UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

NORTH METRO HARNESS INITIATIVE LLC d/b/a RUNNING ACES, *Plaintiff*, v. KEITH ANDERSON; MICHAEL BEATTIE; CRAIG BEAULIEU; RAYMOND BRENNY; SHELLEY BUCK; CONSTANCE CAMPBELL; MICHAEL CHILDS JR.; LORI COLLING; ASHLEY CORNFORTH; REBECCA CROOKS-STRATTON; DON DAMOND; LEANA DEJESUS; LEE DILLARD; ALISON FOGARTY; TIM GENIA; IAN GORRIE; SCOTT HANSON; MICHAEL HEAVNER; ANGELA HEIKES; ROXANNE HEMMING; MICHAEL JANKOVIAK; GRANT JOHNSON; JOHNNY JOHNSON; RONALD JOHNSON; DUSTIN GOSLIN; NOAH HIRSCH; KYLE KOSSOL; RYAN MCGRATH; KEVIN MCNAIR, VALENTINA MGENI; COLE MILLER; JOE NAYQUONABE, JR.; SHAWN O'KEEFE; LON ODONNELL; DAYNA PEARSON; KYLE PETERSON; SAM ROOK; ROBERT SAWYER; LES SCHMOLKE; CHARLES VIG; DENNIS WALKER; RONDA WEIZENEGGER, all in their individual and official capacities, *Defendants*.	Court File No.: 0:24-CV-01369-(JWB/LIB) **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS**

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This action should be dismissed. Procedurally, there are necessary parties who cannot be joined, there are Article III redressability defects, and the sovereign immunity of the Shakopee Mdewakanton Sioux Community, Prairie Island Indian Community, and Mille Lacs Band of Ojibwe (collectively, "Tribes") and their officials precludes the claims. Substantively, IGRA preempts Plaintiff's claims and Plaintiff fails to allege unlawful conduct in any event. With no viable predicate acts pled, and for other reasons, Plaintiff cannot state a RICO claim.

ARGUMENT

I. PLAINTIFF CANNOT JOIN NECESSARY PARTIES

At minimum, the Tribes are required parties under Rule 19.

A. The Three Tribes Are Required Parties

While one will suffice, the Tribes satisfy each of Rule 19(a)'s three definitions of a required party.

1. Complete Relief is Impossible Without the Tribes

Rule 19(a)(1) requires joinder "when the absence of the unjoined party prevents complete relief [.]" *LLC Corp. v. Pension Benefit Guar. Corp.*, 703 F.2d 301, 305 (8th Cir. 1983). Complete relief is not possible in the Tribes' absence. This is so because IGRA provides that the Tribes "have the sole proprietary interest and responsibility for the conduct of any gaming activity," 25 U.S.C. §§ 2710(b)(2)(A); 2710(d)(1)(A)(ii). No matter the outcome here, the Tribes will continue to own and operate Class III gaming under IGRA and their gaming compacts and ordinances. Plaintiff tries to avoid Rule 19 issues by claiming that the compacts and ordinances are not at issue (Opp. 83), but the purpose of

this action is to stop the Tribes from performing under the compacts and ordinances. Plaintiff "has simply named [tribal] officials as stand-ins for the tribal council [,]" and their remedies go "to the heart of the [Tribe's] sovereign and proprietary interests." *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 995-96 (9th Cir. 2020). Relative to the Tribes, Defendants play secondary operational roles in the gaming activities at issue here.

Plaintiff relies on the *Ex parte Young* doctrine, arguing that it overrides the necessary party analysis under Rule 19 (Opp. 82). As discussed *infra* Sections IV.A-B, that doctrine is not applicable when the Tribes are the real, substantial parties in interest. "The doctrine does not allow a plaintiff to circumvent sovereign immunity by naming some arbitrarily chosen governmental officer or an officer with only general responsibility for governmental policy." *Simermeyer*, 974 F.3d at 994 (citing *Ex parte Young*, 209 U.S. 234, 157 (1908)). Plaintiff did just that and seeks "to extinguish or otherwise diminish" tribal rights and "beneficial interests" that go "to the heart of the [Tribes'] sovereign and proprietary interests" in tribal gaming. *Id*. at 995-96.

Regardless, Plaintiff's reliance on *Vann* and *Thlopthlocco* to rebut this argument is misplaced.[1] (Opp. 82). Even if Defendants were enjoined from performing their secondary roles and the injunction was binding upon their successors in office, such an Order would not apply to the Tribes. *E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 780 (9th Cir. 2005) ("The judgment will not bind [the tribe] in the sense that it will directly order [the

[1] *See Vann v. U.S. Dep't of Interior*, 701 F.3d 927 (D.C. Cir. 2012); *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226 (10th Cir. 2014).

tribe] to perform, or refrain from performing, certain acts."). A similar scenario caused the Eighth Circuit Court of Appeals to determine that "the question of whether the United States has acted illegally . . . cannot be tried behind its back." *Two Shields v. Wilkinson*, 790 F.3d 789, 796 (8th Cir. 2015).

Plaintiff's monetary damage claims against Defendants in their individual capacity do not constitute complete relief either. *Infra* Section IV.B. Plaintiff relies on *Peabody*, where a tribe was a necessary party to the federal government's suit against a third party for maintaining a tribe's Indian preference policy. 400 F.3d at 780. Plaintiff misunderstands why that case proceeded—the tribe was a necessary party that ***could*** be joined because tribal sovereign immunity did not bar the federal government, as it does private parties. *Peabody* recognized that the "declaratory and injunctive relief could be incomplete unless [the tribe] is bound by res judicata." *Id*. at 780. If the Tribes were not joined, they could initiate a separate action to enforce their rights, even if those rights "would have been held illegal in this litigation," placing the third party "between the proverbial rock and a hard place." *Id*. Thus, *Peabody* concluded that the tribe was a required party "to actions that might have the result of directly undermining authority they would otherwise exercise." *Id*. (collecting cases).

Plaintiff asserts that *Pit River* and *Dawavendewa* are "irrelevant" because tribal officials were not named as defendants. (Opp. 82). But this argument has been rejected because "the injury complained of was a result of the absent *tribe's* action, not only or principally that of the named agency defendant." *Alto v. Black*, 738 F.3d 1111, 1126 (9th Cir. 2013). The same is true here. The injury complained of—Class III gaming by the

Tribes— is the result of the Tribes' sovereign action as the sole and exclusive gaming owners and operators, not the tribal officials who are only secondarily responsible. (Opp. 1, 30, 35, 40, 66). Further, each official may continue to act under the compact and under the applicable gaming ordinance. (*See id*. at 1-2) ("[Plaintiff's] claims do not call for the invalidation of any gaming compact, tribal gaming ordinance, tribal legislative action, or federal or state action.").

