IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

STATE OF ALABAMA, ex rel ASHLEY RICH,
District Attorney for the
Thirteenth Judicial Circuit of
Alabama (Mobile County)

v. CIVIL ACTION NO. 14-00066-CG-B

50 SERIALIZED JLM GAMES, INC.
gaming devices, et al.,

RESPONSE OF THE STATE OF ALABAMA
TO THE MOTION TO DISMISS FILED BY
THE MOWA/CHOCTAW ENTERTAINMENT CENTER and
FRAMON WEAVER ("MOWA") and
JLM GAMES, INC., and JIMMY L. MARTIN ("JLM Games")
(Collectively "the Removing Parties")

Without waiving any defense to this court's jurisdiction previously asserted in its Motion to Remand (doc.8), the State files this response to the Removing Parties' Motion to Dismiss. Because the issues raised in the Removing Parties' Motion to Dismiss (doc. 5) and the issues raised in their response to the Motion to Remand (doc. 8) overlap, the State incorporates by reference the arguments made in the Motion to Remand into this response to the Motion to Dismiss.

In addition, because the Removing Parties' motion to dismiss is filed pursuant to Rules 12(b)(1) and

12(b)6), and accompanied by voluminous documents which were not submitted under Rule 56(c), Fed. R. Civ. P., the State requests that the court accept this delayed Response (for which a motion for extension of time was filed on March 20, 2014) given the large volume of materials submitted by the Removing Parties.

I. Introduction

This case is fundamentally about illegal gambling. Despite lengthy and costly litigation in the courts of this State, whose strong public policy against lotteries and gaming schemes has been expressed and upheld again and again by law enforcement authorities and by the Supreme Court of Alabama, gaming interests have attempted once again to thwart Alabama's criminal laws which prohibit use and possession of gambling devices and slot machines. These interests, together with the other Removing Parties now seek to operate and profit from illegal gambling devices under the auspices of the MOWA Band of Choctaw Indians.

The MOWA contend that this matter presents a federal question, in that they enjoy complete tribal

sovereign immunity from suit, and that the activities that led up to the seizure of the gambling devices in issue constitute Class II gaming subject the provisions of the Indian Gaming Regulatory Act, 25 U.S.C. §2701 et seq., which they assert completely pre-empts the State's forfeiture suit. They request that this court dismiss the State's entire forfeiture suit under Rule 12(b)(1)and 12(b)(6) and that it order the State to return the gaming devices.

Neither of the Removing parties has been sued *in personam*, although, as required, they were all given notice of the forfeiture suit and filed appearances. See Ala. R. Civ. P. 5(a). As for Jimmy Martin, he is a person who was designated to accept service for JLM Games, Inc.

In any event, none of the Removing Parties has established ownership of the games in question. And it is the devices alone that are in issue in the State forfeiture suit.

II. Response to Motion to Dismiss

The court should find that tribal sovereign

immunity does not bar the State of Alabama's enforcement of its criminal forfeiture law; that IGRA neither applies to this case, nor supplies a basis for federal pre-emption of this suit; and that principles of abstention, comity and equitable jurisprudence require dismissal of this suit.

A. Alabama has a strong public policy against gaming and criminalizes it

The Alabama Supreme Court has ruled since the late 1800s that slot machines, constitute lotteries. Ex parte Ted's Game Enterprises, 893 So.2d 376, 378 (Ala. 2004). The State's vigorous enforcement of its policy against lotteries has a long, clear history. The Alabama Supreme court has made it unambiguously clear in numerous cases that

> [i]t is " 'the policy of the constitution and laws of Alabama [to prohibit] the vicious system of lottery schemes and the evil practice of gaming, in all their protean shapes. '" Opinion of the Justices No. 83, 249 Ala. 516, 517, 31 So.2d 753, 754 (1947) (quoting Johnson v. State, 83 Ala. 65, 67, 3 So. 790, 791 (1887)(emphasis added)).

