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

STATE OF ALABAMA, ex rel ASHLEY RICH, District Attorney for the Thirteenth Judicial Circuit of Alabama (Mobile County),	)	
Plaintiff,	)	
v.	)	Case No. 14-00066-CG-B
50 SERIALIZED JLM GAMES, INC., gaming devices, *et al.*,	)	
Defendants.	)	

AMENDED NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1331, 1441, 1443, and 1446, the Defendants, JLM Games, Inc., Jimmy L. Martin, the MOWA Band of Choctaw Indians (hereafter "MOWA" or "Tribe"), and Chief Framon Weaver, by their undersigned attorneys, submit this Amended Notice of Removal from the Circuit Court of Mobile County, Alabama, in which the above-captioned action is now pending, to the United States District Court for the Southern District of Alabama, Southern Division. In further support of said Amended Notice of Removal, Defendants state as follows:

Procedural History

1. This action was commenced by way of Complaint filed in the Circuit Court of Mobile County, Alabama, on December 6, 2013. The action is docketed

as *State of Alabama, ex rel Ashley M. Rich, District Attorney for the Thirteen Judicial Circuit of Alabama (Mobile County), Plaintiff v. 50 Serialized JLM Games, Inc. gambling devices, $10,090.47 in U. S. Currency, 3 computers, Miscellaneous Gambling Documents and Paraphernalia, including Royal Sovereign money counter, Game win tickets, all listed on appendix A, seized from the MOWA/Choctaw Entertainment Center located on Red Fox Road, Mount Vernon, AL, Respondents*, Civil Action No.: CV-2013-903288.00.

2. On or about January 9, 2014, a copy of the Summons and Complaint filed in *State of Alabama, ex rel Ashley M. Rich, District Attorney for the Thirteen Judicial Circuit of Alabama (Mobile County), Plaintiff v. 50 Serialized JLM Games, Inc. gambling devices, $10,090.47 in U. S. Currency, 3 computers, Miscellaneous Gambling Documents and Paraphernalia, including Royal Sovereign money counter, Game win tickets, all listed on appendix A, seized from the MOWA/Choctaw Entertainment Center located on Red Fox Road, Mount Vernon, AL, Respondents*, Civil Action No.: CV-2013-903288.00, was served by personal service on the Tribe.

3. On or about January 8, 2014, the same Summons and Complaint was served by personal service on Framon Weaver.

4. On January 18, 2014, a copy of the same Summons and Complaint was served by certified mail on Jimmy L. Martin, and others.

5. On February 7, 2014, Defendant Tribe and Framon Weaver filed a Motion to Dismiss in the Circuit Court of Mobile County, Alabama. That Motion has been set for hearing.

6. This Amended Notice of Removal hereby incorporates all the exhibits attached to that Notice of Removal filed on February 24, 2014, which were copies of all processes, proceedings, and orders to that date in the state court this action.

The Parties

7. The Plaintiff, the State of Alabama, is represented by Ashley M. Rich, District Attorney for the Thirteenth Judicial District of Alabama, Mobile County.

8. The Defendant, the MOWA Band of Choctaw Indians, is an autonomous Indian Tribe located within Mobile and Washington Counties, Alabama.

9. Defendants JLM Games, Inc. and Jimmy L. Martin are the manufacturers of the games and have a security interest in their sale to the Tribe.

Plaintiff's Claims

10. The Plaintiff's claims are alleged to arise under the forfeiture laws of the State of Alabama. Specifically, the action is brought pursuant to Section 13A-12-30(a) and (c) of the Code of Alabama (1975), seeking forfeiture to the State of Alabama the games, as gambling devices, and the currency and the other materials. The District Attorney maintains that the items were seized from MOWA Choctaw

Entertainment Center because, the States alleges, that the items are "illegal gambling devices, server-based slot machines, lotteries, gambling paraphernalia, and currency used as bets or stakes, and as such are contraband under Sections 13A-12-20 and 13A-12-30(a), (b) and (c) of the Alabama Code (1975)." (See Complaint.) Additionally, the District Attorney alleges that the materials were used and intended for use in an unlawful gambling activity in violation of the Code of Alabama, specifically Sections 13A-12-21 (simple gambling), Section 13A-12-22 (promoting gambling), and Section 13A-12-27 (possession of a gambling device).