Plaintiff concedes that each Tribe is "federally recognized" (Dkt. 12 ¶¶73, 122, 177), their casinos are "owned" by the Tribes (¶2), and Class III gaming is run by various tribal governing bodies—the Business Council, Corporate Commission, and Tribal Council (¶¶74, 123, 178). Class III gaming is conducted under "tribal-state gaming compacts covering video games of chance" (*Id*. ¶6) and Class III card games (¶7), with each Tribe having enacted a Gaming Ordinance (¶¶ 95, 145, 204). Each Tribe's regulatory agency has the responsibility "to oversee and enforce gaming regulatory matters under [Tribal] law." (*Id*. ¶¶96, 146, 205). These allegations demonstrate that Plaintiff violated Rule 19(c) by failing to name the Tribes as required parties and by neglecting to provide the requisite "reasons for not joining that person[.]"

2. A Judgment Will Impair or Impede Tribal Interests

Plaintiff seeks to shut down the Tribes' Class III gaming, their primary source of governmental revenue, yet contends that the Tribes' interests are "only the legality of particular gaming activities." (Opp. 85). In *Am. Greyhound Racing, Inc. v. Hull*, the court recognized: "the tribes were entitled to be heard" on the issue of the legality of their gaming. 305 F.3d 1015, 1024 (9th Cir. 2002). The court rejected the "circular" argument

that the interest was unprotectible because a plaintiff alleges it is unlawful—"[i]t is the party's *claim* of a protectible interest that makes its presence necessary." *Id*.

Contrary to Plaintiff's assertion that naming tribal officials suffices to halt Class III gaming, this Court has determined that a "typical example of required parties under Rule 19(a)(1)(B) arises when one or more joint property owners are not named parties to a suit over title to the property." *Pitman Farms v. Kuehl Poultry LLC*, 2020 WL 2490048, at *9 (D. Minn. May 14, 2020) (collecting cases). Again, the Tribes are the ***sole and exclusive*** owners of Class III gaming and are required parties and Defendants cannot adequately represent the Tribes' interests.

This Court has also determined that "[a]nother typical example arises when litigation of a claim will result in a judgment that determines a non-party's rights under a contract." *Id*. at *10. Plaintiff ignores that a primary purpose of a gaming compact is to define the scope of Class III gaming that a state permits. Thus, an injunction against Defendants would directly conflict with the Tribes' rights to conduct Class III gaming under the compacts. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785 (2014) ("A tribe may conduct such gaming on Indian lands only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State.").

Plaintiff fails to address each sovereign's "interest in preserving their sovereign immunity, and the concomitant right not to have their legal duties judicially determined without consent." *Shermoen v. U.S.*, 982 F.2d 1312, 1317 (9th Cir. 1992).

Plaintiff maintains that the Tribes' interests are adequately represented by the tribal officials named as defendants. (Opp. 85). Yet, Plaintiff concedes that Defendants cannot

adequately represent the Tribes when their "interests actually differ from or conflict with the tribes." (Opp. 86). Here, Plaintiff is incentivizing Defendants to blame the Tribes for operation of Class III gaming, or even to compromise or settle against the Tribes' interest to avoid personal liability.[2] *See Two Shields*, 790 F.3d at 799 (defendants "have strong incentives to characterize any breach as resulting solely from the government's independent action and judgment"). This improper suit is little more than a vehicle to abuse individuals to leverage the Tribes. Finally, Plaintiff cites no case and offers no credible reasoning for its assertion that the Defendants' choice of counsel somehow means that the Tribes are not required parties. Regardless, "any party may move to dismiss" under Rule 19(b). *Phil. Rep. v. Pimentel*, 553 U.S. 851, 861 (2008).

3. Defendants Will Incur Multiple or Inconsistent Obligations

Plaintiff asserts that it does not matter "whether any governmental authority viewed the gaming activities at issue as lawful." (Opp. 89). However, for over 34 years, all governmental authorities have viewed the Tribes' Class III gaming as lawful and regulated it as such. This creates substantial risk of inconsistent obligations, as the Tribes will retain the right to own and operate Class III gaming. The Tribes may insist that each tribal official continue to perform their secondary roles pursuant to the gaming compact and respective gaming ordinances. The Tribes would have substantial justification to do so.

[2] By seeking monetary damages in addition to injunctive and declaratory relief against the defendants, Plaintiff's requested relief distinguishes this case from *Vann* and *Thlopthlocco,* in which the courts found that tribal officials could adequately represent tribes in *Ex parte Young* cases because they act as "stand-ins" for the tribe. *See Vann*, 701 F.3d at 930; *Thlopthlocco Tribal Town*, 762 F.3d at 1236.

Indeed, the State represents that the gaming compacts are "agreements between sovereign entities" that "do not conflict with state law." (Dkt. 50 at 7). And the Minnesota Court of Appeals recently confirmed "a preference regarding gambling operations in the state legislation that arose from the Indian Gaming Regulatory Act." *In re Minnesota Racing Comm'n*, 2024 WL 4259301, at *4 (Minn. App. 2024). This "[l]egislative framework" "leads us to conclude that the state has afforded [Indian tribes] a limited, legally cognizable, competition-restricted environment" to engage in "gambling-device gambling" and "video-game gambling." *Id.*

Nothing would prevent the Tribes from "initiat[ing] further action," *Peabody*, 400 F.3d at 780, to further confirm these rights, and the lawfulness of Defendants' challenged conduct. Multiple or inconsistent obligations are a certainty, especially when the tribal, state, and federal governments have taken actions to condone the Tribes' Class III gaming.

The Tribes meet the Rule 19(a) factors and are required parties.

B. The Tribes Cannot be Joined and Dismissal is Required

Plaintiff concedes that the Tribes cannot be joined. (Opp. 81). The Tribes are immune from suit and equity and good conscience require dismissal.

1. A Judgment Will Prejudice the Tribes

Plaintiff ignores that it is error to "not accord proper weight to the compelling claim of sovereign immunity." *Pimentel*, 553 U.S. at 869. "A case may not proceed when a required-entity sovereign is not amenable to suit." *Id*. at 867; *Two Shields*, 790 F.3d at 798. Plaintiff's suit poses a substantial challenge to the Tribes' sovereign interests. (*See* Dkt. 44 at 7-8, 13-14; Dkt. 53 at 8-9). Because the tribal officials "cannot be expected to articulate

the government's position on its behalf in its absence, however, the prejudice to the government is obvious." *Two Shields*, 790 F.3d at 798.

Defendants' involvement in this lawsuit will not lessen the prejudice to the Tribes either. Even if Defendants share liability with the Tribes for the Class III games owned and operated by the Tribe, "a defending party has an interest in avoiding 'sole responsibility for a liability he shares with another.'" *Id*. For Defendants, "all liability is therefore contingent upon evaluation of the actions of the" Tribes. *Id*. Thus, Defendants "have strong incentives to characterize any [unlawful gaming] as resulting solely from the government's independent action and judgment." *Id*. at 799.