Barber v. Jefferson County Racing Ass'n, Inc., 960 So.2d 599, 614 (Ala. 2006). See also Barber v. Cornerstone, 42 So.3d 65 (Ala. 2009) (only the ordinary

game of bingo meeting the six-part test is legal in Alabama); Tyson v. Macon County Greyhound Park, 43 So.2d 587 (Ala. 2010)(state courts lack subject matter jurisdiction to enjoin criminal proceedings). In Tyson v. Macon County Greyhound Park, 43 So.2d 587 (Ala. 2010), a case involving seizure of gambling devices, the Alabama Supreme Court emphatically stated the rule, grounded in principles of separation of powers, that a criminal investigation cannot be enjoined or interfered with by civil process, whether it is threatened or pending, whether it involves seizure or forfeiture, or criminal arrest or charge, or whether the interference is by injunction, or restraining order, or declaratory judgment. The State's public policy against gaming is so strong and compelling that the Supreme Court of Alabama, in a case well grounded in precedent, yet extraordinary, issued a writ of mandamus ordering a circuit judge to issue a search warrant for the seizure of gaming devices. Ex parte State, 2013 WL 765747 (Ala. 2013). The court wrote,

> "'... Mandamus can be used to prevent a *gross disruption in the administration of criminal justice.* '..."

Ex parte State, 2013 WL 765747 *12 (Ala. 2013).

The criminal prohibitions against gaming can be found at Ala. Code 13A-12-20 et seq. and include forfeiture provisions. Ala. Code 13A-12-30.

The matters discussed above are set forth in order to establish the breadth and significance of the State's criminal enforcement scheme with respect to gaming. Contrary to the Removing Parties frequent characterizations, this is not a question involving State *regulation* of gaming. See e.g., California v. Cabazon Band of Mission Indians, 480 U.S. Rather, this is a matter of strict enforcement of the State's criminal laws prohibiting gaming, using one of the most punishing statutory remedies, which is the seizure of gaming instrumentalities and proceeds, a decision within the executive branch of state government.

B. IGRA does not pre-empt the State's Criminal Forfeiture Suit because it does not apply

Seeking to avoid the effect of the strong public policy against gaming in Alabama, the MOWA group and JLM Games have declared that they are operating their devices under the provisions of IGRA, 25 U.S.C. 2701 et

seq., and that IGRA pre-empts Alabama law on the subject. But neither the MOWA nor JLM Games has offered one document showing that the gaming operation is consistent with IGRA's provisions or that the National Indian Gaming Commission has performed any of the statutory functions imposed upon it by IGRA with respect to their "Class II" gaming enterprise or, as required by IGRA for Class II games, approved the MOWA's gaming ordinance[1]. See, e.g., Dewberry v. Kulongoski, 46 F.Supp.2d 1136, 1141 (D. Ore. 2005).

However, IGRA by its terms applies to federally recognized tribes. And the MOWA are not a federally recognized tribe, see 25 U.S.C. 479, 479a, 479a-1; Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 79 Fed. Reg. 4748 (Jan. 29, 2014) (Notice), nor is the area from

[1] The State does not concede that the games in question are Class II games. Suffice it to say that slot machines and gambling devices of the type seized here are prohibited under 13A-12-20 et seq. Constitutional amendments that allow the traditional game of bingo as an exception to the broad prohibition against lotteries in Sec. 65 of the Alabama Constitution are required to be strictly construed. Cornerstone, 42 So.3d at 78. Mobile County's Constitutional Amendment does not exempt slot machines or gambling devices from these statutory prohibitions. Ala. Const., Amendment 440, the Mobile County Bingo Amendment.

which the gambling devices were seized federal land held in trust by the United States for the MOWA band or any kind of federal enclave.

Because the MOWA Band is not a federally recognized tribe, the gambling activity conducted by them is not protected or regulated under the pre-emptive provisions of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 et seq., despite unfounded assertions to the contrary.

C. *Younger v. Harris* prohibits injunctions against State criminal proceedings

The abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971), requires dismissal of this proceeding. The doctrine has been applied to suits in federal court to enjoin state forfeiture proceedings involving gambling devices seized by state law enforcement authorities, see Taylor v. Siegelman, 230 F.Supp.2d 1284 (N.D. Ala. 2002), and numerous cases of abstention involving the same circumstances as are presented in this case which are cited therein.

