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

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

Plaintiff,

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

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
The MOWA/CHOCTAW ENTERTAINMENT CENTER
Located on Red Fox Road, Mount Vernon, AL

Respondents.

STATE OF ALABAMA'S SUPPLEMENT TO MOTION TO REMAND

The State of Alabama files this supplemental memorandum in response to the removing parties Amended Notice of Removal the purpose of which was to establish 28 U.S.C. §1443 as an alternative basis for this court's jurisdiction over the state forfeiture proceedings.

The removing parties begin by arguing that this court has jurisdiction under 28 U.S.C. §1331 because the federal court should decide the question whether the MOWA band can assert the defense of sovereign immunity in a state forfeiture proceeding, and because interpretation of a federal treaty (Dancing Rabbit Creek, 1830) is pivotal to that issue. It should be noted that the MOWA band also argues that the Alabama Supreme Court's decision in Wall v. Williams, 11 Ala. 826 (1847) informs the answer to the question of tribal immunity. See document 23, p. 11-16 (Response to Motion to Dismiss).

However, neither the Treaty, nor the MOWA group's status as Indians are sufficient to confer jurisdiction on this court. The MOWA band must allege a claim that arises under the constitution or laws of the United States. See document 26, p. 6-8 (State's Reply in Support of Motion to Remand). Nor is the validity of the defense of immunity a ground for removal. See document 26, p. 3-4. [1]

[1] The MOWA band cites Bottomly v. Passamaquoddy Tribe, 499 F.2d 1061 (1st Cir. 1979), for the proposition that the Tribe need not be federally recognized to raise the defense

The removing parties argue that because IGRA has completely pre-empted the field of Indian gaming, this court should assert jurisdiction over the state forfeiture suit. The State does not dispute the contention that, *were it applicable*, IGRA would completely pre-empt this matter. However, IGRA is not applicable. See document 8, p. 3-4 (Motion to Remand). Federal law (IGRA) does not pre-empt this matter because it does not apply to this case. See First American Casino Corp. v. Eastern Pequot Nation, 175 F.Supp.2d 205, 209-210 (D.Conn. 2000)(discussing complete pre-emption of IGRA *if it applies* and remanding suit to state court for want of jurisdiction). See also document 23, p. 6-7, (Response to MOWA Motion to Dismiss), document 26, p. 4-5 (Reply in Support of Motion to Remand).

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of immunity. Bottomly involved a civil diversity suit against a tribe brought in federal court to recover attorneys' fees. A State's criminal enforcement scheme was not in issue and federal question was not asserted as the jurisdictional basis for the suit.

The argument that the Indian Commerce Clause provides a jurisdictional basis for the suit lacks specificity and is without merit. This suit is not based on the Indian Commerce Clause. The Indian Commerce Clause did not grant Congress the power to abrogate the State's sovereign immunity. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47 (1996). See document 26, p. 1-2 (Reply in Support of Motion to Remand).

Finally, reaching the main point intended to be made by the removing parties when they sought leave to file the Amended Notice of Removal, the MOWA band argue that this court has jurisdiction under 28 U.S. §1443. However, the removing parties have not jotted one concrete factual or legal theory to support removal under that statute. To broadly assert, as they do, that the State's seizure of gaming devices has violated the MOWA band's civil rights is to urge some vague defense to the State's forfeiture suit as the basis for removal. That is both barred by the Eleventh Amendment and by the Younger doctrine, is not a basis for pre-

emption but merely a defense to a well-pleaded complaint. See document 23, p. 8-10 (Response to Motion to Dismiss) and document 26, p. 1-4 (Reply in Support of Motion to Remand). The MOWA appear to be making a counterclaim that the State has violated the band's rights to the Equal Protection of the Laws because it has not confiscated the property of other Tribes engaged in gaming, without any further specificity. The claim, even if construed as a defense of selective prosecution (which would be barred by Younger as noted above), is general and vague and so lacking in factual or legal underpinnings that it borders on the frivolous. "To state a claim for an equal protection violation, Plaintiffs must allege, among other things, that they were "treated differently from others who were similarly situated". Ford v. Strange, 2013 WL 6804191 (M.D. Ala. Dec. 23, 2013).

The MOWA band have failed to make any plausible equal protection claim. The State is aware of no other tribes in Mobile County engaged in gaming. To the extent the MOWA band is referring to Poarch Band of Creek Indians, they have answered their own question,

as noted in the decision they cite, State v. PCI Gaming Authority et al., 2014 WL 1400232 (M.D. Ala. Apr. 10, 2014). The Poarch Band are operating under the Indian Gaming Regulatory Act. Therefore, that group is distinctly different from the MOWA band. The two groups are not similarly situated.

Respectfully Submitted,

/s/ Martha Tierney
Martha Tierney
Assistant District Attorney
MOBILE COUNTY
DISTRICT ATTORNEY'S OFFICE
P.O. Box 2841
Mobile, Alabama 36652-2841

Marthatierney@mobileda.org

(251)574-3307

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon all parties by and through their attorney of record Sam Hill, by the CM-ECF system this date.

/s/ Martha Tierney