Plaintiff also argues that the Tribes' amicus brief lessens the prejudice they face by their absence. (Opp. 91). But it is a well-established principle that an absent party's limited involvement in a lawsuit for the purposes of asserting Rule 19 arguments does not cure the underlying Rule 19 violation. *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F. Supp. 2d 995, 1000 (W.D. Wis. 2004), *aff'd*, 422 F.3d 490 (7th Cir. 2005). Moreover, amicus parties do not have the same rights as a named party, such as "initiating legal proceedings, filing pleadings, or otherwise participating and assuming control of the controversy in a totally adversarial fashion." *In re Edison Mission Energy*, 610 B.R. 871, 879 (Bankr. N.D. Ill. 2020).

Plaintiff fails to rebut that the Tribes will "suffer severe prejudice by not being a party to an action which could deplete the (Tribes') interests or jeopardize their authority to govern the lands in question." *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994). This factor thus weighs in favor of dismissal.

Plaintiff seeks an order binding on the Tribes to enjoin Class III gaming yet concludes that the Tribes "would not be prejudiced by their absence." (Opp. 90-91). The "tribes are ultimately involved in [Class III gaming] and it would be impossible to fashion protective provisions to insulate them from the prejudice an adverse judgment would inflict." *U.S. v. Tribal Dev. Corp.*, 100 F.3d 476, 480 (7th Cir. 1996); *see Maverick Gaming LLC v. U.S.*, 658 F. Supp. 3d 966, 975 (W.D. Wash. 2023) (a declaratory judgment that Class III gaming compacts are void cannot be tailored to lessen the prejudice to the absent tribes), *argued* No. 23-35136 (9th Cir. 2024). In sum, "[n]o alternative remedies or forms of relief have been proposed to [the Court] or appear to be available." *Pimentel*, 553 U.S. at 870.

2. Any Judgment Will Be Inadequate

Plaintiff contends the non-party Tribes will be bound by any judgment because of the *Ex parte Young* doctrine. (Opp. 91). This just proves that the Tribes are the real parties in interest. *Infra* Section IV.B. *Ex parte Young* will not produce an adequate judgment in any event. Plaintiff cannot establish that an order binding the named officials would also prevent other tribal officials from carrying out gaming; in fact, Plaintiff admits that the Tribes and their governing bodies are responsible for Class III gaming. (*Cf.* Dkt. ¶¶2, 12, 74, 122, 178). Federal law governs and IGRA provides that Tribes—not individual officials—"have the sole proprietary interest and responsibility for the conduct of any

gaming activity," 25 U.S.C. §§ 2710(b)(2)(A); 2710(d)(1)(A)(ii). Unless the Tribes are named and subject to an adverse judgment, adequate relief will not be possible.

3. Plaintiff Has Alternative Remedies

Plaintiff argues it would be inadequate to request the Minnesota legislature to repeal the state laws that permit Class III gaming for Indian tribes, and gives up on filing a complaint with any Class III gaming regulator. (Opp. 92). But Plaintiff's preference does not make the remedies inadequate. Moreover, any prejudice that Plaintiff believes that its ineffectiveness will cause pales when compared to the prejudice to the Tribe if the Court were to proceed in its absence. *Pimentel*, 553 U.S. at 872. And even if Plaintiff is "left without a forum . . .that result is contemplated under the [sovereign immunity] doctrine." *Id.*

II. IGRA FORECLOSES PLAINTIFF'S CLAIMS

Plaintiff identifies no authority for a private civil action, under any theory, challenging the legality of class II tribal gaming, or class III gaming under a valid compact, on tribal land. Plaintiff concedes that IGRA preempts state law causes of action. That disposes of Counts 1, 4, and 7. Plaintiff also concedes that IGRA allows no private action. That forecloses the remaining Counts—RICO claims pled as end-runs around IGRA.

A. IGRA Preempts Plaintiff's State Law Claims

Counts 1, 4, and 7 are "state-law equitable claims" challenging the lawfulness of tribal gaming on Indian lands. (Opp. 28). Plaintiff concedes "IGRA's preemption of state-law causes of action." (Opp. 27). Nevertheless, Plaintiff asserts that its claims "could not interfere with the three tribes' ability to govern their on-lands gaming" because allegedly

it is "not 'lawful' under IGRA." (Opp. 29). Plaintiff assumes the conclusion, which contravenes the established law of IGRA preemption.

Congress adopted IGRA in response to the Supreme Court's decision[3] "that States lacked any regulatory authority over gaming on Indian lands." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014). IGRA "established the preemptive balance between tribal, federal, and state interests in the governance of gaming operations on Indian lands," and it follows that "causes of action that would interfere with the tribe's ability to govern gaming" are preempted. *Casino Res. Corp. v. Harrah's Entm't*, 243 F.3d 435, 437-38 (8th Cir. 2001). When a claim implicates tribal gaming "conducted 'on Indian lands,'" it "fall[s] within the preemptive force of the IGRA." *Missouri v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1109 (8th Cir. 1999). IGRA does not give private companies "the right to use state law to challenge the outcome of an internal governmental decision by [the tribe]." *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 549 (8th Cir. 1996).

IGRA occupies "the field of governance of gaming activities on tribal lands," encompassing "nonconforming gaming." *Pueblo of Pojoaque v. New Mexico*, 863 F.3d 1226, 1232 (10th Cir. 2017).[4] Challenges to nonconforming gaming on tribal land are limited to those authorized under IGRA. *Id.*; *see also Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1292-93, n.22 (11th Cir. 2015) (state-law claims against alleged nonconforming

[3] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987).

[4] Insofar as the compacts provide for "the applicability of Minnesota criminal law" on tribal land, Plaintiff concedes that is only an "allocation of ***public*** enforcement responsibility" under IGRA. (Opp. 29) (emphasis added).

tribal gaming preempted, and IGRA claims barred to preserve IGRA's "careful balance of federal, state, and tribal interests," as IGRA allows no private right of action).

B. IGRA Forecloses RICO Claims Against Gaming in Indian Country

Plaintiff admits that IGRA allows no private right of action. (Opp. 68). Plaintiff attempts to evade this result—by asserting RICO claims (Counts 2-3, 5-6, 8-9) that allege predicate acts of offering Class III games purportedly not permitted under IGRA. But IGRA provides a detailed remedial scheme that forecloses any private action, even if styled as a RICO claim.

1. IGRA Forecloses RICO Claims

When Congress establishes a comprehensive remedial scheme that excludes private actions, it also precludes private RICO claims based on the regulated conduct. The Eleventh Circuit held that because the Higher Education Act grants enforcement authority exclusively to the Secretary of Education and does not provide a private right of action, violations of the HEA "cannot form the basis for a civil RICO claim seeking treble damages and injunctive relief." *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1227 (11th Cir. 2002); *see also Ayres v. Gen. Motors Corp.*, 234 F.3d 514, 522 (11th Cir. 2000) (same under Traffic Safety Act). The Fifth Circuit similarly held that "Congress's omission of a private right of action in the [FTC Act] controls" precluding a RICO claim based on its violation. *Arruda v. Curves Int'l, Inc.*, 861 Fed. App'x 831, 835 (5th Cir. 2021). Ultimately, "pleading of the action in RICO terms" to circumvent the limitations on remedies under another law "cuts against the implication of the right of action rather than in its favor." *Danielsen v. Burnside-Ott Av. Training Ctr.*, 941 F.2d 1220, 1228 (D.C. Cir. 1991).