> "A federal lawsuit to stop a prosecution in a state court is a serious matter … The precise reasons for this longstanding public policy

> against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. … This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, 'the notion of comity', that is, a proper respect for state functions, recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways… This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again[] that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions …."

Id. at 1289 (quoting Younger). See also Jernigan v. State, 812 F.Supp. 688, 692 (S.D. Miss. 1993) (acknowledging separation of powers principles as a ground for non-interference in a case involving gambling devices).

Principles governing *in rem* procedures for forfeiture of contraband also militate against this court's exercise of jurisdiction over the State's seizure of the gaming devices in question. In United

States v. $270,000.00 in U.S. Currency, 1 F.3d 1146 (1993), the Court of Appeals for the Eleventh Circuit held that with respect to conflicting State and Federal forfeiture suits, the federal courts cannot exercise authority while the *res* is still under the control of the State courts. Id. at 1146-1147. The court stated that assumption of jurisdiction over a pending state forfeiture matter would violate the "spirit of comity that must underlie federal and state court relations." Id. at 1149. The exhibits (doc. 1-1) the Removing Parties submitted with their notice of removal (doc. 1) establish that jurisdiction attached when the res was brought within the State Circuit Court's jurisdiction on December 6, 2013, more than two months before the matter was removed to the federal court.

D. Sovereign Immunity of the Removing Parties

In 1984, the Alabama legislature recognized the MOWA Band of Choctaws Indians as a tribe. See Ala. Code §41-9-708. This followed the enactment of Alabama Act 79-343 (doc. 10-9) which established the framework for a local Indian affairs commission and made official

recognition the MOWA band an aspiration.

Section 41-9-708 et seq. created the Alabama Indian Affairs Commission. By statute, this commission initially recognized seven tribes, including the Mowa Band of Choctaws. §41-9-708(b). The Commission's website now shows the nine tribes currently recognized by the State of Alabama. The purpose of the commission is to promote Indian social and economic development and recognition of the rights of Indians to pursue their cultural and religious traditions; to "provide aid for Indians as needs demonstrate", to focus state, federal and local resources in furtherance of those goals; and "to establish appropriate procedures to provide for legal recognition of any future Indian organization" that desires state recognition.

The Choctaws of this area are part of a much larger tribe whose lands were situated predominantly in Mississippi, with a much smaller section of that land extending into Southwest Alabama. In 1830, under the Treaty of Dancing Rabbit Creek, 7 Stat. 333, ratified in 1831 (doc. 10-5), the Tribe was offered land in Oklahoma and over several years most of the Choctaws in

the area spanning Mississippi and Alabama removed to the Choctaw Nation in Oklahoma. Article XIV of the treaty provided that the Choctaws that remained would be U.S. citizens and would be awarded parcels of land individually and for their children. After several years, they would be granted their individual parcels in fee simple. Specifically,

> the Treaty of Dancing Rabbit Creek … [was] signed near present day Macon, Mississippi, ceding the last of the Tribal domain in Mississippi, 10,500,000 acres. Contrary to the practice followed in certain notorious cases, the Treaty of Dancing Rabbit Creek required no Indian to leave Mississippi. Permission to remain and become Mississippi citizens was expressly assured. Article XIV of the Dancing Rabbit Treaty [sic] provided:
>
> > 'Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the Agent within six months from the ratification of this Treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one half that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under ten years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years after the ratification of this treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement, of the head of the family, or a portion of it. Persons who

> claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity.'
>
> This article is self explanatory.

U.S. v. State Tax Commission of State of Mississippi, 505 F.2d 633, 640 (5th Cir. 1974), reh'g denied, 535 F.2d 300 (5th Cir. 1976), reh'g denied en banc, 541 F.2d 469 (5th Cir. 1976).

