IN THE UNITED STATES DISTRICT COURT
FOR THE 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.

Case No. 0:24-cv-01369-JWB-LIB

PLAINTIFF'S CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

STATUTES

REGULATIONS AND ADMINISTRATIVE MATERIALS

RULES

TRIBAL ORDINANCES AND REGULATIONS

INTRODUCTION

This case is much simpler than defendants suggest. The federal Indian Gaming Regulatory Act of 1988 ("IGRA") gives Indian tribes in Minnesota the right to conduct a gaming activity on their lands if that activity is both generally permitted by the State and covered by a tribal-state compact approved by the Secretary of the Interior. Otherwise, IGRA declares the gaming activity not "lawful," and instead subject to Minnesota law. Defendants—executives responsible for gaming strategy, operations, finance, and marketing at five tribal casinos in Minnesota—have been conducting "video games of chance" even though Minnesota criminalizes that activity. And defendants associated with three of those tribal casinos have also been conducting various casino card games that were not covered by any compact until very recently, and that were otherwise prohibited by Minnesota law. All those gaming activities, therefore, were unlawful under IGRA and criminal under Minnesota law.

Defendants' illegal gambling activities form the basis for a pattern of predicate racketeering acts under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). By conducting the affairs of their gaming enterprises through these predicate acts, and conspiring to do so, defendants violated RICO. And through their RICO scheme, defendants drew gaming patrons away from Running Aces, a lawful nearby casino, thereby reducing Running Aces' business income.

Defendants' three motions to dismiss raise various threshold and merits challenges to this lawsuit. Woven through those challenges are several fundamental errors. Contrary to defendants' characterizations, Running Aces' claims do not call for the

invalidation of any gaming compact, tribal gaming ordinance, tribal legislative action, or federal or state action. They would not impose monetary liability on any tribe. They do not contest any policy favoring Indian gaming. And they do not intrude on any tribe's right to conduct gaming activity on its lands under IGRA.

IGRA embodies Congress's policy judgments about Indian gaming. Any tribal gaming right, compact, or ordinance is limited by the requirements of IGRA and—according to IGRA—of Minnesota criminal law. Running Aces claims that defendants violated those federal and state laws. Running Aces seeks to hold defendants accountable by recovering monetary damages from defendants personally for their past illegal gaming to the extent it injured Running Aces, and by enjoining them from continuing their illegal gaming activities as tribal officers. The amended complaint adequately pleads defendants' violations and Running Aces' entitlement to relief. No bar to relief—whether immunity, necessary-party joinder, or the statute of limitations—applies.[1]

BACKGROUND

A. Legal Background

1. Minnesota Gambling Law

Minnesota criminalizes: "mak[ing] a bet"; "permit[ting] a structure or location … to be used as a gambling place," i.e., "a location or structure … wherein … betting is

[1] Defendants also paint this case as retaliation for the tribes' use of "the courts and the political process" to gain other advantages against Running Aces. ECF #39, pp.3-4 (hereinafter "MLCV MTD"); *see* ECF #29, p.1 (hereinafter "PIIC MTD"). This case stands on its own merits: it seeks remedies for the harm Running Aces suffers from defendants' illegal gaming.

permitted or promoted … or a gambling device is operated"; "maintain[ing] or operat[ing] a gambling place"; "possess[ing] a gambling device"; "set[ting] up for use for the purpose of gambling, or collect[ing] the proceeds of, any gambling device"; and "intentionally participat[ing] in the income of a gambling place." Minn. Stat. §§ 609.75 subd. 5, 609.755, 609.76 subd. 1.

Under Minnesota law, poker and casino card games, e.g., blackjack, Ultimate Texas Hold'Em, Mississippi Stud, and Three Card Poker, are generally prohibited because they involve betting. "A bet is a bargain whereby the parties mutually agree to a gain or loss by one to the other of specified money, property or benefit dependent upon chance although the chance is accompanied by some element of skill." Minn. Stat. § 609.75 subd. 2. However, Minnesota permits a State-licensed person operating a racetrack to offer parimutuel betting on horse racing and card games pursuant to an operating plan approved by the Minnesota Racing Commission ("MRC"). Minn. Stat. §§ 240.30, 240.07 subd. 3(b); Minn. Stat. § 609.75 subd. 3(7).

Under Minnesota law, video games of chance, e.g., video slots, video keno, and Big Six Wheel, are criminally prohibited because they are gambling devices. "Gambling device … includes a video game of chance," Minn. Stat. § 609.75 subd. 4, which is: (a) "a game or device that simulates one or more games commonly referred to as poker, blackjack, craps, hi-lo, roulette, or other common gambling forms, though not offering any type of pecuniary award or gain to players"; or (b) "any video game having one or more of the following characteristics: (1) it is primarily a game of chance, and has no substantial elements of skill involved; [or] (2) it awards game credits or replays and

contains a meter or device that records unplayed credits or replays," Minn. Stat. § 609.75 subd. 8.

2. Federal Indian Gaming Law

IGRA declares: "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5).

IGRA defines three classes of gaming. Class I covers "social games" and "traditional forms of Indian gaming." § 2703(6). Class II covers "bingo" and similar "game[s] of chance," as well as "card games" that are not "banking" (or "banked") card games, such as traditional poker. § 2703(7). Class III—the only class relevant here—covers "all forms of gaming that are not class I gaming or class II gaming." § 2703(8). Class III includes "any banking card games" (or "banked" card games), "slot machines," and "electronic or electromechanical facsimiles of any game of chance" (a.k.a. "video games of chance"). § 2703(7)(A)-(B), (8); 25 C.F.R. § 502.4.

IGRA precisely defines the conditions under which a class III gaming activity is lawful: "Class III gaming activities shall be lawful on Indian lands *only if* such activities are[] (A) authorized by an ordinance or resolution that … is adopted by the governing body of the Indian tribe having jurisdiction over such lands …, (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, *and* (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State … that is in effect." § 2710(d)(1) (emphasis added). A tribal-state compact

"take[s] effect only when notice of approval by the Secretary [of the Interior] of such compact has been published by the Secretary in the Federal Register." § 2710(d)(3)(B); *see* 25 C.F.R. §§ 293.2(a)(1), 293.14(a).

IGRA specifies that Minnesota "gambling" laws "apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State," except if the gaming activities are conducted pursuant to IGRA's requirements. 18 U.S.C. § 1166(a)-(c).

B. Factual Background

1. The SMSC's Gaming Operations

The Shakopee Mdewakanton Sioux Community ("SMSC") has formed two gaming compacts with Minnesota. The 1990 compact gives the SMSC "the opportunity to operate video games of chance" by "establish[ing]" the "regulatory standards … for video games of chance operated and played" on tribal lands. Am. Compl., ECF #12 (hereinafter "Complaint"), Ex. 1, §§ 1.02-1.03, 4.1, ECF #12-2 (hereinafter "SMSC Video Game Compact") (effective Apr. 2, 1990). The 1991 compact does the same for the card game blackjack. Compl., Ex. 2, §§ 1.02-1.03, 4, ECF #12-3 (hereinafter "SMSC Blackjack Compact") (effective Oct. 3, 1991). On March 13, 2024, the SMSC Blackjack Compact was amended to "permit[] and … govern the operation of [all] Class III card games" on tribal lands. Compl., Ex. 3, § 1.1, ECF #12-4 (hereinafter "SMSC Card Game Addendum").

The SMSC adopted a gaming ordinance to "[r]egulate [g]aming" within the reservation. SMSC Gaming Ordinance § 101(i) (as amended Sept. 27, 2013).[2] The ordinance declares the SMSC's "policy … to fully comply with all applicable U.S. federal law, to include [IGRA], and to comply with all applicable State law." *Id.* § 500. The ordinance establishes a gaming commission, which processes license applications for gaming operators and takes other regulatory actions. *Id.* §§ 205-206. The commission is also charged with "[e]nsur[ing]" that "all" gaming on SMSC lands "shall comply with all applicable Tribal, Federal, and State laws." *Id.* § 206(*o*).[3]

The SMSC operates a significant commercial enterprise, which includes the largest gaming enterprise in Minnesota, with two casinos on SMSC lands: Mystic Lake Casino and Little Six Casino. Compl. ¶¶ 74-80. Since 2020, both casinos have conducted gaming through various video games of chance, e.g., slots, blackjack, keno, baccarat, craps, roulette, Big Six Wheel, and Dai Bacc. Compl. ¶¶ 98, 110.

2. The Mille Lacs' Gaming Operations

The Mille Lacs Band of Ojibwe ("Mille Lacs") has formed two gaming compacts with Minnesota. The 1990 compact gives the Mille Lacs "the opportunity to operate video games of chance" by "establish[ing]" the "regulatory standards … for video games of chance operated and played" on tribal lands. Compl., Ex. 4, §§ 1.02-1.03, 4.1, ECF

[2] https://www.nigc.gov/images/uploads/gamingordinances/shakopeemdewakanton-2013.09.27%20Letter%20to%20Tribe%20fr%20NIGC%20re%20Ordinance%20approval%20-%20Shakopee.pdf.

[3] Websites and exhibits cited herein show the basis for the Complaint's allegations. The Court may also take judicial notice of them. *See* MLCV MTD p.39 & n.25.

#12-5 (hereinafter "ML Video Game Compact") (effective June 29, 1990). The 1991 compact does the same with respect to the card game blackjack. Compl., Ex. 5, §§ 1.02-1.03, 4, ECF #12-6 (hereinafter "ML Blackjack Compact") (effective Oct. 3, 1991). On August 22, 2024 (after this case was filed), the ML Blackjack Compact was amended to "permit[] and … govern the operation of [all] Class III card games" on tribal lands. Addendum to Tribal-State Compact for Control of Class III Blackjack on the Mille Lacs Band of Chippewa Reservation in Minnesota for Class III Card Games § 1.1 (hereinafter "ML Card Game Addendum");[4] 89 Fed. Reg. 67,958 (Aug. 22, 2024).[5]

The Mille Lacs adopted a gaming ordinance "to regulate and control gaming" on its lands and "to ensure that gaming on [Mille Lacs] lands is conducted in conformity with … the IGRA … and regulations promulgated pursuant thereto, applicable state law, and any tribal-state compacts." ML Gaming Ordinance §§ 2(b), (e), 103 (as amended Feb. 22, 2024).[6] The ordinance establishes a gaming commission, which "exercise[s] regulatory, not operational, authority over any gaming enterprise or gaming operation" by processing license applications for gaming operators, conducting background checks, and

[4] https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/pdf/508_compliant_2024.08.22_mille_lacs_band_tribal_state_gaming_compact.pdf.

[5] The MLCV defendants falsely assert that their Card Game Addendum "was … effective April 22, 2024," upon execution, MLCV MTD p.19, rather than upon publication of the Secretary's approval, *see* § 2710(d)(3)(B); 25 C.F.R. §§ 293.4(a), 293.14(a).

[6] https://www.nigc.gov/images/uploads/gamingordinances/20240222_Mille_Lacs_Band_of_Ojibwe_Amend_Gam_Ord.pdf.

taking other regulatory actions. *Id.* §§ 301, 304, 306, 308. The commission is also charged with "ensuring that all gaming activities … are carried out in compliance with the IGRA … and other appliable laws." *Id.* § 304.