Plaintiff's only response is that the "cases are irrelevant." (Opp. 70). But in each case, the plaintiff alleged violations of a statutory scheme and attempted to characterize the violations as RICO predicate acts. This is precisely what Plaintiff does here—to characterize alleged illegal gambling that falls under IGRA's comprehensive regulatory structure as RICO predicate acts to avoid IGRA's preclusion of private remedies.

2. Section 1983 Cases Confirm that IGRA Precludes RICO Claims

Plaintiff cites cases addressing whether a 42 U.S.C. § 1983 claim can enforce rights under another federal statutory scheme but overlooks the threshold issue in these cases—just like the RICO cases discussed above—of whether the statutory scheme creates an individually enforceable right. *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 180 (2023). Without an individually enforceable right, no §1983 claim exists. *Id*. at 186. Plaintiff fails to identify any individual rights in IGRA and concedes that "IGRA contains no express private remedy." (Opp. 68). Plaintiff's contention that "a statute's lack of a private remedy *defeats* the notion that it precludes the general remedial scheme" (Opp. 70) is contradicted by the cases it cites.

III. PLAINTIFF DOES NOT ADEQUATELY ALLEGE UNLAWFUL GAMING

Even if Plaintiff could challenge the legality of Tribal gaming on tribal land, the claims would fail because Plaintiff does not allege any gaming that is "unlawful."

A. The Tribes' VGC Gaming Is Lawful

Plaintiff contends that "defendants' video games of chance are not 'lawful' under IGRA" because "they are *not* located in a State that permits such gaming for any purpose

by any person." (Opp. 15-16 (citing 25 U.S.C. § 2710(d)(1)(B))). Plaintiff applies the wrong legal standard and ignores the relevant State law and public policy.

1. Plaintiffs Are Incorrect on "Permitted" Gaming

Plaintiff relies on an incorrect application of the *Cabazon* rule—quoting parts of the *Ysleta* case—to assert that, for gaming to be permitted under IGRA, "the State must generally allow the gaming activity within its borders" and "if the State criminalizes the gaming activity, the activity is not lawful on Indian lands under IGRA." (Opp. 19). *Cabazon* instead held that "an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of [§1162]." 480 U.S. at 211. In *Cabazon*, California permitted some gaming, prohibited other forms, and imposed criminal penalties for certain violations—meaning that it broadly regulated "gambling in general," the laws were civil in nature, and not enforceable in Indian country. *Id*. Plaintiff invokes other cases that make the same point—criminal penalties may apply to a violation of state gaming laws, but that does not mean that a particular form of gaming is prohibited for purposes of IGRA. *Ysleta del Sur Pueblo v. Texas*, 596 U.S. 685, 693, 700, 707 (2022); *U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 368 (8th Cir. 1990). Following the principle established in *Cabazon*, IGRA mandates that tribes have the right to conduct gaming on their lands "not specifically prohibited by Federal law and is conducted within a State that does not, as a matter of criminal law *and public policy*, prohibit such gaming activity." 25 U.S.C. § 2701(5) (emphasis added). States are not required to take "an affirmative act of legal authority" to "permit" gaming; instead, a state

may permit class III gaming by "mere tolerance" or a "failure to prevent" it. *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 722 (9th Cir. 2003).

2. VGC Gaming is Permitted in Minnesota under IGRA

Contrary to Plaintiff's assertions (Opp. 20), Minnesota law and public policy permit video games of chance ("VGCs") as a general matter for Indian tribes and subject to regulation in other cases.

Minnesota entered the VGC compacts based on its determination that such gaming was permitted,[5] and enacted multiple statutes to support the tribes' continued operation of VGCs. In 1989 Minnesota passed a law intended to restrict commercial VGCs but provided it "may not be construed as prohibiting the state from entering into a tribal-state compact under [IGRA] as it relates to" VGCs "currently operated by Indian tribes in this state." Minn. Sess. Law, CH. 334, ART. 6, § 14(9) (1989). This informed the statutory mandate for the governor to negotiate Class III gaming compacts. Minn. Stat. § 3.9221. Minnesota recognized and endorsed the Tribes' contemporaneous operation of VGCs and the creation of a framework for the continuing operation of such gaming. The State furthered its policy in 1994 by expressly permitting the sale of VGC machines to Indian tribes "to operate the gambling device[s] under a tribal state compact under [IGRA]." Minn. Stat. § 299L.07(2a)(b)(1); Minn. Sess. Law, CH. 633, ART. 4, § 9 (1994). These law and policy decisions, along with the compacts and tribal gaming ordinances, are more than sufficient

[5] When the Tribes requested VGC compacts, the State concluded that such gaming was permitted and required negotiation. *Lower Sioux Indian Cmty. v. Minnesota*, No. 4-90-936, REPORT & RECOMMENDATION, at 2 (D. Minn. Dec. 20, 1990).

to permit the continued operation of VGCs under IGRA. 25 U.S.C. § 2710(d)(1); *In re Minn. Racing*, 2024 WL 4259301, at *4 (Minnesota "afforded [Indian tribes] a limited, legally cognizable, competition-restricted environment" for VGC).[6] And it makes no difference that Minnesota's policy supports tribal, rather than general commercial gaming. A state may "permit" Class III gaming "within the meaning of IGRA" by only allowing tribal gaming under a compact. *Artichoke*, 353 F.3d at 731. But as explained below, VGCs are permitted for other purposes too.

Additionally, Minnesota allows "private social bet[s]" without restricting the form of gaming. Minn. Stat. § 609.75(3). Minnesota also allows personal possession of VGC machines for amusement purposes. *Id*. § 609.755.[7] A "private social bet" involving such machines would not be unlawful. Under IGRA, if a state permits "social" gaming—as Minnesota does—then it "permits" that gaming for IGRA purposes. *N. Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1312-13 (10th Cir. 2004). Minnesota's social betting law enables tribes to operate games otherwise unavailable commercially. Minnesota managed the implications of this by compacting for blackjack and requiring tribes to agree not to request future compacts for "Class III gaming that is permitted by the State only in conjunction with a private social bet." (*E.g.*, PIIC Blackjack Compact ¶¶2, 3).

[6] Minnesota law and policy continue to affirmatively permit VGC gaming, and the Tribes' position is that the Compacts secure their right to operate VGCs regardless of subsequent changes in state law or policy. (*E.g.*, PIIC VGC Compact § 2.1).

[7] Minnesota also permits sales of gambling devices "for use in the person's dwelling for display or amusement purposes." Minn. Stat. § 299L.07(2a)(b)(2).