> The last sentence of Article XIV: 'Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity', meant that if the individual deciding to remain in Mississippi should ever choose to join his brethren in the Indian Territory he could not be denied that privilege, but he was to be cut off from any portion of the annuity payable to the Tribe under the Treaty, because he had already received his compensation in the form of land. See, Winton v. Amos, post.

Id. (citing Winton v. Amos, 255 U.S. 373 (1921)).

In 1832, Alabama passed an act that extended its jurisdiction over those lands. In explaining the significance of this act, the Alabama Supreme Court, in a case concerning the validity of the dissolution of a marriage by a Choctaw, wrote:

> It is enacted by the 8th section of the act of 1832, "to extend the jurisdiction of the State of Alabama, over the territory according to the geographical boundaries within the limits of said

> State, and for other purposes,"…

Wall v. Williams, 11 Ala. 826, 834 (1847). The Alabama Supreme court further explained that,

> It will be observed, that the cohabitation of the defendent [sic] and D. W. Wall commenced previous to the extension of the jurisdiction of this State over the Indian territory, by the act of 1832; that this enactment abolished only the "laws, usages and customs of the Creek and Cherokee nations of Indians," leaving those of the Choctaws in full force, except so far as they might interfere with the exercise of the jurisdiction conferred upon the tribunals of the State.

Id. at 839.

Consistent with the above authorities and as noted in materials submitted by the Removing Parties, the cultural traditions of the Choctaws were upheld.

Hence, the Choctaw Nation of Oklahoma is a recognized tribe with lands held in trust, see 79 Fed. Reg. 4748 (Jan. 29, 2014) (Notice), and the Mississippi Band of Choctaws have acquired federal recognition, id. See U.S. v. John, 437 U.S. 634 (1979), after an act of Congress in 1929 was passed…

> providing essentially that title to all the lands previously purchased for the Mississippi Choctaws would be 'in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior.' Ch. 235, 53 Stat. 851. In December 1944, the Assistant Secretary of

> the Department of the Interior officially proclaimed all the lands then purchased in aid of the Choctaws in Mississippi, totaling at that time more than 15,000 acres, to be a reservation. 9 Fed. Reg. 14907.

Id. at 646.

The MOWA Band of Choctaws in Alabama did not acquire such status or lands similarly designated.

Against this historical backdrop, which includes the denial of federal recognition of the MOWAs in an administrative decision of the Department of the Interior that were upheld by *this court*, (cited in paragraphs 14 and 15 of the State's Motion to Remand, doc. 8), and despite the State's recent formal recognition of this group in the 1984 legislation and the earlier Act 79-343 (doc. 10-9), cited by the Removing Parties and included in its exhibits, no treaty, or statute, or *applicable* (and non-distinguishable) authority is offered to support the assertion that the criminal laws of Alabama do not apply to the MOWA Band of Choctaw Indians, or that they can flout Alabama's criminal laws, or that criminal jurisdiction over the MOWA Band is exclusively federal.

The cases offered by the Removing parties, Bison

(doc. 10-23) (a civil dispute over tribal elections and membership) and Etheridge (doc. 10-24) (a civil dispute about tribal government), also included in their exhibits, are consistent with the view that Alabama recognizes self-governance by the MOWA with regard to those internal tribal matters over which the State had not asserted its jurisdiction. But internal tribal matters, such as its membership, the tribal council, its customs and usages, traditionally left to tribal governance, are far different offenses under the State's criminal laws or the criminal jurisdiction of the circuit courts of this State.

The Choctaws have offered no authority that supports the claim of sovereign immunity from State criminal laws. Further, under the principles of comity, equitable jurisprudence, and abstention discussed above, the decision whether the State has jurisdiction over this type of forfeiture suit and recognizes only a limited immunity with respect to internal tribal matters may be a decision that the courts of Alabama should decide in the first instance.

Clearly JLM Games is not an arm of the tribe nor

an instrumentality of the tribe and it is not argued that this entity can claim sovereign immunity as such.

For the foregoing reasons, the State requests that the Removing Parties' Motion to Dismiss (doc. 5) be denied and that the State's Motion to Remand be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon all parties by the CM-ECF system.
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