Basis for Removal

11. This Court has original jurisdiction over this action under 28 U.S.C. § 1331 because the action is one that is founded on a claim or right "arising under the Constitution, laws or treaties of the United States." Therefore, this action may be removed to this Court pursuant to 28 U.S.C. § 1441.

12. There are several, independent bases for federal question jurisdiction in this matter. Federal question jurisdiction exists in this case because the Complaint presents claims that can be decided only through the application of federal law. First, the central issue in this case is whether the MOWA Tribe is entitled to assert a defense of sovereign immunity. The answer to that question relies heavily on the interpretation of the 1830 Treaty of Dancing Rabbit Creek, a

federal treaty, entered into between the Choctaws and Congress. Specifically, Article XIV provides that those Choctaws who chose to remain in Alabama and Mississippi were entitled to "a reservation of one section of 640 acres of land..." with additional allotments based on the number of children living with those persons. Those same persons living in Mississippi and Alabama "shall not lose the privilege of a Choctaw citizen" which is the privilege of "jurisdiction and government" of the Choctaw people as granted in Article XIV.

13. The significance of the Treaty of Dancing Rabbit Creek was not lost on legislators in Alabama as is reflected in the Alabama Act of 1832 which sought to assert the jurisdiction of the State over native tribes in the State, including the Cherokees and the Creeks. However, as the Alabama Supreme Court, in *Wall v. Williams*, 11 Ala. 826 (1847), noted, Choctaw law was not superseded. In *Wall*, the Court ruled that Choctaw law, pursuant to the Treaty of Dancing Rabbit Creek, was controlling. Taken together, the 1830 Treaty of Dancing Rabbit Creek, the Alabama Act of 1832, and the 1847 decision in *Wall v. Williams*, demonstrate a deference to Choctaw law. The application and interpretation of the Treaty of Dancing Rabbit Creek is fundamental in this case. As such, federal question jurisdiction obtains pursuant to the doctrine of "artful pleading." Therefore, although the District Attorney's Complaint is cast as a state law cause of action, because her claim "requires resolution of a substantial question of federal law,"

federal jurisdiction is appropriate. *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 164 (emphasis added) (quoting *Franchise Tax Board*, 463 U.S. 1, 13); *see also Merrill Dow Pharm. Inc.*, 478 U.S. at 819 (Brennan, J., dissenting) ("[i]t is firmly settled that there may be federal question jurisdiction even though both the right asserted and the remedy sought by the plaintiff are state created").

14. A second, independent basis for federal question jurisdiction arises from the mere general determination of whether a group of persons is to be recognized as an Indian Tribe and therefore entitled to sovereign immunity. In this case that issue is purely a question of federal law. For example, "tribal status," for purposes of gaming, are often determined by the Office of Federal Acknowledgement, an office within the Bureau of Indian Affairs, an office within the Department of Interior. (This office was formerly known as the Bureau of Acknowledgement and Recognition.) However, the general test for determining tribal status is found in *Montoya v. United States*, 180 U.S. 261, 266, 21 S. Ct. 358, 359, 45 L. Ed. 2d 521 (1901). The significance, for purposes of this removal, is that both tests are made by the application of federal law.[1]

15. Third, Congress has completely preempted the field of regulating Indian gaming. The federal code, at 18 U.S.C. § 1166(d), gives the United States

[1] It should be noted, however, that there is no requirement that a tribe be recognized by the Bureau of Indian Affairs in order to assert sovereignty and immunity claims. *See, e.g., Bottomly v. Passamaquoddy Tribe*, 499 F.2d 1061, 1065 (1st Cir. 1979). (Again, federal law is determinative.)