The Mille Lacs operates a significant commercial enterprise, called Mille Lacs Corporate Ventures ("MLCV"), which encompasses a gaming enterprise operating two of the largest casinos in Minnesota, both on tribal lands: Grand Casino Hinckley and Grand Casino Mille Lacs. Compl. ¶¶ 123-130. Since 2020, both casinos have conducted gaming through various video games of chance, e.g., slots, keno, poker, blackjack, Ultimate Texas Hold'Em, Big Six Wheel, and roulette. Compl. ¶¶ 149, 163. Since 2020, both casinos have also conducted gaming through various casino card games, e.g., blackjack, Mississippi Stud, Three Card Poker, Four Card Poker, Let It Ride, and Ultimate Texas Hold'Em, along with various types of side bets, e.g., TriLux Bonus, Fortune Blackjack, and Blazing 7s Four-Tier Progressive. Compl. ¶¶ 152, 166. It is undisputed that, other than blackjack, none of those card games were covered by any compact until the ML Card Game Addendum took effect. Compl. ¶¶ 142, 152, 166.

3. The PIIC's Gaming Operations

The Prairie Island Indian Community ("PIIC") has formed two gaming compacts with Minnesota. The 1990 compact allows the PIIC "the opportunity to operate video games of chance" by "establish[ing]" the "regulatory standards … for video games of chance operated and played" on tribal lands. Compl., Ex. 6, §§ 1.02-1.03, 4.1, ECF #12-7 (hereinafter "PIIC Video Game Compact") (effective Apr. 2, 1990). The 1991 compact does the same with respect to the card game blackjack. Complaint, Ex. 7, §§ 1.02-1.03,

4, ECF #12-8 (hereinafter "PIIC Blackjack Compact") (effective Oct. 3, 1991). On October 4, 2023 (shortly before this case was filed), the PIIC Blackjack Compact was amended to "permit[] and … govern the operation of [all] Class III card games" on tribal lands. Complaint, Ex. 8, § 1.1, ECF #12-9 (hereinafter "PIIC Card Game Addendum").

The PIIC adopted a gaming ordinance to "[c]ompletely regulate and control gaming" on its lands. PIIC Gaming Ordinance §§ 101, 102(H)(1) (as amended Feb. 24, 2015).[7] The ordinance "authorizes all permitted forms of Class I, Class II and Class III gaming" on its lands "subject to … IGRA." *Id.* § 107(A). The ordinance establishes a gaming commission, which "regulate[s] the conduct of [g]aming" by processing license applications for gaming operators, conducting background checks, and taking other regulatory actions. *Id.* §§ 200(A), 201. The commission is also charged with "[e]nsur[ing] compliance" with "IGRA." *Id.* §§ 201(A)(14), 400(A).

The PIIC operates a significant commercial enterprise, which encompasses a gaming enterprise operating one of the largest casinos in Minnesota, called Treasure Island Resort & Casino, which is on tribal lands. Compl. ¶¶ 178-182. Since 2020, the casino has conducted gaming through various video games of chance, e.g., slots, keno, poker, blackjack, Big 6 Wheel, Ultimate Texas Hold'Em, baccarat, and roulette. Compl. ¶ 207. Since 2020, the casino has also conducted gaming through various card games, e.g., baccarat, Free Bet Blackjack, Mississippi Stud, Ultimate Texas Hold'em, Three Card

[7] https://www.nigc.gov/images/uploads/gamingordinances/20150224_Prairie_Island_Indian_Community_Gam_Ord_Approval.pdf.

Poker, Four Card Poker, I Luv Suits Poker, Let It Ride, and Pai Gow, along with various types of side bets, e.g., TriLux Bonus, Fortune Blackjack, and Blazing 7s Progressives. Compl. ¶¶ 210. It is undisputed that, other than blackjack, none of those card games were covered by any compact until the PIIC Card Game Addendum took effect. Compl. ¶¶ 199, 210.

4. Running Aces

Running Aces is a non-tribal entity that has lawfully operated a parimutuel racetrack and associated card room in Minnesota since before 2020. Compl. ¶¶ 221-222. At the card room, Running Aces offers various casino card games, including blackjack, Mississippi Stud, Three Card Poker, Four Card Poker, and Ultimate Texas Hold'Em, as well as side bets. Compl. ¶ 223. Running Aces competes for gaming patrons directly with the five casinos operated by the SMSC, the Mille Lacs, and the PIIC. Compl. ¶ 225.

C. Running Aces' Claims

Running Aces filed this lawsuit against the individual executives responsible for operating, financing, and promoting the gaming activities at the SMSC's, the Mille Lacs', and the PIIC's casinos, including CEOs, vice presidents, directors, and general managers: seventeen associated with the SMSC's gaming, Compl. ¶¶ 81-83; thirteen associated with the Mille Lacs' gaming, Compl. ¶¶ 131-133; and ten associated with the PIIC's gaming, Compl. ¶¶ 183-193.

Runnings Aces' claims begin with the undisputed fact that the gaming activities managed, operated, financed, and promoted by defendants at their five casinos would violate state law if conducted by anyone other than an Indian tribe gaming in conformity

with IGRA's requirements. As both the SMSC and the Mille Lacs have said recently, "video game[s] of chance under Minnesota law [are] prohibited." Compl. ¶ 6; *see* Compl. ¶¶ 99-100, 111-112, 150-151, 164-165, 208-209. And Minnesota law prohibits gaming through card games except in a licensed card room associated with a racetrack, which defendants' five casinos undisputedly lack. Compl. ¶¶ 152-153, 166-167, 210-211.

Running Aces contends that defendants' video games of chance and their non-blackjack card games are not operated consistent with IGRA's requirements, and therefore, as a matter of federal law, they are subject to state criminal prohibitions. Defendants' video games of chance do not conform to IGRA's requirements because Minnesota does *not* "permit[] such gaming for any purpose by any person, organization, or entity," § 2710(d)(1)(B); rather, Minnesota categorically criminalizes gambling through video games of chance. And, until the MLCV and PIIC Card Game Addenda took effect recently, the MLCV and PIIC defendants' non-blackjack card games did not conform to IGRA's requirements because they were not "conducted in conformance with a Tribal-State compact … that is in effect." § 2710(d)(1)(C).

In Counts 1, 4, and 7, Running Aces claims that defendants' gaming through video games of chance violates Minnesota criminal law. Naming defendants in their official capacity, Running Aces asks the Court to exercise its equitable powers to declare that conduct illegal and to enjoin defendants from continuing it. Compl. ¶¶ 229-232, 245-248, 261-264, Prayer for Relief (a) & (c). (In light of the Addenda, Running Aces no longer seeks prospective relief with respect to any card gaming.)

In Counts 2, 5, and 8, Running Aces claims that defendants' conduct—involving both their video games of chance and their non-blackjack card games—violates RICO. Defendants conduct or participate in the conduct of the affairs of the three tribes' commercial and gaming enterprises through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c). The predicate acts that form the racketeering pattern include conducting, financing, managing, supervising, or directing an illegal gambling business, in violation of 18 U.S.C. § 1955. Compl. ¶¶ 103-105, 115-117, 156-158, 170-172, 214-216. The predicate acts also include using the mail or any facility in interstate commerce, with intent to distribute the proceeds of, or to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, namely, the illegal gaming, in violation of 18 U.S.C. § 1952. Compl. ¶¶ 106-109, 118-121, 159-162, 173-176, 217-220. Through these predicate acts, defendants injured Running Aces' business by diverting patrons from Running Aces and thereby diminishing Running Aces' business income. Compl. ¶¶ 221-228. Naming defendants in their individual capacity, Running Aces seeks treble damages for its business injury caused by defendants' past RICO violations. And naming defendants in their official capacity, Running Aces asks the Court to declare defendants' conduct unlawful and to enjoin defendants from continuing it. *See* Compl. ¶¶ 233-239, 249-255, 265-271, Prayer for Relief (a)-(c).

Finally, in Counts 3, 6, and 9, Running Aces claims that defendants conspired to commit the RICO violations just described, in violation of § 1962(d). Again, Running Aces seeks treble damages from defendants in their individual capacity for their past

RICO violations, and seeks a declaration and an injunction against future violations by defendants in their official capacity. *See* Compl. ¶¶ 240-244, 256-260, 272-276, Prayer for Relief (a)-(c).

STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter … to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).[8] Courts "must assume the well-pleaded factual allegations in the complaint are true," "draw reasonable inferences in the [plaintiff's] favor[,] and consider the allegations as a whole," not "in isolation." *National Rifle Ass'n v. Vullo*, 602 U.S. 175, 194-195 (2024). "The plausibility standard is not akin to a probability requirement." *Iqbal*, 556 U.S. at 678. The complaint need only "[]cross the line from conceivable to plausible." *Id*. at 680. The allegations "suffice" if they merely "raise a reasonable expectation that discovery will reveal evidence" of the claim, *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 46 (2011), "even if it strikes a savvy judge that actual proof of [the] facts is improbable, and that a recovery is very remote and unlikely," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). This standard also applies to subject-matter jurisdiction at the pleading stage. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

[8] All quotations omit immaterial punctuation and internal citations.

ARGUMENT

Each defense group—the SMSC defendants, the PIIC defendants, and the MLCV defendants—moved to dismiss. This brief refutes all their arguments on each topic in integrated fashion.

I. THE COMPLAINT ADEQUATELY ALLEGES THAT DEFENDANTS' GAMING ACTIVITIES ARE ILLEGAL

The Complaint identifies two offenses as RICO predicate acts. Section 1952 offenses are based on "unlawful activity," which includes "any business enterprise involving gambling … in violation of the laws *of the State* in which they are committed *or of the United States*." § 1952(a)-(b) (emphasis added). Section 1955 offenses are based on an "illegal gambling business," which "means a gambling business which[] … is a violation of the law *of a State* … in which it is conducted." § 1955(a), (b)(1)(i) (emphasis added). Defendants' video gaming and non-blackjack card gaming are not "lawful" under IGRA, a federal law; those violations of IGRA form the basis for the § 1952 predicate acts. Further, defendants' video gaming and non-blackjack card gaming violate Minnesota criminal laws; those violations form the basis for the predicate acts under both § 1952 and § 1955.

Defendants do not deny that gaming that is unlawful under IGRA can form the basis of § 1952 predicate acts, but they argue that their gaming activities are lawful under IGRA. And defendants do not deny that their gaming activities violate Minnesota criminal law, but they argue that Minnesota criminal law is preempted by IGRA and thus cannot form the basis for § 1952 or § 1955 predicate acts. Finally, defendants argue the

Complaint does not adequately allege that each defendant individually participated in the predicate acts or the conspiracy. Defendants are incorrect.

A. Defendants' Gaming Activities Are Unlawful Under IGRA

IGRA states: "Class III gaming activities shall be lawful on Indian lands *only if* such activities are[] … (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, *and* (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State … that is in effect." 25 U.S.C. § 2710(d)(1) (emphasis added). Therefore, if a particular gaming activity is class III, and either of those separate requirements is not met, the gaming activity is *not* "lawful" under IGRA. The particular gaming activities at issue here are class III, and one of IGRA's requirements for lawful class III gaming is not met for each activity. Therefore, each activity is illegal under IGRA.

1. Video Games of Chance

Defendants' video games of chance are undisputedly class III games. *See* § 2703(7)(A)-(B), (8); 25 C.F.R. § 502.4(b); ECF #44, pp.1, 5, 7 (hereinafter "SMSC MTD"); PIIC MTD p.32; MLCV MTD p.28. And Minnesota has long criminalized gambling through video games of chance. *See supra* Background.A.1. Defendants and their tribal amici concede this. *See* Compl. ¶ 6; *In re MRC*, No. A23-1738, 2024 WL 4259301, at *2, *4-5, *7 (Minn. Ct. App. Sept. 23, 2024); SMSC MTD pp.5-6, 33; MLCV MTD pp.28-29; ECF #53, p.6 (hereinafter "Tribes Br."). Therefore, defendants' video games of chance are not "lawful" under IGRA: the games are class III and yet they

are *not* "located in a State" that "permits such gaming for any purpose by any person." § 2710(d)(1)(B).