As Plaintiff acknowledges (Opp. 19), the Eighth Circuit held that a form of gaming is "permitted" under IGRA "even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity." *Sisseton-Wahpeton*, 897 F.2d at 365. "IGRA incorporated *Cabazon's* distinction between prohibition and regulation," meaning that "[i]f a state law seeks to regulate gaming, it will not be applied" to tribal gaming. *Gaming Corp.*, 88 F.3d at 546.

B. The Tribes Offered Card Games Lawfully

Plaintiff claims that PIIC and MLCV Defendants offered Class III card games not covered by a compact. (Opp. 22). Plaintiff fails to adequately allege that the Tribes conducted any Class III gaming, such as house-banked card games, or provide the details of play for the named games that would support the conclusion they were played as house-banked games. Plaintiff argues that requiring such allegations imposes "an overly demanding pleading standard." (*Id.*); but Plaintiff cannot rely on "labels and conclusions" or "naked assertions" without "further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted). Allegations that merely suggest the possibility of involvement in allegedly unlawful Class III gaming are insufficient. *Crawley v. Clear Channel Outdoor, Inc.*, 2011 WL 748162, at *5 (M.D. Fla. Feb. 24, 2011) (claims involving "Class III banked card games" require specific "factual allegations as to the business operations"). Plaintiff just lists purportedly Class III games and asserts that PIIC and MLCV offered them without a compact.

Plaintiff attempts to buttress its conclusory allegations with factual allegations not in its Complaint, such as details of Ultimate Texas Hold'em and Three Card Poker (Opp.

22-24) and references to PIIC's and MLCV's websites (Opp. 24, 77-78). This is improper. Plaintiff discusses two specific games—Ultimate Texas Hold'em Poker and Three Card Poker—and alleges these are Class III games currently offered by the Tribes under the 2023 Compact amendment. However, Plaintiff carefully avoids any specific allegation regarding the games offered before the 2023 Compact amendment. (Opp. 23-24). Instead, Plaintiff vaguely alleges that games were offered sometime "[s]ince 2020" (Opp. 21), a timeframe that includes offering them in 2023 or later.

C. IGRA's Limited Incorporation of State Law Forecloses Plaintiff's Claim that VGC Gaming Is Unlawful

Plaintiff's argument that the Tribes' gaming is unlawful relies on the application of state criminal law under IGRA, 18 U.S.C. § 1166 (Opp. 26), which extends certain state gambling laws to Indian country "for purposes of Federal law." However, § 1166(c) expressly excludes from the definition of "gambling" all Class II and Class III gaming "conducted under a Tribal-State compact approved by the Secretary of the Interior." Plaintiff does not adequately allege that the Tribes conducted gaming outside these categories. Indeed, Plaintiff admits that such compacts are in effect and purportedly does not challenge them, conceding that Tribes operate their games under these compacts. (Dkt. 12 ¶¶89, 98-99, 139, 149-50, 196, 207-08). Plaintiff cannot rely on state law or § 1166 to argue that the Tribes' gaming is unlawful.

IV. DEFENDANTS ARE IMMUNE

Plaintiff argues exceptions to sovereign immunity. (Opp. 37). None apply.

A. Plaintiff Has No Official-Capacity Claims for Prospective Relief

Plaintiff cannot pursue declaratory or prospective injunctive relief against tribal officials in their official capacity, the ***only*** relief potentially available under *Ex parte Young*.

First, Plaintiff concedes that its official-capacity claims related to card games cannot proceed. (Opp. 11 ("In light of the [Compact] Addenda, Running Aces no longer seeks prospective relief with respect to any card gaming.")).

Second, the remaining official-capacity claims seek to enjoin the operation of VGC based on alleged violations of Minnesota criminal law related only to such games. (Counts 1, 4, 7). But these claims (1) are invalid under Minnesota law and (2) cannot overcome established law that protects on-reservation tribal gaming from state-law interference.

As Defendants argued, there is no private right of action to enforce the Minnesota criminal laws Plaintiff cites. (Dkt. 39 at 40 (quoting *H.J., Inc. v. Nw. Bell Corp.*, 420 N.W.2d 673, 675 (Minn. App. 1988))). Plaintiff did not distinguish *H.J.*, instead moving the target and claiming that it has requested injunctive relief under RICO. (Opp. 71 ("That argument does not touch Running Aces' request for injunctive relief *under* RICO.")). But Plaintiff's official capacity claims are ***only*** alleged violations of Minnesota criminal law—not RICO. (Counts 1, 4, 7). While these claims are also asserted as individual claims, *see id.*, that also fails under *H.J.* The remaining claims—all under RICO—are solely individual-capacity claims. (Counts 2-3, 5-6, 8-9). If Plaintiff is seeking injunctive relief in connection with its RICO claims, it concedes that the Tribes are the real parties in interest and thus it cannot bring individual-capacity claims. *See infra* Section IV.B.

Plaintiff's quote from *Miller v. Minneapolis Underwriters Ass'n*, does not change the result. 33 N.W.2d 48, 51 (Minn. 1948). There, a party sought to enforce an antitrust law that provided for a private cause of action. Minn. Sess. Law, CH. 865, S.F.No.1200 (1972). The point in *Miller* (irrelevant here), was only that a plaintiff can obtain an injunction under the private-action authorization even if the conduct could ***also*** be a criminal offense. *Miller* supports Defendants, as the court held that equity alone "will not enjoin purely criminal acts." *Id*. at 51.

Plaintiff's lack of a private right of action to bring its state-law claims dooms its ability to obtain prospective, injunctive relief under *Ex parte Young*—which itself is not a private right of action.

Assuming *arguendo* Plaintiff could bring official-capacity claims under state law, a private plaintiff cannot use state law to enjoin tribal gaming operations on tribal land. Plaintiff quotes *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247 (2011), and claims—inaccurately—that state law is "superior" to tribal law so state gaming laws can be used to enjoin tribal gaming on tribal land. *Virginia Office* contains no discussion of state law being superior to tribal law on tribal land. *Id.* Plaintiff cites no case for that proposition, much less one allowing tribal officials to be enjoined by state law for gaming on tribal land under IGRA. (Opp. 43). *Ex parte Young* does not apply in actions to enjoin tribal officials under state law for on-reservation gaming. *Bay Mills*, 572 U.S. at 795, n.6; *PCI Gaming*, 801 F.3d at 1289-1290, 1293 n.22 (*Ex parte Young* would apply to claims that tribal officials violated federal law where there is a private right of action, but does not create a private right of action or allow restraint of tribal officials by state law).

Next, Plaintiff concedes that *Ex parte Young* does not permit judgments declaring that an official violated federal law in the past, concedes that it requested such a declaration nevertheless, but invites the Court to "avoid doubt" and declare that the officials' conduct is presently illegal. (Opp. 45). Plaintiff cannot amend its Complaint via opposition and the Court should decline the request.