exclusive jurisdiction over criminal prosecutions for violations of state gambling laws that are made applicable to Indian tribes. *See, e.g., Lac Du Flambeau Band of Superior Chippewa Indians*, 743 F. Supp. 645, 652-53 (W.D. Wisc. 1990). The Eleventh Circuit agrees. The Indian Gaming Regulatory Act "is intended to expressly preempt the field in the governance of gaming activities on Indian lands." *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 63 F. 3d 1030, 1033 (11th Cir. 1999). In fact, 25 U.S.C. § 2710(d)(7)(A)(ii), a provision of IGRA, allows states to bring suit against the National Indian Gaming Commission to seek injunctions against unauthorized gaming, but not against tribal defendants. See also, 25 C.F.R. § 501.2(c) which allows Class II gaming on Indian lands only within the jurisdiction of the Indian Tribe and of the National Indian Gaming Commission, and 25 C.F.R. § 542.5 which reads "nothing in this part shall be construed to grant a state jurisdiction in Class II gaming...".

16. Most recently, the Middle District of Alabama has ruled in *State of Alabama v. PCI Gaming Authority, et al*., 2014 WL 1400232 (M.D. Ala. Apr. 10, 2014) that IGRA indeed completely preempts state law causes of action with respect to the governance of gaming on Indian lands. *Id.* at *6. The Court first recited the language from *Tamiami* in the immediately preceding paragraph, and then noted:

> Although the Eleventh Circuit in *Tamiami I* did not expressly hold that IGRA is a complete preemption statute, the Eighth Circuit has so

> held. In *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996), the Eighth Circuit addressed as a matter of first impression whether "IGRA completely preempts state laws regulating gaming on Indian lands." *Id*. at 543. After a comprehensive analysis of IGRA's text and structure, its legislative history, and its jurisdictional framework, *see id.* at 544-47, the Eighth Circuit concluded that "IGRA has the requisite extraordinary preemptive force necessary to satisfy the complete preemption exception to the well-pleaded complaint rule." *Id.* at 547. It reasoned also that its holding was buttressed by the long history of Supreme Court decisions that "illustrate the importance of federal and tribal interest in Indian case and the authority of Congress to protect those interests." *Id.* As to what types of claims fall within IGRA's complete preemptive scope, the Eighth Circuit concluded that "the key question is whether a particular claim will interfere with tribal governance of gaming." *Id.* at 549. It opined that "those causes of action which would interfere with the Tribe's ability to govern gaming should fall within the scope of IGRA's preemption of state law." *Id.* at 550. Based on the Eleventh Circuit's recognition of IGRA's strong preemptive force and the Eighth Circuit's reasoning, which is persuasive, the Eighth Circuit's holding will be applied here.

State of Alabama v. PCI Gaming Authority, et al., 2014 WL 1400232 (M.D. Ala. Apr. 10, 2014) at *7.

The Court then concluded, "IGRA completely preempts the state law claim... if that claim interferes with the [tribe's] governance of gaming on Indian lands." In that action, a state law nuisance claim was preempted. Similarly, in this case, a state law forfeiture claim is preempted because both interfere with the Tribe's governance of gaming on their lands. *Id.*

17. The effect of this preemptive force given to IGRA is that it "recharacterizes the plaintiff's claim as federal in nature. The federal issue is not a defense, but rather actually provides the basis for the plaintiff's cause of action."

15 W. Moore, Moore's Federal Practice, ¶ 103.45[2] (3d Ed. 2003). Put another way:

> In complete preemption cases, federal law so occupies the field that any complaint alleging facts that come within the [federal] statutes scope necessarily "arise under" federal law, even if the plaintiff pleads a state law claim only. It is not just that a preemption defense is present, but that it is so persuasive that the claim must be deemed completely federal from its inception.

Id. See also Schmeling v. Nordam, 97 F.3d 1336, 1342-43 (10th Cir. 1996).