Defendants try two meritless arguments to salvage their video gaming.

a. Defendants say Minnesota law permitted video games of chance in 1990, when their tribes' Video Game Compacts took effect. *See* SMSC MTD pp.3-6, 33; PIIC MTD pp.7, 32; MLCV MTD p.28. That is legally irrelevant and factually incorrect.

It is irrelevant because IGRA requires that the surrounding State permits the gaming activity *at the time of the activity*, but Minnesota has prohibited video gaming since at least 2020. IGRA uses the present tense: a gaming activity "shall be lawful … only if such activities *are* … located in a State that *permits* such gaming." § 2710(d)(1)(B) (emphasis added). That is, an IGRA compact may remain valid and "in effect" while the State changes its law to permit or prohibit the activity, thereby altering whether the activity is "lawful" under IGRA; the compact merely establishes a framework governing the tribes' gaming and regulation thereof *when permitted* by the State.

The State of Minnesota has the same understanding of IGRA:

> Compacts between tribes and states do not by themselves authorize gaming. It is not until such gaming is authorized by tribal ordinance and permitted within the state that a tribe can offer any particular game within its borders. The legality of games on tribal land may therefore change as state law changes or as tribal ordinances are modified. But the ability of the legal landscape to shift does not mean that the compacts reached between the State and the Tribes should be at issue. The compacts remain valid agreements.

ECF #50, p.6 (hereinafter "State Br."). The State adds that IGRA's regulatory framework "requires each party to independently authorize gaming, then agree on terms for its governance on tribal land"—i.e., the compact (agreement) is separate from the State's *independent authorization* of the gaming. *Id.* The State also articulated this position in the tribes' Video Game Compacts: "if the Minnesota Legislature prohibits the operation or use of video games of chance for all purposes as against public policy and as a matter of criminal law, this [compact] shall not be construed to provide for continued operation by the [tribe] of video games of chance pursuant to this compact." SMSC Video Game Compact § 2.1; ML Video Game Compact § 2.1; PIIC Video Game Compact § 2.1. The SMSC also acknowledged this in a recent compact amendment: "Whereas[] … the State may now *and/or hereafter* permit the operation of other Class III card games in the State." SMSC Card Game Addendum at PDF.5 (emphasis added).

Regardless, defendants are wrong that Minnesota allowed video games of chance in 1990, when the three tribes' Video Game Compacts took effect. In 1945, Minnesota enacted laws criminalizing "gambling with … any … gambling device whatever" and prohibiting "a gambling device to be set up or used for the purpose of gambling." Minn. Stat. §§ 614.06-.07 (1945). Apparently citing 1984 Minn. Laws ch. 654, art. 3, § 91 (codified at Minn. Stat. § 349.52 (1984)), defendants assert that Minnesota legalized gambling through video games of chance in 1984. SMSC MTD p.3; PIIC MTD p.32;

MLCV MTD p.28.[9] That is incorrect: in 1984, the State legalized only the possession and use of video poker machines at licensed bars and clubs, Minn. Stat. §§ 349.50-.60 (1984); 1984 Minn. Laws ch. 654, art. 3, §§ 89-99, while specifying that using such devices *for gambling* was still criminally prohibited, 1984 Minn. Laws ch. 654, art. 3, § 99; Minn. Stat. §§ 609.75-.76 (1984). "[I]n practice," however, some people found ways to "use the machines as gambling devices," e.g., by giving prizes, but the law still prohibited that. State Br. p.3. Defendants assert that the State did not "repeal" the 1984 authorization until 1992, through 1990 Minn. Laws ch. 590, art. 1, § 48 (codified at Minn. Stat. § 349.61 subd. 1). SMSC MTD p.5; PIIC MTD pp.7, 32; MLCV MTD p.8.[10] That contention overlooks the facts that (1) again, the 1984 law did not authorize gambling via video games of chance at all and (2) as the SMSC defendants acknowledge, the State had already reinforced the prohibition against using the video poker machines for gambling when, in June 1989 (before any of the Video Game Compacts were even signed, let alone took effect), the State increased the criminal status of "reward[ing] players of video games of chance" from a misdemeanor to a gross misdemeanor. 1989 Minn. Laws ch. 334, art. 6, § 9, *quoted in* SMSC MTD p.3. In sum, when the tribes'

[9] The SMSC defendants do not specify the section, the PIIC defendants cite 1984 Minn. Laws ch. 652, art. 3, § 91, and the MLCV defendants cite 1984 Minn. Laws ch. 653, art. 3.

[10] The PIIC and MLCV defendants cite 1990 Minn. Laws ch. 590, art. 1, §§ 4-9, which are unrelated to video games of chance. PIIC MTD p.7; MLCV MTD p.8.

Video Game Compacts took effect in 1990, Minnesota law criminalized all gambling through video games of chance.[11]

b. Defendants try a narrower argument: the State *exclusively* permits the *tribes* to conduct gaming through video games of chance. SMSC MTD pp.6, 33; MLCV MTD pp.28-29. This argument is also both legally irrelevant and factually incorrect.

It is irrelevant because tribal exclusivity under state law does not satisfy IGRA. IGRA declares a gaming activity "lawful … only if" the State permits the activity "for any purpose by any person." § 2710(d)(1)(B). That means the State must generally allow the gaming activity within its borders, subject only to *regulatory* requirements; if the State *criminalizes* the gaming activity, the activity is not lawful on Indian lands under IGRA. *See Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 693, 700, 707 (2022) (through the "permits such gaming for any purpose by any person" requirement, IGRA applies a "prohibitory/regulatory framework"); *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 366 (8th Cir. 1990) (under IGRA's "permits … any person" requirement, "our task is to assess whether South Dakota's gaming law is prohibitory or regulatory in nature"); *see also* § 2701(5) (tribes may regulate gaming activity on their lands if activity "is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity"). Put another way, a gaming activity is lawful under IGRA only if the State "allow[s] at least some non-Indian groups to conduct similar

[11] The PIIC defendants assert: "In 2012, Minnesota again legalized some [video games of chance] gaming." PIIC MTD p.7. Nothing in their cited chapter 349 of Minnesota Statutes supports their assertion.

gambling." *Stockbridge-Munsee Community v. Wisconsin*, 922 F.3d 818, 819 (7th Cir. 2019). The State agrees: under IGRA, the tribes could conduct only "the same types of gambling allowed *elsewhere* in Minnesota." State Br. p.6 (emphasis added).

Defendants say the D.C. Circuit held: "a compact and related provisions of state law may allow a tribe 'the exclusive right to offer that form of Class III gaming in the state.'" PIIC MTD p.32 (quoting *West Flagler Associates, Ltd. v. Haaland*, 71 F.4th 1059, 1063 (D.C. Cir. 2023)). That is inaccurate; the court merely described what the compact and state law there "purport[ed] to allow." 71 F.4th at 1063. The only issue there was whether the compact could, and did, exclusively authorize the tribe to game with individuals "not … on the Tribe's lands," i.e., outside IGRA's purview. *Id.*

Regardless, Minnesota has never given tribes the exclusive right to conduct gaming through video games of chance. Defendants cite a provision in the June 1989 law stating that its prohibition on rewards for players of video games of chance "may not be construed as prohibiting the state from entering into a tribal-state compact … relat[ing] to video poker or video blackjack gaming of chance currently operated by Indian tribes in this State." 1989 Minn. Laws ch. 334, art. 6, § 14, *quoted in* SMSC MTD pp.3-4 *and* PIIC MTD pp.7 n.3, 32.[12] And they cite a provision enacted in 1990 stating that the repeal of any licenses for operating video games of chance was not "intended to affect the validity of any compact." Minn. Stat. § 349.61 subd. 2, *quoted in* SMSC MTD pp.5-6,

[12] The PIIC defendants mischaracterize this provision as "provid[ing] that VGC gaming under tribal-state compacts was not subject to the regulation applicable to VGC gaming on state land." PIIC MTD p.7 n.3.

and cited in PIIC MTD p.32 *and* MLCV MTD p.28. Neither of those provisions authorized the *gaming*; they addressed only the *compacts*. As explained, IGRA expressly treats the compact's coverage of a given gaming activity and the State's permission of that activity as separate requirements for lawful gaming on Indian lands. *Supra* p.4.

Defendants also cite a provision allowing licensed distributors to "provide" video games of chance to any "Indian tribe that is authorized to operate the gambling device under a tribal state compact under" IGRA. Minn. Stat. § 299L.07 subd. 2a(b), *quoted in* SMSC MTD pp.6, 32. This provision also does not authorize Minnesota tribes to engage in any gaming activity. It expressly limits distributors to transacting with tribes that are *separately authorized* to conduct such gaming. Tellingly, the provision expressly covers *all* tribes, not just *Minnesota* tribes; if defendants' reading were correct, then the provision would purport to authorize all tribes nationwide to engage in video gaming—an implausible legislative intent.

2. Non-Blackjack Casino Card Games

Since 2020, the PIIC and MLCV defendants have undisputedly offered various casino card games other than blackjack, including Mississippi Stud, Three Card Poker, Four Card Poker, Let It Ride, Ultimate Texas Hold'Em, and I Luv Suits Poker. *Supra* pp.8-10. And those games undisputedly were not conducted "in conformance with a Tribal-State compact … that [was] in effect," § 2710(d)(1)(C), because blackjack was the only card game covered by the Blackjack Compacts until the recent Addenda. *Supra*

pp.7-10. Therefore, those non-blackjack card gaming activities were "lawful" under IGRA only if they are *not* class III games, § 2710(d)(1), but they are.[13]

Defendants do not deny that those games were class III. Instead, they make only the procedural argument that the Complaint "does not allege [defendants] conducted any 'house banking card games' or the details of play for the named games that would allow the conclusion they were played as house banking games." PIIC MTD p.32; *see* MLCV MTD p.27. Defendants' contention reflects an overly demanding pleading standard. Class III includes all "banking card games." § 2703(7)(A)-(B), (8); 25 C.F.R. § 502.4. The Complaint establishes that premise, explains what banking card games are, and alleges that the non-blackjack casino card games played at the PIIC and MLCV defendants' casinos are banking card games. Compl. ¶¶ 69-71, 152, 166, 210. That is sufficient at this stage.

That the games are class III is further shown by regulations and opinions issued by the National Indian Gaming Commission ("NIGC")—the federal regulator created by IGRA—as well as defendants' own public statements. A banked card game is "any game of chance that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win." 25 C.F.R. § 502.11. As the NIGC concluded long ago and as at least the Mille Lacs have acknowledged, the "house" can be a casino or a player in the game: "all banking card games, including card games banked by the gaming operation or by a

[13] Traditional poker is not at issue because it is a class II game.

player, fall within class III gaming." NIGC, Bulletin No. 95-1, "All Banking Card Games Fall Within Class III Gaming," at 1 (Apr. 10, 1995) (hereinafter "NIGC Bulletin")[14]; *see* Mille Lacs Band of Ojibwe Indians Gaming Regulatory Authority, Detailed Gaming Regulations, No. DGR 10-a, pt.III, § 1(A)-(B)[15]; Compl. ¶ 70. The NIGC added that the "banker ha[ving] a percentage or odds advantage over all other players … is a fundamental characteristic of a banking game," and in a player-banked game, "[t]he banker/player has a mathematical percentage advantage over the other players." NIGC Bulletin at 1-2. The NIGC has identified another hallmark of banked card games: they "pay[] wins according to a fixed pay table." NIGC, Memorandum, re: *Ultimate Texas Hold'Em Poker—Game Classification Opinion* at 5 (April 7, 2021) (hereinafter "NIGC Ultimate Texas Hold'Em Opinion").[16]

Applying these standards, the NIGC determined that Ultimate Texas Hold'Em—one of the card games the MLCV and PIIC defendants offered—is a banked card game and therefore is class III. NIGC Ultimate Texas Hold'Em Opinion at 1. Although the NIGC issued that opinion to a different Minnesota tribe, the conclusion applies equally to Ultimate Texas Hold'Em at defendants' casinos because the game is proprietary, copyrighted, and patented, and every casino must license the game from the rightsholder

[14] https://www.nigc.gov/images/uploads/bulletins/1995-1bankingcardgames.pdf.

