content/uploads/2013/05/12-515-Michigan-v-Bay-Mills.pdf

appropriate if a federal remedy did not exist in the alternative."). Defendants cannot have their jurisdictional cake and eat it too. If Defendants were right to argue that this Court has jurisdiction under the complete-preemption doctrine, then federal law must provide the State a cause of action against the Defendants.

2. Defendants are alleged to be engaged in class III gambling.

Defendants imply in their motion to dismiss that their slot-machine gambling is "class II," not class III gambling. *See* Doc. 14 at 10 n.9. Although Section 1166 says that state laws do not apply to class II gambling, Defendants' mere insinuation is no basis upon which to dismiss the State's complaint. IGRA unequivocally states that "[t]he term 'class II gaming' does not include . . . (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B). Here, the State has alleged in great detail that Defendants are operating slot machines and other unlawful gambling devices, and Defendants do not argue that those factual allegations are implausible or insufficient. *See* Doc. 10 ¶¶13-18. The Attorney General has also explained, in correspondence attached to Defendants' notice of removal, that Defendants' machines are a "kind" of "slot machine" that is prohibited by IGRA for use in "class II" gambling. *See* Doc. 1, Ex. C (citing Disapproval Letter from Commissioner Philip Hogen to Mayor Karl S. Cook at 7 (June 4, 2008)). It may be that Defendants can prove that they are not operating class III slot machines at summary judgment or trial. But they have not even attempted to argue that their gambling devices are legal in their motion to dismiss. Accordingly, the State's allegations are sufficient to establish that Defendants' gambling devices are illegal slot machines under Alabama and illegal class III machines under federal law.

B. The State's Public Nuisance Claim *under State Law* Is Not Preempted.

The State has also brought a claim for public nuisance under State law. Again, Defendants do not deny that Alabama law provides the Attorney General a cause of action to enjoin unlawful gambling activity as a public nuisance. *See* Doc. 14 at 6. Nor do Defendants deny that their gambling activity—as recounted in the State's Amended Complaint—is illegal under state law. Defendants argue instead that "IGRA Occupies the Field for Regulating Gaming on Indian Lands." Doc. 14 at 6-7. Because Section 1166 authorizes the State to bring this civil action for all the reasons above, this "complete preemption" argument cannot work. But even if Section1166 were not on the books, the issue of preemption in this case would not be clear-cut against the State.

First, as explained in detail above, Section 1166 of IGRA expressly provides that tribes must comply with state law with respect to all gambling that is not class I or class II. It may be possible at some future date for Defendants to establish that their gambling activities are class I or class II, but they have not attempted to make that showing in their motion to dismiss. Accordingly, the State's public nuisance claim is not preempted by the text of Section 1166.

Second, as explained in the Background section of this brief, IGRA governs gambling only if that gambling is conducted on "Indian Lands," which requires that land be a "reservation" or held "in trust by the United States for the benefit of any Indian tribe." 25 U.S.C. § 2703(4). If IGRA does not apply to the lands, then there is no question that the Amended Complaint states a claim upon which relief can be granted. Defendants' motion to dismiss does not conclusively establish that they are conducting gambling on Indian Lands as that term is defined in IGRA.

As it is, Defendants have not shown that the United States holds their land in trust such that IGRA applies. To be sure, the United States recognized the Poarch Band of Creek Indians in

June of 1984, and the Secretary of the Interior has purported to take certain lands into trust on the Tribe's behalf in the years since 1984. *See* 49 Fed. Reg. 24083 (June 11, 1984); Exhibit A to Doc. 1. But, unless the Poarch Band was "under federal jurisdiction" as of 1934, the Secretary had no authority under federal law to take the Poarch Band's landholdings into trust.

The U.S. Supreme Court held as much in *Carcieri v. Salazar*, 555 U.S. 379 (2009). In *Carcieri*, the State of Rhode Island challenged the Secretary's decision to accept land into trust on behalf of an Indian tribe that the federal government first recognized in 1983. *See Carcieri*, 555 U.S. at 395 (citing 48 Fed. Reg. 6177 (Feb. 10, 1983)). The U.S. Supreme Court held that the Secretary had no authority to take the land into trust because the tribe was admittedly not "under federal jurisdiction" when Congress passed the Indian Reorganization Act in 1934:

> We agree with petitioners and hold that, for purposes of § 479 [of the Indian Reorganization Act], the phrase "now under Federal jurisdiction" refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, § 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934.

Carcieri, 555 U.S. at 382; c*f. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2212 (2012) (litigants may challenge Secretary's trust decisions as violating *Carcieri*).

The Poarch Band has never established in any administrative or judicial forum that it was "recognized" and "under federal jurisdiction" in 1934, and Defendants have not attempted to make that showing here. To the contrary, it is undisputed that the United States recognized the Poarch Band of Creek Indians as a tribe in June of 1984—50 years too late for the Secretary to be able to take land into trust on the tribe's behalf. *See* 49 Fed. Reg. 24083 (June 11, 1984). Defendants might be able to establish in some future proceeding that the lands at issue were properly taken into trust, but they have made no attempt to make that showing at this stage.

Accordingly, it is not clear that IGRA applies to the gambling at issue here and Defendants have not made out the affirmative defense of preemption.

* * *

Defendants' motion to dismiss under Rule 12(b)(6) should be denied. Assuming the casinos at issue here are located on "Indian Lands," Section 1166 of IGRA incorporates into federal law the public nuisance claim that Alabama law provides. *See United States v. Santee Sioux Tribe*, 135 F.3d 558 (8th Cir. 1998); *United States v. Seminole Tribe*, 45 F. Supp. 2d 1330 (M.D. Fla. 1999). Although Section 1166 provides exclusive jurisdiction to the federal government for criminal prosecutions, it does not give the federal government exclusive jurisdiction to file civil actions to enjoin unlawful conduct going-forward. Moreover, Defendants have not met their burden to establish the affirmative defense of preemption to the State's state-law claim because they have not established that the gambling at issue is being conducted on properly-recognized Indian Lands or that the gambling is being conducted in accordance with federal law. The State's public nuisance claim—whether it arises under state law, federal law, or both—should be allowed to proceed.

CONCLUSION

Defendants' motion to dismiss for lack of jurisdiction should be **GRANTED** as to PCI Gaming Authority and **DENIED** as to the individual defendants.

Defendants' motion to dismiss for failure to state a claim should be **DENIED**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and service will be perfected upon the following counsel of record on this day the 4th of June, 2013:

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