Assuming Plaintiff could clear all these hurdles, the Supreme Court repeated in *Virginia Office*, 563 U.S. at 255, that *Young* does not apply when the sovereign is "the real, substantial, party in interest." Plaintiff does not apply the factors in *Virginia Office* but instead counters that all *Young* claims involve strong government interests, apparently suggesting the Court ignore *Virginia Office*. (Opp. 39). It should not. And for the reasons stated below, *see infra* Section IV.B, the Tribes are the real parties in interest.

Finally, Plaintiff failed to plead that Defendants possess the authority to halt the Tribes' respective gaming operations, a power that Defendants' lack. (Opp. 66). None of Plaintiff's allegations establish that any Defendant (or combination of), could stop the Tribes from operating VGCs—a power held exclusively by the Tribes. Plaintiff has therefore failed to demonstrate an essential Article III element of the relief it seeks—redressability—and the case must be dismissed. *McDaniel v. Bd. of Educ.*, 956 F. Supp. 2d 887, 892-93 (N.D. Ill. 2013) ("Indeed, if a defendant does not have the authority to carry out the injunction, a plaintiff's claims for injunctive relief must be dismissed[.]"); (Dkt. 12 ¶¶74, 123, 178 (The Tribes' Class III gaming is run by various tribal governing bodies, respectively the Business Council, Corporate Commission, and Tribal Council.)). Relatedly, because the governing bodies of the Tribes, not the Defendants, are responsible

for gaming, Plaintiff cannot demonstrate a continuing violation of federal law ***by Defendants*** that can be remedied through *Ex parte Young* relief.

B. The Tribes Are the Real Parties in Interest, Foreclosing Individual Relief

Plaintiff agrees that if the Tribes are the real parties in interest, then the Defendants are immune from suit (Opp. 46-48) but argues that the Tribes are not the real parties in interest because Plaintiff brought individual capacity claims seeking monetary relief from Defendants. *Id.* According to Plaintiff, seeking money from Defendants, not the Tribes, satisfies the real party in interest doctrine. Plaintiff is wrong.

First, the test for whether a sovereign is the real party in interest was unchanged by *Lewis v. Clarke*. 581 U.S. 155, 163 (2017). As it had in prior cases, the court prohibited "simpl[e] rel[iance] on the characterization" in the complaint and required "determin[ation] in the first instance whether the remedy sought is truly against the sovereign." *Id*. "A suit is against the sovereign if the judgment would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting or compel it to act." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984).

In *Lewis*, the test was easy to apply because the case presented "an ordinary negligence action" against a limousine driver alleged to have caused an accident—with no official capacity claims or request for relief against the sovereign. 581 U.S. at 157. That is nothing like Plaintiff's claims.

Plaintiff seeks (1) to enjoin Tribes from operating VGCs; (2) a declaration that the Tribes' gaming operations have been and are illegal; and (3) treble damages from Defendants for damages allegedly caused by the Tribes. (Dkt. 12 at 64-65). Plaintiff's claim for this broad relief is based entirely on actions taken by the Tribes or their wholly owned tribal entities—and not a single specific action by any defendant comparable to the highway driving at issue in *Lewis*. (*Id*. ¶¶98-103, 110-15, 149, 151, 163, 165, 207-14). The relief requested, and Plaintiff's inability to allege wrongdoing by Defendants, demonstrates that Plaintiff's claims are against the sovereigns. *See Simermeyer*, 974 F.3d at 994 (tribe was the real party in interest where the plaintiff "arbitrarily" named a "governmental officer or an officer with only general responsibility for governmental policy").

By bringing official capacity claims, a plaintiff admits that the relief sought is against the sovereigns. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (Official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent."); (Opp. 40 (admitting Plaintiff intends to "perpetually bind the tribes' relevant officeholders")). Defendants have found ***no case anywhere*** imposing a judgment against a defendant in both their official and individual capacities, as Plaintiff seeks to do here. If Plaintiff's theory were correct, sovereign immunity could be circumvented in every case—since a plaintiff could seek all forms of relief against individual officers simply by suing them as officials and as individuals. That is not the law.

Plaintiff's cases are distinguishable, as each involved suits for only monetary relief against defendants in their individual capacities for specific personal actions of each defendant. (Opp. 50-51). *See Acres Bonusing, Inc. v. Marston*, 7 F.4th 901, 910 (9th Cir.

2021); *Pistor v. Garcia*, 791 F.3d 1104, 1113-14 (9th Cir. 2015); *Rabang v. Kelly*, 2017 WL 1496415, at *7 (W.D. Wash. Apr. 26, 2017).

Contrary to Plaintiff's argument, this case resembles *Mestek* and *Genskow*. In *Mestek v. Lac Courte Oreilles Cmty. Health Ctr.*, the plaintiff attempted to bring individual and official capacity claims. 72 F.4th 255, 261 (7th Cir. 2023). In addition to monetary relief, Mestek requested relief that would force the tribe to act (reinstatement and injunctive relief) and "would effectively run against the Tribe—meaning sovereign immunity applied." *Id*. at 262. The same is true here because Plaintiff is seeking to enjoin tribal gaming.

In *Genskow v. Prevost*, a tribal member sued tribal officers as officials and individually for removing her from a tribal council meeting on tribal land. 825 Fed. App'x 388, 389-90 (7th Cir. 2020). The Seventh Circuit affirmed dismissal on sovereign immunity grounds because the remedy sought was "'truly against the sovereign'" and the suit would be "at odds" with "'tribal self-government' and 'undermine the authority of tribal forums'"—issues not implicated by the claims in *Lewis*. *Id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64-65 (1978)). As in *Genskow*, Plaintiff seeks to upend tribal governments by destroying the Tribes' main source of governmental revenue.

Plaintiff responds by disclaiming any challenge to a council meeting or directive, and "merely contends that commercial activity violated federal and state laws." (Opp. 53). But it is not mere commercial activity at stake here. Tribal gaming has special status under federal law as a tribal government function that requires tribal government approval and that the Tribes operate gaming "as a means of promoting tribal economic development,

self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1); (Dkt. 53 at 8-9 (discussing the importance of gaming to tribal governments)). Tribal sovereign immunity bars Plaintiff's claims.

C. Tribal Officials Possess Absolute, Qualified, and Official Immunity

This Court could also dismiss this action because Defendants are entitled to absolute, qualified, and official immunity.

1. Absolute Immunity

Tribes offering VGCs, an element vital to Plaintiff's case, occurred through the negotiation of compacts and adoption of tribal gaming ordinances over thirty years ago. (*E.g.*, SMSC Gaming Ordinance §§ 312-13). Federal law requires the gaming ordinance be "adopted by the governing body of the Indian tribe having jurisdiction over such lands." 25 U.S.C. § 2710(d)(1)(A). The decision to offer certain card games was also made by tribal leaders through the "hallmark of legislation;" specifically, voting on ordinances and resolutions. *Church v. Missouri*, 913 F.3d 736 (8th Cir. 2019) (citing *Bogan v. Scott-Harris*, 523 U.S. 44, 54-56 (1998)).