[15] https://millelacsband.com/media/pages/government/indian-gaming-regulation/gaming-regulations-resolutions/245b621301-1687967324/dgr-10a-card-games1-2.pdf.

[16] https://www.nigc.gov/images/uploads/indianlands/20210407GameopreUltimateTexasHoldemPoker-RedLake.pdf.

(Light & Wonder). Compl. ¶¶ 155, 169, 213. The PIIC's casino's website acknowledges that in Ultimate Texas Hold'Em, the house dealer plays all other players and pays each player based on whether the player's hand beat the dealer's hand, and pays according to a fixed pay table. Treasure Island Resort & Casino, "Table Games".[17]

Or consider Three Card Poker, another proprietary, copyrighted, and patented game licensed by and offered at the MLCV and PIIC defendants' casinos. The rules offer an "ante wager" to play against the dealer and a "pair plus" bet to play against a pay table based exclusively on the player's hand. Light & Wonder, *Three Card Poker Training Manual* PDF.7-8 (Apr. 10, 2013).[18] The dealer "collects all forfeited wagers and cards" and "pay[s] and/or take[s]" the players' wagers. *Id.* at PDF.9. The PIIC's casino's website acknowledges that in Three Card Poker, the house dealer plays all other players and pays according to a fixed pay table. Treasure Island Resort & Casino, "Table Games." The same website makes similar statements about Mississippi Stud, I Luv Suits, Free Bet Blackjack, TriLux, and Blazing 7s Blackjack Progressive. *Id.*

Therefore, it is at least plausible—if not certain—that defendants' non-blackjack casino card games are class III, and consequently those games were unlawful under IGRA because they were not conducted in conformance with any compact in effect (until the recent Addenda).

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[17] https://www.ticasino.com/casino/games/table-games.

[18] https://wsgc.wa.gov/sites/default/files/2023-11/Three%20Card%20Poker%206%20Card%20Bonus.pdf.

B. Minnesota Criminal Law Applies to Defendants' Gaming Activities and Supplies the Basis for the RICO Predicate Acts

Defendants do not deny that their gaming activities violate Minnesota criminal law. Instead, they argue that IGRA preempts Minnesota criminal law. That argument contradicts the express text of federal law, and consequently has been consistently rejected by appellate courts.

1. "Indian reservations are part of the surrounding State and subject to the State's jurisdiction except as forbidden by federal law." *Oklahoma v. Castro-Huerta*, 597 US. 629, 636, 652-653 (2022). Thus, the surrounding State's "laws, civil and criminal, have the same force [on the reservation] as elsewhere within [the State's] limits," "unless preempted." *Id.* at 636-38. IGRA itself "established the preemptive balance between tribal, federal, and state interests in the governance of gaming operations on Indian lands." *Casino Resource Corp. v. Harrah's Entertainment, Inc.*, 243 F.3d 435, 437 (8th Cir. 2001).

Federal law states that "the criminal laws of [the State of Minnesota] shall have the same force and effect within … Indian country as they have elsewhere within the State." 18 U.S.C. § 1162(a). IGRA extends this principle to Minnesota gambling law specifically: "all [Minnesota] laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, … apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." § 1166(a); *see also* § 1166(d). And IGRA states: "Whoever in Indian country is guilty of any act or omission involving gambling, … which … would be

punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment." § 1166(b). Thus, IGRA "makes [Minnesota's] gambling laws applicable in Indian country." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 793 n.5 (2014).

IGRA "incorporates state law as the federal law governing *nonconforming* gambling on tribal lands." *Pueblo of Pojoaque v. New Mexico*, 863 F.3d 1226, 1232 (10th Cir. 2017) (emphasis added); *accord Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 540 (9th Cir. 1994), *as amended on denial of reh'g* (Apr. 28, 1995); *United States v. E.C. Investments, Inc.*, 77 F.3d 327, 330 (9th Cir. 1996); *Alabama v. PCI Gaming Authority*, 801 F.3d 1278, 1297 (11th Cir. 2015); *see* § 1166(c). So, when gaming on Indian lands does not conform to IGRA's requirements, federal law specifies that Minnesota gambling law is not preempted, and a violation of Minnesota gambling law will form the basis for a violation of § 1952 and § 1955—the RICO predicate acts here. *E.C. Investments*, 77 F.3d at 330-331; *United States v. Cook*, 922 F.2d 1026, 1033-1034 (2d Cir. 1991). Because defendants' video gaming and non-blackjack class III card gaming activities do not conform to IGRA, *supra* I.A.1-2, they are not "lawful" under IGRA and instead are subject to Minnesota criminal law, including for purposes of § 1952 and § 1955.

Defendants cite no authority suggesting otherwise. They assert that in *State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999), the Eighth Circuit held that

IGRA preempted state law regarding gaming activity "conducted *on* [tribal] lands … *without* a compact," i.e., nonconforming gaming on Indian lands. PIIC MTD p.12 (emphasis added). That is false: the court did not decide whether the gaming activity was on tribal lands (in Idaho) or off (in Missouri), but insofar as the activity was *on* tribal lands, it would have been covered by the tribe's compact. 164 F.3d at 1104, 1109.

Beyond that, *Coeur D'Alene* and defendants' other cases and statutes—and their arguments—pertain to IGRA's preemption of state-law *causes of action* and to the allocation of *enforcement jurisdiction* among federal, state, and tribal governments. *See, e.g.*, *id.* at 1104, 1108-1109 (IGRA preempts state enforcement of state law with respect to "IGRA-regulated" gaming activities), *cited in* SMSC MTD pp.31-32, PIIC MTD p.12, *and* MLCV MTD p.14; *Bay Mills*, 572 U.S. at 795 n.6 ("the surrounding State cannot sue; only the Federal Government can enforce the law"), *cited in* SMSC MTD pp.29-30 *and* PIIC MTD pp.12-14; *Casino Resource*, 243 F.3d at 436, 438-440 (IGRA preempts certain "causes of action"), *cited in* PIIC MTD p.11.[19]

Those authorities are irrelevant to Running Aces' claims because they do not refute that, per IGRA, state criminal law still applies to defendants' gaming activities insofar as those activities do not comply with IGRA's requirements. *See E.C.*

[19] *See also, e.g.*, *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 549-551 (8th Cir. 1996) ("cause of action"), *cited in* SMSC MTD p.31, PIIC MTD p.12, *and* MLCV MTD p.14; *Sycuan Band*, 54 F.3d at 540 ("Section 1166(d) … grants the federal government exclusive power to enforce *[state gambling] law*," "impliedly repeal[ing]" § 1162(a)'s grant of enforcement responsibility to States), *cited in* SMSC MTD p.32 *and* PIIC MTD p.13; *PCI Gaming*, 801 F.3d at 1298-1299, *cited in* SMSC MTD p.30.

Investments, 77 F.3d at 330-331. Under RICO, it does not matter which government can prosecute the predicate acts or whether any government has done so. What matters is that the defendant take an act that qualifies as the relevant predicate offense. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 488 (1985) ("[R]acketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be."). Similarly, the two predicate-act statutes here do not depend on who has enforcement authority or whether that government has exercised it; they depend on whether the conduct was "in violation of the laws of the State … or the United States," § 1952, or "is a violation of the law of the State," § 1955.

So, the pertinent questions are: what law applies to, i.e., governs, the conduct and was that law violated? As explained, Minnesota criminal law also applies to defendants' gaming activities pursuant to IGRA, and violations of Minnesota criminal law form the basis for violations of § 1952 and § 1955, and in turn of RICO.

2. Defendants are also wrong that IGRA impliedly preempts Running Aces' state-law equitable claims. As just explained, if defendants' gaming activities do not comply with IGRA, they are governed by Minnesota criminal law. Further, although the Eighth Circuit has held that IGRA preempts certain state-laws causes of action (as just discussed), IGRA does not preempt Running Aces' state-law claims. The Eighth Circuit has stressed that every state-law claim "must be individually scrutinized," and only "those causes of action that would interfere with the tribe's ability to govern gaming fall within IGRA's complete preemption of state law," such as state-law claims that "would directly affect or interfere with a tribe's ability to conduct its own gaming licensing

process." *Casino Resource*, 243 F.3d at 437-438 & n.2; *see also Gaming Corp.*, 88 F.3d at 549 ("The key question is whether a particular claim will interfere with tribal governance of gaming," such as the "tribal licensing process"). Running Aces' state-law claims could not interfere with the three tribes' ability to govern their on-lands gaming because the tribes have *no* authority to govern gaming activities that are not "lawful" under IGRA. *See also* § 2701(5) (tribes may regulate gaming activity on their lands if activity "is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity").

3. Even if the allocation of public enforcement responsibility mattered for preemption purposes, the relevant compacts expressly *preserve* the applicability of Minnesota criminal law and the State's responsibility for enforcing those laws with respect to video games of chance on the three tribes' lands, under § 2710(d)(3)(C)(ii): "The State pursuant to P.L. 280, 18 U.S.C. 1162 has criminal jurisdiction over the … reservation. This jurisdiction is concurrent with federal criminal jurisdiction under the IGRA and other applicable law. Nothing in this compact shall be construed to limit this state and federal criminal jurisdiction." SMSC Video Game Compact § 3.1; *accord* PIIC Video Game Compact § 3.1; MLCV Video Game Compact § 3.1.

C. The Complaint Adequately Alleges That Each Defendant Individually Violated RICO

Defendants argue the Complaint lacks sufficient allegations of each *individual* defendant's predicate acts, for purposes of § 1962(c), and of each *individual* defendant's

agreement to the conspiracy, for purposes of § 1962(d). Defendants, however, fail to account for the governing pleading standards and substantive rules.

1. The Complaint Adequately Alleges Each Defendant's Predicate Acts

Defendants argue that the Complaint does not adequately allege how each defendant committed the RICO predicate acts because the Complaint "lump[s] several defendants into collective allegations" and "merely lists the job titles and descriptions of each" defendant. SMSC MTD pp.35-36; PIIC MTD pp.24, 33; MLCV MTD pp.36-37.

The Complaint placed individual defendants into three groups—"Gaming Leaders," "Finance Leaders," and "Marketing Leaders"—only to avoid a repetitive, prolix pleading. The Complaint still expressly alleged that "each" member of each defense group individually committed the predicate acts. Compl. ¶¶ 104-109, 116-121, 157-162, 171-176, 215-220, 231-232, 237, 240, 247-248, 253, 256, 263-264, 269, 272. The Complaint based those allegations on the gaming activities of defendants' five casinos and each defendant's specific job responsibilities at those casinos or at the associated broader commercial and gaming enterprises. *See id.*; *id.* ¶¶ 81-83, 131-133, 183-193. That suffices to plead the predicate acts "as to each individual defendant." *Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1027 (8th Cir. 2008). It is plausible—reasonable to infer—that the executives responsible for gaming strategy, operations, finance, and marketing at the casinos and the broader commercial and gaming enterprises would participate in the gaming operations, marketing, and financing of the casinos' primary gaming activities—the very activities that are the basis for Running Aces' claims. At a minimum, given the casinos' activities and defendants'

responsibilities there, it is reasonable to expect that discovery will reveal more details about each individual defendant's participation in the predicate acts, and that alone suffices at this stage. *Supra* p.13.