18. The Indian Commerce Clause recognizes the exclusive federal authority over tribes. Only Congress has the ability to negotiate with tribes and other sovereigns. This provision has been the basis for "broad and exclusive federal powers and responsibilities over Indian affairs." Handbook of Federal Indian Law, 1982 at 232-233, F. Cohen.

19. Removal jurisdiction also exists under 28 U.S.C. § 1443. The MOWA Tribe has been recognized by both the Alabama and federal governments as an Indian Tribe. The Alabama government recognized the Tribe in the Alabama Act of 1832 and the federal government recognized the Tribe in the 1830 Treaty of Dancing Rabbit Creek. That Treaty afforded certain civil rights to the tribal members, referred to in the Treaty as the "privilege of a Choctaw citizen." In spite of this recognition, the District Attorney has entered onto tribal land, has seized tribal equipment and property, and asserted the jurisdiction of the State of Alabama over that property and equipment, all in derogation of the rights accorded the Tribe

by the federal Constitution, federal law, and the federal Treaty of Dancing Rabbit Creek. Such actions have denied the Tribe their civil rights pursuant to the Treaty.

20. Apart from denying the MOWA Tribe its civil rights pursuant to the Treaty of Dancing Rabbit Creek, the State has, in its dealings with other Indian Tribes which have undertaken to game within the state, not entered onto their land or confiscated their equipment, evidencing a marked disparate treatment of the native tribes located within the state by the state government. Such disparate treatment violates the civil rights of the MOWA Band.

21. Apart from these specific bases, the removing parties would also note that Tribes have a right to remove actions to federal to challenge subject matter jurisdiction based on sovereign immunity. *Contour Spa at The Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F. 3d 1200, 1208 (11th Cir. 2012). *See also, Santana v. Muskogee Creek Nation*, 2013 WL 323223 (10th Cir. 2013) (affirming district court's tribal sovereign immunity-based dismissal of a removed tort action against the tribe).

22. This Court has the jurisdiction to enjoin the conduct of the District Attorney under the All Writs Act. 28 U.S.C. § 1651. *See, In re Ford Motor Co.*, 471 F.3d 1233 (11th Cir. 2006).

23. Finally, the Anti-injunction Act, 28 U.S.C. § 2283, does not prohibit this action.

Removal is Procedurally Proper

24. The Southern District of Alabama is the federal district in which the Circuit Court of Mobile County, Alabama, where the Plaintiff filed its Complaint, is located.

25. This Notice of Removal is timely filed under 28 U.S.C. § 1446(b), which states that "Notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based."

26. This notice is brought by JLM Games, Inc. and Jimmy L. Martin and is timely. The Tribe and Framon Weaver consent to the filing of this Removal.

27. Written notice of the filing of this Notice of Removal will be provided to the Plaintiff, a copy of this Notice of Removal will be filed in the appropriate state court, as required by 28 U.S.C. § 1446(d). This Notice of Removal is signed pursuant to Federal Rule of Civil Procedure 11, see 28 U.S.C. § 1556(a).

28. In filing this Notice of Removal, the Defendants do not waive any defenses that may be available, including, without limitation, jurisdiction. Nor do the Defendants admit any of the factual allegations in the Complaint; rather, the Defendants expressly reserve the right to contest those allegations at the appropriate time.

WHEREFORE, notice is given that this action is removed from the Circuit Court of Mobile County, Alabama, to the United States District Court for the Southern District of Alabama, Southern Division.

Dated: April 25, 2014.

/s/ Samuel M. Hill

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of April, 2014, I electronically filed the foregoing with the Clerk of the Court using CM/EFS which will send notification of such filing to all counsel of records, or if any counsel does not participate in CM/EFS, a copy has been served by United States Mail, postage prepaid and properly addressed as follows:

Martha Tierney, Assistant District Attorney,
Mobile County Government Plaza
205 Government Street, Suite C-501
Mobile, Alabama 36644-2501

/s/ Samuel M. Hill
SAMUEL M. HILL