The legislative acts here, enacting tribal gaming compacts and ordinances, are akin to those in *Runs After v. U.S.*, where the Eighth Circuit determined that the adoption of resolutions by Tribal Council members is a legislative act for which absolute legislative immunity applies. 766 F.2d 347, 354 (8th Cir. 1985).

Plaintiff argues that the acts of the elected tribal officials are not legislative but proprietary or commercial. (Opp. 73). To make its point, Plaintiff cites cases about city and

county governments, not tribal gaming, which is a tribal government function under federal law.

2. Qualified Immunity

Plaintiff argues that applying qualified immunity to RICO cases goes against public policy. In fact, the policy rationales for qualified immunity "apply with equal force to tribal officials" in a RICO case. *Acres Bonusing*, 2022 WL 17170856, at *15.

Plaintiff argues that the *Harlow* standard is inapplicable, and this case must be decided on qualified immunity law as it existed when RICO was enacted. (Opp. 75) (citing *Harlow v. Fitzgerald*, 457 U.S. 880, 818-19 (1982)). But Plaintiff cites no federal precedent agreeing. In fact, contemporary qualified immunity law is routinely applied to claims under older laws, like 42 U.S.C. § 1983 (enacted in 1871). *E.g.*, *Pearson v. Callahan*, 555 U.S. 223 (2009); *Faulk v. City of St. Louis*, 30 F.4th 739 (8th Cir. 2022).

Plaintiff finally argues that the tribal officials' actions were contrary to clearly established laws. (Opp. 75-78). That is absurd on its face when the federal, state, and tribal governments have endorsed the gaming at issue for decades.

Minnesota's amicus brief, as well as a recent Court of Appeals decision, offer a logical interpretation that state law permits VGCs to be operated by tribal governments. (Dkt. 50 at 5-6); *In re Minn. Racing*, 2024 WL 4259301, at *4. There is no debate.

3. *Westfall* Immunity

The principles underlying common law personal official immunity apply to tribal officials and Plaintiff's so-called "federal damages liability" (which is Plaintiff's attempt to avoid preclusion of a putative state-law tort claim). Personal official immunity exists to

ensure the effective functioning of government—not as a matter of federal supremacy or conflict preemption, as Plaintiff suggests. *Westfall v. Erwin*, 484 U.S. 292 (1988); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Howard v. Lyons*, 360 U.S. 593, 597 (1959). Given the federal government's strong interest in supporting effective tribal governance, common law official immunity logically extends to tribal officials. *Lewis*, 581 U.S. at 163, n.2; *Nat'l Farmers Union Ins. v. Crow Tribe*, 471 U.S. 845, 856 (1985). Plaintiff's use of private damages claims to challenge tribal officials' duties expressly authorized under approved compacts and tribal gaming ordinances undermines government functions. Such "vexatious and often frivolous damages suits" are precisely the type of interference that official immunity is designed to prevent. *Westfall*, 484 U.S. at 295.

V. PLAINTIFF'S RICO CLAIMS ARE DEFECTIVE

The Complaint alleges three separate RICO schemes involving individuals associated with three tribes. (Opp. 66). Plaintiff must plausibly allege RICO elements for (i) ***each*** defendant and (ii) ***each*** scheme. *Craig Outdoor Advert., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1027 (8th Cir. 2008). Plaintiff, however, impermissibly lumps defendants from all three alleged schemes together. (Dkt. 29 at 33; 39 at 35-36; 44 at 35-36). This tactic fails to demonstrate under Rule 8 that each defendant committed two predicate acts or the proximate causation required for RICO standing. *In re Platinum & Palladium Commodities Litig.*, 828 F. Supp. 2d 588, 602 (S.D.N.Y. 2011); *see Vaughan v. Wardhaugh*, 2024 WL 2853972, at *2 (N.D. Cal. May 10, 2024); *Marfut v. Gardens of Gulf*

Cove POA, Inc., 2018 WL 4005816, at *2 (M.D. Fla. Aug. 22, 2018). The Court should dismiss the substantive and conspiracy RICO claims.[8]

A. Plaintiff Lacks Standing Under RICO

Standing under RICO requires establishing ***individualized*** proximate cause for each defendant. *Kerrigan v. ViSalus, Inc.*, 112 F. Supp. 3d 580, 608 (E.D. Mich. 2015); *Pa. Chiropractic Ass'n v. Blue Cross Blue Shield Ass'n*, 2010 WL 1979569, at *10-11 (N.D. Ill. May 17, 2010). Plaintiff cannot merely allege the scheme proximately caused the injury. Plaintiff's argument misrepresents the holding in *Holmes v. SIPC*, 503 U.S. 258 (1992). The Supreme Court found no proximate cause and "assume[d] without deciding that the Court of Appeals correctly held that Holmes can be held responsible for the acts of his co-conspirators." *Id*. at 264 n.6, 276. Plaintiff must establish that predicate acts committed by ***each*** Defendant proximately caused its injuries.

Proximate cause is lacking because Plaintiff's alleged injuries "could have resulted from factors other than" each Defendant's alleged conduct. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 459 (2006). Proximate cause requires a "direct relation between the injury asserted and the injurious conduct alleged;" a link "too remote," "purely contingent,"

[8]As stated *supra* Sections II-III, Plaintiff's claims fail because it has not alleged unlawful gaming constituting RICO predicate acts under 18 U.S.C. § 1961(1); *see id.* §§ 1952(a), 1955(a). Plaintiff is also wrong because a conspirator must have knowledge of illegality. *Fed. Deposit Ins. Corp. v. First Interstate Bank of Des Moines, N.A.*, 885 F.2d 423, 430-31 (8th Cir. 1989) ("Knowledge of wrongful purpose" is "crucial" for conspiracy); *Marlin v. Moody Nat. Bank, N.A.*, 248 Fed. App'x 534, 538 (5th Cir. 2007).

or "indirect" is insufficient. *Holmes*, 503 U.S. at 268, 271, 274. Plaintiff conflates this RICO standard with but-for causation, (Opp. 59), which is not enough. *Id*. at 268.

Plaintiff cannot show the requisite ***direct*** connection between each Defendant's conduct and Plaintiff's purported lost revenue. (Dkt. 29 at 29-30; 39 at 31-32). Myriad factors show no direct connection, including that Defendants operate large casinos while Plaintiff operates a racetrack with an adjacent cardroom and Defendants cater to different audiences through their vastly different amenities and games. (Dkt. 12 ¶¶1-2, 7, 12, 77-80, 127-30, 179-82); *see Sybersound Recs., Inc. v. UAV Corp.*, 517 F.3d 1137, 1148-49 (9th Cir. 2008) (injury determination would be "a speculative and complicated analysis" dependent on business decisions and customer preference, further complicated by the existence of "more than one principal competitor"); *see also Anza*, 547 U.S. at 459 ("[B]usinesses lose and gain customers for many reasons.").[9] It is pure speculation to assume that patrons who gamble at tribal casinos would play cards or bet on horses at Running Aces. *See L.A. Turf Club, Inc. v. Horse Racing Labs, LLC*, 2016 WL 6823493, at *4 (C.D. Cal. May 2, 2016) (plaintiffs could not merely assume customers who partake in one form of betting would partake in another form).