Courts routinely find that "group pleading is permissible" "[s]o long as it is plausible that each defendant was involved in all of the facts alleged," as the Complaint does. *New v. Faris*, No. 5:23-cv-628, 2024 WL 4200749, at *3 (S.D. W. Va. Sept. 16, 2024); *see also, e.g.*, *Sprint Nextel Corp. v. Simple Cell, Inc.*, No. 13-cv-617, 2013 WL 3776933, at *2 (D. Md. July 17, 2013); *Drake University v. Des Moines Area Community College Foundation*, No. 4:24-CV-227, 2024 WL 4132499, at *3 (S.D. Iowa Sept. 10, 2024); *Fitzgerald v. Wildcat*, 687 F. Supp. 3d 756, 786-787 (W.D. Va. 2023); *Pennsylvania v. Think Finance, Inc.*, No. 14-cv-7139, 2016 WL 183289, at *11-12 (E.D. Pa. Jan. 14, 2016).

Group pleading is problematic only under Rule 9(b)'s heightened pleading requirement that a complaint "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); *see Quintero Community Ass'n v. FDIC*, 792 F.3d 1002, 1010 (8th Cir. 2015) ("Appellants' … group pleading … does not satisfy Rule 9(b)."). Rule 9(b)'s heightened standard does not apply here. A civil RICO plaintiff "is not required to plead with the particularity required by Rule 9(b)" except for "RICO acts predicated upon fraud." *Robbins v. Wilkie*, 300 F.3d 1208, 1211 (10th Cir. 2002), *rev'd and remanded on other grounds*, 551 U.S. 537 (2007), *vacated on other grounds*, 497 F.3d 1122 (10th Cir. 2007). None of Running Aces' claims are based on fraud (or mistake).

All of defendants' cases rejecting group pleading are irrelevant because they all relied on Rule 9(b)'s heightened requirement. *See Santana v. Adler*, No. 1:17-cv-06147, 2018 WL 2172699, at *4, *6-7 (S.D.N.Y. Mar. 26, 2018) (fraud-based RICO claim), *report and recommendation adopted*, 2018 WL 2170299 (S.D.N.Y. May 10, 2018), *cited in* MLCV MTD p.36; *Lima LS PLC v. PHL Variable Insurance Co.*, No. 3:12-cv-1122, 2013 WL 3327038, at *10-11 (D. Conn. July 1, 2013) (same), *cited in* MLCV MTD p.37; *Raineri Construction, LLC v. Taylor*, 63 F. Supp. 3d 1017, 1030-1031 (E.D. Mo. 2014), *cited in* MLCV MTD p.36 (incorrectly applying Rule 9(b) to non-fraud-based claim, citing *Crest Construction II, Inc. v. Doe*, 660 F.3d 346, 353, 358 (8th Cir. 2011)).

Regardless of Rule 9(b)'s applicability, the analysis in defendants' cases would not yield the same result here. Like the Complaint here, the *Lima* complaint "rel[ied] upon the corporate positions of the Individual Defendants to indicate their ability to direct or manage the enterprise"; but unlike here, in *Lima*, the alleged scheme did not involve work within the individual defendants' formal responsibilities but rather involved a surreptitious effort to "undermine" insurance policies that the defendants' company had previously issued. 2013 WL 3327038, at *2, *11. And the Complaint specifically alleges each defendant's personal responsibilities for the casinos' illegal gaming activities, avoiding the *Raineri* complaint's defect of "merely alleg[ing] that each of the individual defendants 'participated in, authorized, or ratified the racketeering activity'" and "generically assert[ing] acts in which 'an individual defendant or an individual under the control of defendants' engaged." 63 F. Supp. 3d at 1030-1031.

2. Defendants Conspired to Violate Section 1962(c), in Violation of Section 1962(d)

Defendants raise three meritless challenges to the claim that they conspired to commit the RICO violations (besides arguing that the underlying RICO violations are deficient).

a. Defendants contend that they could not have conspired to violate RICO because they "had every reason to believe … their conduct is, and was, lawful." PIIC MTD p.36. Given how clear it is that their gaming activities are unlawful, *see supra* I.A.1-2, their assertion about what they believed is not credible. Indeed, the evidence plausibly shows that they *knew* their activities were illegal. *Infra* V.B.3.

Regardless, their belief is irrelevant. "The general rule [is] that ignorance of the law … is no defense to criminal prosecution." *Cheek v. United States*, 498 U.S. 192, 199 (1991). The only exception is where Congress requires that the violation be "willful." *Id.* at 200-201; *see Ratzlaf v. United States*, 510 U.S. 135, 136-137 (1994). The RICO statute does not require a "willful" violation or otherwise depart from this general rule. A RICO conspiracy requires "either [i] that a defendant personally agreed to commit two predicate acts in furtherance of the enterprise or [ii] that a defendant agreed to participate in the conduct of the enterprise with the knowledge and intent that other members of the conspiracy would commit at least two predicate acts in furtherance of the enterprise." *United States v. Henley*, 766 F.3d 893, 908 (8th Cir. 2014). Thus, a RICO defendant must have had intent or knowledge with respect to the *acts*, not with respect to the acts' *legality*. *See Salinas v. United States*, 522 U.S. 52, 63, 65 (1997) (RICO "conspirator

must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor"); *Williams v. Big Picture Loans, LLC*, 693 F. Supp. 3d 610, 635-641 (E.D. Va. 2023) ("in the civil context, §§ 1962(c) and (d) do not require knowledge of illegality").

b. Defendants contend that the Complaint lacks sufficient factual allegations "about whether each [defendant] had the requisite knowledge and agreement for a conspiracy claim." SMSC MTD p.36; *see also* MLCV MTD pp.37-38. Like their similar argument with respect to the predicate acts, this argument rests incorrectly on Rule 9(b)'s heightened standard.

The Complaint's allegations satisfy the ordinary pleading standard. As just noted, a RICO conspirator may agree to commit the predicate acts or agree to participate in the scheme with knowledge or intent that other conspirators will commit the predicate acts. More generally, a "conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense"; it is enough if the conspirator "knew about and agreed to facilitate the scheme." *Salinas*, 522 U.S. at 63, 65; *see Henley*, 766 F.3d at 908 ("the focus is on the agreement to participate in the enterprise through the pattern of racketeering activity, not on the agreement to commit the individual predicate acts"). And a plaintiff may rest on "a tacit understanding between the parties, … [which] may be shown wholly through the circumstantial evidence of each defendant's actions." *United States v. Kehoe*, 310 F.3d 579, 587 (8th Cir. 2002).

Here, the Complaint alleges that defendants were executives responsible for gaming strategy, operations, finance, and marketing for the gaming activities at their casinos. The illegal gaming at issue here is central to the gaming operations of those casinos and their broader commercial and gaming enterprises. The *only* reasonable conclusion is that defendants acted in concert to further their illegal scheme through the predicate acts—i.e., that they overtly or tacitly agreed to operate a gambling business that is illegal and to use interstate facilities to do so, or to participate in the enterprises' affairs knowing that others were operating the illegal gambling business or using interstate facilities to do. At a minimum, each defendant undoubtedly knew about the activities relating to the illegal gaming of the other defendants in his or her defense group. That is enough to state a RICO conspiracy. *See Allstate Insurance Co. v. Linea Latina De Accidentes, Inc.*, 781 F. Supp. 2d 837, 841, 845 (D. Minn. 2011) (discussing complaint, ECF #1, ¶¶ 31-75); *Hengle v. Asner*, 433 F. Supp. 3d 825, 893, 898 (E.D. Va. 2020) ("court may infer a defendant's agreement to join a RICO conspiracy from circumstantial evidence of the defendant's status in the enterprise or knowledge of the wrongdoing"), *aff'd sub nom. Hengle v. Treppa*, 19 F.4th 324 (4th Cir. 2021).

c. Finally, the SMSC defendants contend that "'individual members of the Tribal Council, acting in their official capacity as tribal council members, cannot conspire when they act together with other tribal council members in taking official action on behalf of the Tribal Council.'" SMSC MTD p.36 (quoting *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985)). That argument facially applies only to the handful of defendants who were members of a tribal council, not to all defendants. Regardless, the

argument is irrelevant because the Complaint does not allege that defendants performed their illegal acts *on behalf of* any tribal council; the Complaint alleges that defendants' illegal acts were performed in the course of conducting the affairs of the three tribes' commercial and gaming enterprises. Compl. ¶¶ 74-76, 125-130, 178-182, 234-236, 250-252, 266-268; *see infra* V.A; *see also infra.* pp.50-51.

Defendants' argument is also incorrect as a matter of RICO. *Runs After* rested on a general rule that "[t]here is no conspiracy if the conspiratorial conduct challenged is essentially a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his or her employment." 766 F.2d at 354. That rule governs in civil rights and antitrust cases, such as *Runs After* itself (arising under 42 U.S.C. § 1985) and all the cases that *Runs After* cited, *see, e.g.*, *id.*; *Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66, 71 (2d Cir. 1976). That rule, however, has not been extended to RICO, and should not be extended to RICO because it would undermine RICO's fundamental purpose of "protect[ing] the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a vehicle through which unlawful activity is committed." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164 (2001).

Indeed, RICO specifically targets people who are "employed by or associated with any enterprise"—including corporations, businesses, and other associations—and who "conduct or participate" in the "affairs" of that enterprise through a "pattern of racketeering activity," §§ 1961(4), 1962(c). Because RICO defendants may include "corporate employee[s] who conduct[] the corporation's affairs," *Cedric Kushner*, 533

U.S. at 164-165, RICO conspiracies may involve such employees or other agents of the organization whose affairs they are illegally conducting. *See, e.g.*, *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1280-1281 (7th Cir. 1989) (corporate officers); *United States v. Simon*, 12 F.4th 1, 24-32 (1st Cir. 2021) (executives); *United States v. Hills*, 27 F.4th 1155, 1170, 1173-1174 (6th Cir. 2022) (executive and subordinates); *Kirwin v. Price Communications Corp.*, 391 F.3d 1323, 1327 (11th Cir. 2004) (corporate "agents").

II. SOVEREIGN IMMUNITY DOES NOT BAR RUNNING ACES' CLAIMS

Tribal immunity does not bar Running Aces' claims. Running Aces requests prospective equitable relief against defendants in their official capacity: a declaration that their video gaming activities are unlawful and an injunction against their continuation. These equitable claims fit comfortably within the exception to sovereign immunity established long ago in *Ex parte Young*, 209 U.S. 123 (1908). Running Aces also asserts damages claims against defendants for their past RICO violations, but only in their individual capacity. These damages claims comfortably avoid sovereign immunity because the ensuing judgments would bind only defendants personally, not the tribes or defendants *as tribal officials*. Defendants ignore these basic doctrinal rules and mischaracterize the nature of Running Aces' claims.

A. Sovereign Immunity Does Not Bar Running Aces' Official-Capacity Claims Because They Seek Only Prospective Equitable Relief

1. In *Ex parte Young*, the Supreme Court "recognized a narrow exception [to sovereign immunity] grounded in traditional equity practice—one that allows certain private parties to seek judicial orders in federal court preventing state executive officials

from enforcing state laws that are contrary to federal law." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 39 (2021). "[T]he *Ex parte Young* doctrine allows suits … for declaratory or injunctive relief against state officers in their official capacities." *Reed v. Goertz*, 598 U.S. 230, 234 (2023); *see Pharmaceutical Research & Manufacturers of America v. Williams*, 64 F.4th 932, 949 (8th Cir. 2023). "[A]nalogizing to *Ex parte Young*," the Supreme Court has correspondingly held that "tribal immunity does not bar … a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Bay Mills*, 572 U.S. at 796; *see Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1131 (8th Cir. 2019).

"[I]n determining whether the doctrine of *Ex parte Young* avoids [a sovereign immunity] bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of … law and seeks relief properly characterized as prospective." *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). Here, this straightforward inquiry yields a straightforward answer: Running Aces alleges that defendants' gaming through video games of chance violates federal and state law, and that defendants' illegal conduct will continue. Therefore, under *Ex parte Young*, sovereign immunity does not bar a declaration that defendants' conduct is illegal or an injunction restraining such future conduct. *See Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 645 (2002) ("The prayer for injunctive relief—that state officials be restrained from enforcing an order in contravention of controlling federal law—clearly satisfies our straightforward inquiry.").

2. Defendants' various arguments that the tribes are the "real part[ies] in interest" are meritless. They assert that Running Aces seeks prospective relief against the tribes themselves and seeks monetary damages against defendants in their *official* capacity. SMSC MTD pp.20, 24. Both assertions are false. The Complaint names only individuals as defendants, not the tribe or any instrumentality thereof, *see* Compl. ¶¶ 12-54, 81-83, 131-133, 183-193; and the only relief sought against defendants in their official capacity is prospective equitable relief, *see* Compl. Prayer for Relief.

Defendants' notion that the tribes are the real parties in interest because the prospective relief would constrain the tribes' ability to conduct video gaming contradicts the very concept of *Ex parte Young*, as the Supreme Court has long acknowledged. "Despite the artifice [of *Ex parte Young*], of course, a [sovereign] will as a practical matter often retain a strong interest in [the] litigation. After all, however captioned, a suit of this sort can implicate the continued enforceability of the [sovereign's] own statutes." *Berger v. North Carolina State Conference of the NAACP*, 597 U.S. 179, 184 (2022). "Indeed, the suit in *Young,* which sought to enjoin the state attorney general from enforcing state law, implicated substantial state interests." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997).

Next, defendants argue that there is "no continuing violation" because they "lack[] the authority under IGRA to independently … offer video games of chance on … Indian lands." SMSC MTD p.24. This again ignores *Ex parte Young*, under which defendants do not need authority to engage in the illegal conduct "independently," i.e., in their individual capacity. As official-capacity relief, the injunction and declaration will

perpetually bind the tribes' relevant *officeholders*—the tribes' officials responsible for gaming strategy, operations, finance, and marketing at the casinos and the broader commercial and gaming enterprises—not the specific people who happen to occupy those offices now. *See Lewis v. Clarke*, 581 U.S. 155, 162 (2017) ("when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation"); *Randolph v. Rodgers*, 253 F.3d 342, 346 n.7 (8th Cir. 2001) ("An *Ex parte Young* injunction against [public official] in her official capacity would be binding upon her successor …."); *Vann v. United States Department of the Interior*, 701 F.3d 927, 929 (D.C. Cir. 2012) (Kavanaugh, J.) (*Ex parte Young* "suit in effect binds the government entity" and "an injunction entered against an officer in his official capacity is binding on the officer's successors"). And because a "sovereign can act only through agents …, when the agents' actions are restrained, the sovereign itself may, through [them], be restrained." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949); *see* PIIC MTD p.21 ("tribal government … can only act through its officers"). Defendants concede this elsewhere: "A judgment on [Running Aces'] claims, even if nominally confined to the named individuals, would … enjoin class III video games of chance" at the tribes' casinos. PIIC MTD p.20.

Defendants also assert that they "cannot disregard the Gaming Compact and Gaming Ordinance," and a tribe may conduct gaming "only pursuant to … a compact." SMSC MTD p.24. Running Aces' claims, however, do not call upon defendants to violate any compact or gaming ordinance because, as the State acknowledges and defendants admit, the compacts and ordinances expressly give the tribes only the

"opportunity" to conduct gaming activities *consistent with* applicable federal and state law; the compacts and ordinances do not mandate any particular gaming activities. *Supra* pp.5-10; State Br. pp.5-7. But even if a compact or ordinance mandated a particular gaming activity, the mandate could not be valid or binding if it conflicted with IGRA's requirements, as is the case for defendants' video gaming. Indeed, *Ex parte Young* purposefully provides a vehicle to adjudicate the validity of the law under which a public official acts. *Whole Woman's Health*, 595 U.S. at 39; *Virginia Office*, 563 U.S. at 254; *Green v. Mansour*, 474 U.S. 64, 68 (1985).

Broadening their approach, defendants argue that "restrain[ing] the [tribes] from operating video games of chance" would "'interfere with [the tribes'] public administration.'" SMSC MTD p.22 (quoting *Virginia Office*, 563 U.S. at 255). That again reflects a misunderstanding of both Running Aces' claims and established doctrine. A judgment does *not* interfere with public administration in the "precise situation" of this case, namely, where "a federal court commands a [tribal] official to do nothing more than refrain from violating federal law." *Virginia Office*, 563 U.S. at 255.

Equitable relief against an official would interfere with public administration in only very limited circumstances: "requiring the payment of funds from the State's treasury"; "an order for specific performance of a State's contract"; or "the functional equivalent of a quiet title suit against" the sovereign because it "would extinguish the [sovereign's] control over a vast reach of lands and waters long deemed by the [sovereign] to be an integral part of its territory." *Virginia Office*, 563 U.S. at 256-257; *see Coeur d'Alene*, 521 U.S. at 281-283. None of those circumstances is present.

The requested equitable relief would not require any payment by the tribes or specific performance of a contract, or extinguish any core tribal rights. Running Aces' claim is that the tribes' gaming does not comply with IGRA's requirements, and again, the tribes' right to conduct gaming extends only as far as IGRA allows it. The claims would not forever prohibit the tribes from operating video games of chance; the tribes could lawfully resume that gaming activity if the State amended its laws to "permit[] … any person" to conduct the same gaming activity. Nor do Running Aces' claims threaten tribal governance: again, if successful, they would not invalidate any gaming compact, any tribal gaming ordinance, or the process by which any such action is made, and the tribes have no right to conduct gaming that is not "lawful" under IGRA. The claims challenge only commercial actions taken by officials responsible for the tribes' commercial gaming enterprises.

3. Defendants also contend that the *Ex parte Young* doctrine does not permit tribal officials to be compelled to comply with *state* law. PIIC MTD p.22; SMSC MTD p.23; MLCV MTD pp.19-20. Even if correct, that would not touch Running Aces' request for injunctive and declaratory relief with respect to violations of *federal* law, i.e., RICO. *See* Compl. ¶¶ 56, 230, 246, 262, Prayer for Relief (c). Regardless, defendants are incorrect. *Ex parte Young* applies whenever an official "comes into conflict with the superior authority" of another law, for in that circumstance the sovereign has "no power to impart to him any immunity." *Virginia Office*, 563 U.S. at 254; *see Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327 (2015) (*Ex parte Young* applies even "with respect to violations of federal law by federal officials"). Federal and state criminal

law are superior to tribal law, even on tribal lands, *supra* I.B.1-2, and therefore *Ex parte Young*'s exception is available to restrain tribal officials from violating federal and state law on tribal lands.

Defendants cite the Supreme Court's holding in *Pennhurst State School & Hospital v. Halderman* that *Ex parte Young* is "inapplicable in a suit against state officials on the basis of state law," 465 U.S. 89, 106 (1984). SMSC MTD p.23; PIIC MTD p.22. That holding, however, rested on the "intrusion on state sovereignty [that occurs] when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. at 106. That dynamic is absent when a federal court instructs a tribal official on how to conform to state law. Accordingly, the Supreme Court and various circuit courts have directly rejected defendants' position, holding that *Ex parte Young* is available to restrain tribal officials from violating *state* law. *See Bay Mills*, 572 U.S. at 791, 796; *PCI Gaming*, 801 F.3d at 1290; *Gingras v. Think Finance, Inc.*, 922 F.3d 112, 122-123 (2d Cir. 2019) ("There is a minimal intrusion on sovereignty if federal courts are available as forums for enforcing violations of a state's law against tribal officials because tribes cannot empower their officials to violate state law the way a state can interpret its own laws to permit a state official's challenged conduct."); *Hengle*, 19 F.4th at 344-346.

Defendants suggest that insofar as *Ex parte Young* is available to restrain tribal officials from violating state law, that is only for conduct *off* Indian lands. MLCV MTD pp.19-20; PIIC MTD p.22. Although the cases involved off-lands activity, none held or implied that *Ex parte Young* was limited to such conduct. Their premise was that *Ex*

parte Young is available whenever tribal officials are subject to superior law. *See Bay Mills*, 572 U.S. at 791, 795-796 ("Indians going beyond reservation boundaries are subject to any generally applicable state law."); *PCI Gaming*, 801 F.3d at 1290; *Gingras*, 922 F.3d at 121; *Hengle*, 19 F.4th at 346. Here, defendants are subject to superior federal and state laws on tribal lands insofar as their gaming activities do not comply with IGRA, *supra* I.B.1-2; *infra* IV.A, and therefore *Ex parte Young* is available to prohibit such activity.[20]

4. Defendants argue that Running Aces' requested declaratory relief would be retrospective, not prospective, because Running Aces asked the Court to declare that defendants' video gaming "has been" illegal, Prayer for Relief (a). *See* SMSC MTD p.23. That is irrelevant as a practical matter because the requested *injunction* is undisputedly prospective.

Regardless, so is the declaration. The essence of a prospective declaration is that it "is meant to define the legal rights and obligations of the parties in anticipation of *some future conduct*, not simply to proclaim liability for a past act." *Justice Network Inc. v. Craighead County*, 931 F.3d 753, 764 (8th Cir. 2019). Thus, declaratory relief is unavailable under *Ex parte Young* only if the declaration would be "purely retrospective," *id.*, i.e., when "[t]here is no claimed continuing violation of … law" and the declaration

[20] The Eighth Circuit's decision in *Santee Sioux Tribe of Nebraska v. Nebraska*, 121 F.3d 427, 431-432 (8th Cir. 1997), which defendants lump into this category, PIIC MTD p.22, is irrelevant to the applicability of *Ex parte Young* here. It concerned only whether the *State and the governor* were immune.

"would have much the same effect as a full-fledged award of damages," *Green*, 474 U.S. at 73. *See also, e.g.*, *Verizon Maryland*, 535 U.S. at 646 (*Ex parte Young* applied where plaintiff sought "a declaration of the *past*, as well as the *future*, ineffectiveness of the Commission's action," and thus "does not impose upon the State a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials" (emphasis omitted)); *Freedom From Religion Foundation v. Abbott*, 955 F.3d 417, 424-425 (5th Cir. 2020) (sovereign defendant immune only if declaration would be "purely retrospective," i.e., when there is no "ongoing violation of … law" and declaration "is tantamount to an award of damages for a past violation of law"); *PeTA, People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1202 n.2 (10th Cir. 2002) (declaration retrospective only "to the extent that it is intertwined with a claim for monetary damages that requires [the court] to declare whether a past [legal] violation occurred").

Running Aces' requested declaration is prospective. The declaration does not seek (purely or at all) to impose any monetary liability for past conduct. The Complaint alleges illegal conduct that is and will continue occurring, and accordingly the requested relief would declare that the conduct "has been" illegal in order to prevent its continuation, Compl. Prayer for Relief (a). To avoid doubt, however, the Court could declare that defendants' conduct "is" illegal.

5. Finally, under the "sovereign immunity" banner, defendants raise several arguments that actually involve the merits: that their conduct is "lawful" and "authorize[d]" by IGRA, SMSC MTD pp.22, 24, and that *Ex parte Young* is unavailable

because Running Aces lacks "a private cause of action," SMSC MTD p.23. "[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Maryland*, 535 U.S. at 646; *see also Coeur d'Alene*, 521 U.S. at 281 ("An *allegation* of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction." (emphasis added)). These arguments are refuted elsewhere. *See supra* I; *infra* IV.