Plaintiff cannot reframe the proximate cause analysis, a requirement of standing, as simply "the measure of damages." (Opp. 59).[10] Proximate cause is not satisfied here

[9] Plaintiff's non-RICO cases about general allegations of direct competition with tribal casinos are inapposite. (Opp. 59–60).

[10] Nor can Plaintiff rely on joint and several liability, which comes into play only ***after*** standing is established. Plaintiff's cases involve either criminal RICO forfeiture or damages awards. (Opp. 65–66).

precisely because the claims "would require a complex assessment to establish what portion of [Running Aces'] lost [revenue] were the product of" Defendants' purported illegal gambling at three distinct gaming enterprises. *Anza*, 547 U.S. at 459.

The facts alleged here parallel *Club One Casino, Inc. v. Sarantos*, which recognized that "numerous other factors, aside from defendants' alleged actions, could have led to plaintiffs' decline in business, such as the demand for table games in [Minnesota], a change in the local economy, or the manner in which plaintiffs operated their business." 2018 WL 4719112, at *5 (E.D. Cal. Sept. 28, 2018), *aff'd,* 37 Fed. App'x 459, 461 (9th Cir. 2020); *see also Ozeran v. Jacobs*, 2018 WL 1989525, at *9 (C.D. Cal. Apr. 25, 2018), *aff'd,* 798 Fed. App'x 120 (9th Cir. 2020). Because Plaintiff has alleged ***multiple*** schemes involving ***multiple*** defendants, proximate cause is a steeper mountain to climb. Plaintiff cannot distinguish *Club One* (Opp. 62), because the plaintiff there, just like here, alleged it "was damaged by the mere existence of defendants' alleged illegal gambling business." *Club One*, 2018 WL 4719112, at *1, *5.

To evade these obvious market factors, Plaintiff tries to cabin its claims under *Bridge v. Phoenix Bond & Indem. Co.* (Dkt. 62 at 63). In *Bridge*, proximate cause existed only "[b]ecause of the zero-sum nature of the auction" for tax liens. 553 U.S. 639, 658 (2008). There, when a bidder won the tax lien, all the other bidders were "necessarily passed over" for that ***same*** lien. *Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 14 (2010) (discussing *Bridge*). Because "there [were] no independent factors that account for [plaintiff's] injury," the Supreme Court distinguished *Bridge* from *Holmes* and *Anza*. *Bridge*, 553 U.S. at 658.

Unlike *Bridge*, a patron's decision is not a "zero-sum between Running Aces and defendants' casinos." (Opp. 63). The gaming market is not a closed universe; a patron's decision to visit one tribal casino does not preclude that patron from visiting Running Aces (or other casinos). *See Club One*, 2018 WL 4719112, at *5. The Complaint concedes "other casinos in Minnesota and in nearby States" compete for these patrons. (Dkt. 12 ¶¶78, 80, 130, 182). *Bridge* is inapplicable. *See Empire Merchs., LLC v. Reliable Churchill LLLP*, 902 F.3d 132, 143 (2d Cir. 2018) (distributor failed to plead proximate cause for lost sales because the "market was far from 'zero-sum'" as retailers had other distribution options).

Proximate causation further fails because the Eighth Circuit requires conduct be "directed at" the plaintiff to satisfy RICO proximate cause. *Hamm v. Rhone-Poulench Rorer Pharms., Inc.*, 187 F.3d 941, 953-54 (8th Cir. 1999). The target is based on whom the underlying statutory scheme protects. *Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 447 (8th Cir. 2000) (consumers were the targets when USDA regulations were designed to protect consumers (not competitors)). The gambling statutes at issue are designed to protect Minnesotan consumers, not non-tribal competitors. (Dkt. 39 at 34-35). Regardless, the government would be a more direct victim than Plaintiff. *See* (Dkt. 12 ¶¶5-7); *Club One*, 837 Fed. App'x at 461 (government was immediate victim of avoiding state's gambling license requirements); *Anza*, 547 U.S. at 458 (same as to tax law). Plaintiff cannot allege the required direct RICO harm when Defendants' alleged conduct is directed at others.

B. The RICO Claims Are Time-Barred[11]

RICO's limitation period accrues when "plaintiff discovers or should have discovered the injury." *Schreier v. Drealan Kvilhaug Hoefker & Co. P.A.*, 992 F.3d 674, 681 (8th Cir. 2021). The clock "does not 'reset' every time [plaintiff] discovers a new act that is part of the conspiracy." *Healy v. Fox*, 572 F. Supp. 3d 730, 749 (D.S.D. 2021), *aff'd*, 46 F.4th 739 (8th Cir. 2022). Plaintiff does not dispute that the Tribes have publicly offered these games for decades. (Dkt. 29 at 34-35; 39 at 38-39; 44 at 37). Plaintiff should have discovered the alleged injuries in 2008, when Running Aces opened.

To avoid its timing problem, Plaintiff asks the Court to adopt a separate accrual rule for RICO that the Eighth Circuit has expressly rejected. *See Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 239 (8th Cir. 1996) (declining to adopt the "open ended" standard of "a separate accrual rule"), *aff'd judgment* 521 U.S. 179, 191 (1997). Although a continuing-violation rule may be appropriate for antitrust claims, Plaintiff's reasoning for adopting it in RICO is flawed because antitrust claims accrue upon the date of the injury. *See In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059, 1063 (8th Cir. 2017). The Supreme Court and the Eighth Circuit have maintained a consistent policy against extending RICO's accrual rules. *E.g.*, *Rotella v. Wood*, 528 U.S. 549, 554 (2000) (rejecting "injury and pattern discovery" rule); *Klehr*, 521 U.S. at 187 (rejecting "last predicate act" rule); *Hope v. Klabal*, 457 F.3d 784, 790 (8th Cir. 2006) (rejecting "continuing tort" doctrine).

[11] Defendants stand by all their timeliness arguments, including laches, but focus here on RICO's statute of limitations.

In any case, the separate accrual rule does not apply here. Plaintiff's alleged loss of customers to Defendants "continuously offer[ing]" "games at their [sic] 24/7 casinos" (Opp. 97) stems from the same schemes and does not create an independent RICO injury each time a customer walks into a tribal casino. *See Lorber v. Winston*, 962 F. Supp. 2d 419, 447-48 (E.D.N.Y. 2013) (separate accrual rule inapplicable when further injuries "simply followed from the execution of [the] scheme"). The RICO claims are time-barred.

CONCLUSION

The Complaint should be dismissed.

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Respectfully submitted,

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