B. Sovereign Immunity Does Not Bar Running Aces' Damages Claims Because They Are Asserted Against Defendants Only in Defendants' Individual Capacity

Running Aces seeks damages for defendants' past illegal gaming activities. Because Running Aces asserts these claims against defendants only in their individual capacity, the claims are not barred by sovereign immunity. Defendants' argument that the tribes and their gaming instrumentalities are the "real parties in interest," SMSC MTD p.19; PIIC MTD p.22; MLCV MTD p.20, is foreclosed by precedent.

1. "The identity of the real party in interest dictates what immunities may be available," and "[t]he distinction between individual- and official-capacity suits is paramount here." *Lewis*, 581 U.S. at 162-163. Although "[d]efendants in an official-capacity action may assert sovereign immunity, … sovereign immunity does not erect a barrier against suits to impose individual and personal liability." *Id.* To distinguish the two capacities, *Lewis* adopted a "remedy-focused analysis." *Acres Bonusing, Inc v. Marston*, 17 F.4th 901, 910-912 (9th Cir. 2021). "In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. … The real party in interest is the government entity, not the

named official." *Lewis*, 581 U.S. at 162. In contrast, individual-capacity suits seek "to impose *individual* liability upon a government officer for [their] actions." *Id.* Therefore, "in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated"—even if the defendant "was acting within the scope of his employment at the time" of the harmful act. *Id.* at 158; *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 697 (8th Cir. 2019) ("claims against tribal officers acting in their individual capacities are not barred by the Tribe's sovereign immunity"). In short, under the Supreme Court's remedy-focused analysis, "[t]he critical inquiry is who may be legally bound by the court's adverse judgment." *Lewis*, 581 U.S. at 165.

This remedy-focused rule accords with the rule for damages claims against *state* officials in their individual capacity. *See Alden v. Maine*, 527 U.S. 706, 757 (1999) ("Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally."); *Pennhurst*, 465 U.S. at 107 ("the general criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought").

Running Aces asserts claims for money damages against defendants only in their individual capacity. Compl. Prayer for Relief (b). The damages claims "will not bind the Tribe or its instrumentalities in any way"—they "will not require action by the sovereign or disturb the sovereign's property." *Lewis*, 581 U.S. at 163, 165. Rather, the individual defendants alone will be subject to the monetary obligation. Therefore, the individual

defendants, not the tribes or their instrumentalities, are the real parties in interest behind the damages claims, and accordingly the damages claims are not barred by sovereign immunity.

2. Disregarding these binding precedents, defendants argue that, "in their individual capacities, [they] do not have the ability to offer [the illegal gaming], nor are they alleged to have done so." SMSC MTD pp.21, 24-25. That is irrelevant. As an exception to sovereign immunity, individual-capacity suits impose personal liability for actions that government officials took while acting on the government's behalf. *See Native American Distribution v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008) ("The general bar against official-capacity claims … does not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities …."). Otherwise, for example, there could be no individual-capacity liability for constitutional violations, such as excessive force or unreasonable seizure. As *Lewis*' remedy-focused analysis makes clear, what matters is the capacity in which the defendant will be bound by the judgment, not the capacity in which the defendant acted.

3. Defendants also assert that "Running Aces' primary remedies"—meaning, according to defendants, the declaration and injunction—"lie exclusively against" the tribe. SMSC MTD p.20; PIIC MTD p.23; MLCV MTD pp.23-24. It is the requests for such prospective equitable relief, defendants say, that "would require action by the sovereign and disturb the SMSC's Indian lands," SMSC MTD pp.20-21, or "would directly interfere with the tribe's administration of its gaming operations[and] its

property," MLCV MTD p.24. Defendants' attempt to cloud the issue by mixing and matching claims and relief for immunity purposes—turning to the official-capacity equitable claims to try to show the effect of the individual-capacity damages claims—is telling. As just explained, the only question for immunity purposes with respect to the damages claims is whether the *monetary liability* would bind the tribe or its property, and defendants have no argument that it would.

Defendants assert that the damages "claims require adjudication of[] the legality of the [tribes'] gaming compacts, the validity of the [tribes'] Gaming Ordinance[s], [and] the legality of operations by [tribal] governmental department[s]"—the gaming enterprises—"that exist[] to generate revenue for government services." PIIC MTD pp.19, 23. The first two parts of that are false: Running Aces' claims do not question the legality of any gaming compact or tribal gaming ordinance. Running Aces claims that the non-blackjack card games were illegal because they were conducted outside the compacts, and the video gaming is illegal because state law does not "permit[] … any person" to engage in that gaming activity. *Supra* I.A.

The third part—that the claims require adjudication of the legality of the gaming operations—is true but irrelevant for immunity purposes because, again, individual-capacity damages claims are permitted against sovereign officials for actions taken within the scope of their authority. The Supreme Court rejected defendants' position in the analogous context of suits against state officers: courts may "impos[e] personal liability on state officers" even though their conduct was "within their authority and necessary to

fulfilling governmental responsibilities" and even though the liability "may hamper their performance of public duties" in the future. *Hafer v. Melo*, 502 U.S. 21, 28, 31 (1991).

Correspondingly, defendants' position contradicts the Supreme Court's extension of immunity principles to tribal officials in *Lewis*. Even if the damages claims would dissuade tribal employees from offering similar gaming activities in the future, that would not amount to "interfer[ing] with the public administration" and the tribes would still not be the real parties in interest behind the damages claims, MLCV MTD pp.20-21—otherwise, individual-capacity damages claims would routinely be barred. As the Ninth Circuit has explained, under *Lewis*' "remedy-focused analysis," "[r]eferences to 'interfering with the public administration' of the tribe can … only be understood in connection with the fundamental principle that the 'remedy sought' governs the tribal sovereign immunity analysis." *Acres Bonusing*, 17 F.4th at 910-912. Thus, when a plaintiff seeks "money damages not from the tribal treasury but from the tribal defendants personally," tribal defendants cannot show that "the judgment would interfere with tribal administration." *Id.* at 912. Otherwise, courts "would seemingly end up applying tribal sovereign immunity [to individual-capacity damages claims] whenever a tribal employee was acting within the scope of her employment" "because any suit against a tribal employee for conduct in the course of her official duties almost inevitably has some valence to tribal governance"—but that result "is precisely what the Supreme Court in *Lewis* said not to do." *Acres Bonusing*, 17 F.4th at 912.

Accordingly, the Ninth Circuit has held that sovereign immunity did not bar individual-capacity claims (including a RICO claim) against a tribal judge for damages

stemming from his decision in a case, even though the judge's adjudicative act was plainly related to "tribal governance." *Acres Bonusing*, 17 F.4th at 905-906, 911. Nor did sovereign immunity bar individual-capacity damages claims against a tribal police chief, a tribal gaming inspector, and the general manager of a tribal casino for detaining the plaintiffs and seizing their property in retaliation for their gambling success at a tribal casino. *Pistor v. Garcia*, 791 F.3d 1104, 1108-1109, 1113-1114 (9th Cir. 2015); *see also Rabang v. Kelly*, No. 2:17-cv-00088, 2017 WL 1496415, at *1-2, 7 (W.D. Wash. Apr. 26, 2017) (sovereign immunity did not bar individual-capacity RICO damages claim against members of tribal council for disenrollment decisions).

The PIIC defendants incorrectly assert that "[h]olding members of a tribal council—or subordinate tribal officers—liable for tribal council decisions 'would interfere with the tribe's internal governance' and 'attack[] the very core of tribal sovereignty.'" PIIC MTD p.23 (quoting *Pistor*, 791 F.3d at 1113). Running Aces seeks to hold defendants liable for a commercial, proprietary function or, at most, an executive function, not *legislative* functions." *Pistor*, 791 F.3d at 1113 (emphasis added) (quoting *Maxwell v. County of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013)); *see supra* pp.35-36; *infra* V.A. Moreover, the validity of *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985)—the legislative-function case *Pistor* was describing in the passage relied on by defendants—is dubious because it was rendered in a pre-*Lewis* case where, unlike here, the plaintiff "did not … identify which officials were sued in their individual capacities," and thus it "was in reality an official capacity suit." *Maxwell*, 708 F.3d at 1089; *see also Pistor*, 791 F.3d at 1113; *Acres Bonusing*, 17 F.4th at 913.

4. With one exception, none of the post-*Lewis* cases defendants cite held otherwise, i.e., held that an individual defendant was immune from a monetary claim for which the individual but not the sovereign entity would be liable. Rather, they involved monetary liability imposed directly on the tribe or an instrumentality thereof (which is barred by sovereign immunity under *Lewis*), or injunctive relief binding on the tribe or an instrumentality thereof (which does not fit the *Ex parte Young* exception). *See, e.g.*, *Mestek v. LAC Courte Oreilles Community Health Center*, 72 F.4th 255, 262 (7th Cir. 2023) ("Critically, however, any monetary relief would come from the [tribe's] Health Center's coffers. And reinstatement, as well, would likewise require action on the part of the Health Center, not the individual defendants."), *cited in* MLCV MTD p.21; *see also Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100, 1103, 1106 (8th Cir. 2012) (third-party subpoena upon tribe), *cited in* PIIC MTD p.23.

The lone exception is the Seventh Circuit's nonprecedential order in *Genskow v. Prevost*, 825 F. App'x 388 (7th Cir. 2020), which defendants cite for the proposition that "[w]hen a [tribal] official follows directives inherent in their employment responsibilities, generally the real party in interest is" the tribe. SMSC MTD pp.20-21; *see* PIIC MTD p.23; MLCV MTD pp.21, 23. There, the *pro se* plaintiff sought damages against the tribal chairman and several tribal police officers for forcibly removing her from a meeting of the tribal council, and the court declared the claims barred by the tribe's sovereign immunity. 825 F. App'x at 389. The court reasoned: "[W]ith regard to the Tribal Chairman's directive to remove Genskow from the meeting[,] the tribe is the real party in interest because the officers' actions 'in essence' were the tribe's own. In carrying out the

Chairman's directive [to remove the plaintiff], the officers were acting merely as 'an arm or instrumentality' of the tribe." *Id.* at 391. And with respect to the "claims against the individual officers for using excessive force while removing [the plaintiff] from the meeting," the court reasoned: "Allowing this suit to proceed would be at odds with tribal self-government and undermine the authority of tribal forums" because the "excessive force [was used] while removing her from a meeting of the Nation's governing body on tribal land at the Tribal Chairman's direction." *Id.*

Genskow is irrelevant for two reasons. First, again, Running Aces' claims do not challenge the conduct of any tribal council hearing or otherwise threaten to interfere with a tribal *legislative process*, but rather merely contend that commercial activity violated federal and state statutes. Second, Running Aces' claims do not depend on defendants' having been "directed" by a tribal council to conduct their illegal gaming activities, nor is there evidence of that.

In any event, *Genskow* is incorrect: it applied a conduct-focused analysis rather than the remedy-focused analysis required by *Lewis*. And *Genskow*'s treating an individual official as an "arm or instrumentality of the tribe" would obliterate *Lewis*' holding that immunity does not preclude individual-capacity damages claims even when the defendant was acting within the scope of employment. The Seventh Circuit's later *precedential* decision in *Mestek* got it right. *Supra* II.B.1.

5. Finally, defendants argue that Running Aces' "claims cannot plausibly be characterized as personal capacity claims for the additional reason that [Running Aces] fails to allege any personal conduct by the … Defendants." PIIC MTD pp.22, 24; *see*

also SMSC MTD pp.21, 27; MLCV MTD p.21. Similarly, they argue that "the collective actions of government officials are not sufficient to establish any personal capacity claim" because "members of the Tribal Council … cannot conspire." PIIC MTD p.24. Those arguments are irrelevant to sovereign immunity: as defendants' invocation of "the basic *Iqbal* standard for alleging liability" shows, PIIC MTD p.24, and as their own cited authority says, those arguments "confuse the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action." *Larson*, 337 U.S. at 692-693, *cited in* PIIC MTD p.24. And as already explained, those arguments are incorrect: the Complaint contains sufficient individual allegations, *supra* I.C, and defendants' relative conduct did not involve council action, *supra* pp.35-36.

In the nonprecedential *Garden State Electrical Inspection Services Inc. v. Levin*, the amended complaint simply "did not specify whether [the plaintiff] sought to recover from the Commissioner in her official or personal capacity." 144 F. App'x 247, 251 (3d Cir. 2005), *cited in* PIIC MTD p.24. The amended complaint had merely "substituted" the Commissioner and other officials for the government agency named in the initial complaint and lacked "any particularized allegations or facts which suggest that the Commissioner or any of the unnamed defendants had any personal involvement in the alleged selective and improper enforcement of the Code"; therefore, the court concluded that the complaint still asserted only official-capacity claims. 144 F. App'x at 251-252. Here, in contrast, the Complaint contains extensive allegations pointing specifically to the conduct of the individual defendants and unmistakably asserts the damages claims solely in their individual capacity. *Supra* I.C.

III. RUNNING ACES HAS ARTICLE III AND RICO STANDING

Defendants present various arguments that Running Aces lacks Article III standing and RICO standing. Because many of those arguments are intertwined, they are refuted together.

A. The Complaint Adequately Pleads Cognizable Injury

Under Article III, "the plaintiff must have suffered an 'injury in fact' that is both concrete and particularized and actual or imminent, not conjectural or hypothetical." *Department of Education v. Brown*, 600 U.S. 551, 561 (2023). "[I]ntangible injuries can nevertheless be concrete." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). And RICO requires that the plaintiff show it was "injured in [its] business or property." § 1964(c). The Eighth Circuit has held that the RICO injury cannot be to an "intangible property interest." *Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 660 (8th Cir. 2012).[21]

1. The MLCV defendants assert that Running Aces "does not actually allege decreased revenues." MLCV MTD p.32. The Complaint says otherwise: "[D]efendants' conduct relating to the illegal gambling activities … deprived Running Aces of substantial sums of business revenue and profit. That conduct directly deprived Running

[21] The Eighth Circuit's requirement of a tangible injury contradicts the RICO statute's plain text, which requires only injury to "business or property," § 1964(c), and the Supreme Court's declaration that "'[c]oncrete' is not … necessarily synonymous with 'tangible'"; "concrete" simply means the injury "must actually exist," *Spokeo*, 578 U.S. at 340. The Eighth Circuit's position traces to *Berg v. First State Insurance Co.*, 915 F.2d 460, 464 (9th Cir. 1990). *Berg*, however, does not support the position; it rejected the RICO claim only because the injury to the asserted "intangible property interest" actually "describe[d] a personal injury in the form of emotional distress," which was an injury to neither "business" nor "property." *Id.* Running Aces reserves this issue for appellate review.

Aces of gaming patrons it would have otherwise served, and thus deprived Running Aces of the profits it would have otherwise earned from those patrons through casino card games, as well as through ancillary horse racing and food and beverages." Compl. ¶ 228; *see also* Compl. ¶ 10.

2. Under the label of "constitutional standing," the PIIC defendants contend that Running Aces' lost business income is "conjectural and hypothetical" because Running Aces "cannot show that the alleged injury is 'factually and proximately caused' by" defendants' illegal conduct. PIIC MTD p.28 (quoting *Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 446-447 (8th Cir. 2000)). That argument conflates distinct doctrinal questions: "conjectural and hypothetical" is an Article III injury-in-fact concept (as just explained), whereas "factually and proximately caused" is a causation concept and, as *Newton* said, "proximate" cause is uniquely a RICO requirement. *See Bennett v. Spear*, 520 U.S. 154, 168-169 (1997) ("wrong[]" to "equate" Article III's "fairly traceable" requirement to "proximate cause"). Injury-in-fact is addressed here; causation, later.

For Article III purposes, an injury is not "conjectural or hypothetical" if it is "actual or imminent." *Brown*, 600 U.S. at 561. Running Aces' lost income easily meets this standard. Courts have routinely recognized that "lost sales" is a cognizable injury-in-fact. *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014). By definition, Running Aces' past lost income (for the damages claims) is actual. As for future lost income (for the equitable claims), the Complaint alleges that defendants' illegal video gaming will continue absent relief, ensuring that their conduct will imminently divert patrons from Running Aces. Compl. ¶¶ 10, 78, 80, 130, 182, 225-

228; *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 162-163 (2014) (requirement satisfied if "there is a substantial risk that the harm will occur").

3. Defendants also advance the RICO-specific contention that Running Aces' "lost revenue and profit" is not a "'concrete financial loss,'" but rather is "[i]njury to mere expectancy interests or to an intangible property." SMSC MTD p.34. Defendants have their categories wrong. "RICO [was] designed to remedy economic injury," *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 151 (1987), and lost business income is as concrete as any other economic injury. Thus, under RICO, "there is no automatic rule against the recovery of any type of lost profits or lost value damages." *Maiz v. Virani*, 253 F.3d 641, 663-664 (11th Cir. 2001) (collecting cases); *see, e.g.*, *BCS Services, Inc. v. BG Investments, Inc.*, 728 F.3d 633, 638 (7th Cir. 2013) (holding: "the profit [the plaintiffs] would have made had the fraud not prevented them from being awarded [more] tax liens" on real estate was cognizable RICO injury and such "a money loss" was not "a deprivation of intangible rights," unlike, e.g., "a right to honest service by an agent").

Defendants' cases confirm that Running Aces' RICO injury is concrete. In most of them, the problem was the total absence of financial loss. *See Gomez*, 676 F.3d at 661-662 (plaintiffs "fail to allege a concrete financial loss" because they alleged no "financial harm" *at all* but rather admittedly "received" the desired services at "market rates"), *cited in* SMSC MTD p.34 *and* MLCV MTD p.30; *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606-607 (5th Cir. 1998) (no "tangible financial loss" because plaintiffs "received … precisely what they bargained for"), *cited in* SMSC MTD p.34 *and* MLCV MTD p.30; *In*

re Taxable Municipal Bond Securities Litigation, 51 F.3d 518, 523 (5th Cir. 1995) (collecting cases), *cited in* MLCV MTD pp.30-31. In their remaining case, the injury did not qualify because the plaintiff was not "in the 'business' of gambling" and had no "property" right "in the opportunity to gamble under [certain] circumstances." *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 3 F. Supp. 2d 518, 534 (D.N.J. 1998), *cited in* PIIC MTD p.29.

B. The Complaint Adequately Pleads Causation

Both Article III and RICO require causation. Under Article III, "the plaintiff's injury must be fairly traceable to the challenged action," i.e., "there must be a causal connection between" the two. *Brown*, 600 U.S. at 561. RICO's requirement that the injury be "by reason of a violation of" RICO, § 1964(c), requires "proximate cause," *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9 (2010). Reflecting "common-law foundations," RICO "thus requires some direct relation between the injury asserted and the injurious conduct alleged. A link that is too remote, purely contingent, or indirect is insufficient." *Id.*

1. Defendants attach various labels to their causation challenges, e.g., that the lost income "is based upon a series of unsupportable inferences," MLCV MTD p.31, or is "speculative," SMSC MTD pp.34-35; PIIC MTD pp.28-30. But defendants' central underlying argument, against both Article III causation and RICO causation, is this: the Complaint's "assum[ption] … that *all* consumers would have gambled at Running Aces but for [defendants'] decision to 'illegally' offer card games and video games of chance" "does not account for other variables" affecting potential patrons' choice of where to

game, including another non-tribal card room (Canterbury Park), the "geographic separation of the businesses," and defendants' casinos' "non-gaming amenities." MLCV MTD pp.31-32; PIIC MTD pp.28-30.

That argument rests on a false premise: Running Aces did not claim, nor need it claim, that but for defendants' illegal gaming, *all* of defendants' patrons would have *always* patronized Running Aces' casino (for the damages claims) or would *always* do so in the future (for the prospective claims). Running Aces need only allege that, but for defendants' illegal gaming, *some* of defendants' patrons would *sometimes* have chosen or would choose Running Aces instead. The extent to which patrons would have chosen Running Aces instead affects only the measure of damages, which is not to be resolved on a motion to dismiss. *See Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 644 n.3 (2008).

And the Complaint's allegations are sufficient to plausibly show the requisite causal connection between defendants' RICO violations and Running Aces' lost business income. "[O]n a motion to dismiss[, courts] presume that general allegations embrace those specific facts that are necessary to support the claim," including with respect to RICO causation. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994). Therefore, the Complaint's general allegations that defendants' illegal gaming activities drew patrons away from Running Aces, reducing its business income, suffices. *See Bridge*, 553 U.S. at 644 n.3 (on motion to dismiss, "it suffices that respondents allege they 'suffered the loss of property related to the liens they would have been able to

acquire, and the profits flowing therefrom, had petitioners not implemented their scheme'").

The Complaint buttresses its general allegations with more specific ones. The Complaint alleges that Running Aces competes directly with defendants' casinos. Compl. ¶¶ 10, 78, 80, 130, 182, 225-228. The Complaint elaborates that Running Aces and defendants' casinos offer the same or similar gaming activities in the same geographic area. Compl. ¶¶ 10, 223, 225-226. SMSC admitted that its casinos are "economic competitor[s] to Running Aces." *MRC*, 2024 WL 4259301, at *2. The 50-or-so miles between Running Aces and PIIC's casino, PIIC MTD p.29, do not impede their competition; for example, many potential patrons living in between them, in the Twin Cities, could drive to either within about a half hour. Even the two defendant casinos that are farthest from Running Aces—the Grand Casinos—directly target Running Aces' patrons. *See* Decl. of Aaron Bedessem, Exhibits.

And from that competition, the causal connection to the injury follows naturally. Because "[s]ales gained by one are … likely to come at the other's expense," "[e]vidence of direct competition is strong proof" of "causation" between a plaintiff's lost sales and a defendant's wrongful marketing to consumers. *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 825 (9th Cir. 2011). Here, the Complaint alleges that through their illegal activities, defendants' casinos "offer an overlapping and broader set of gaming options than Running Aces was legally permitted to offer," which draws gaming patrons away from Running Aces. Compl. ¶¶ 10, 78, 80, 130, 182, 225-228. Without their illegal games, defendants' casinos would be left with just traditional poker, blackjack, and bingo

and bingo-like games, making Running Aces' offering of traditional poker, blackjack, *and* various other casino card games—e.g., Mississippi Stud, Three Card Poker, Four Card Poker, and Ultimate Texas Hold'Em—strongly attractive to anyone interested in card gaming. Compl. ¶¶ 223, 226.

Defendants' cases finding no RICO causation involved very different situations. For example, in *Anza v. Ideal Steel Supply Corp*., the plaintiff claimed that by underpaying taxes, its competitor became economically able to lower its prices, but the Supreme Court found no proximate cause because the cause of the plaintiff's harm was "a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)," given that the "lowering of prices in no sense required [the competitor] to defraud the state tax authority." 547 U.S. 451, 458-459 (2006), *cited in* PIIC MTD pp.28-29 *and* MLCV MTD pp.30, 32. Or, as the Supreme Court later put it, in *Anza* "the [competitor's] conduct directly causing the harm was distinct from the [competitor's] conduct giving rise to the" RICO violation. *Hemi*, 559 U.S. at 11 (no proximate cause where plaintiff's "theory of liability rests not just on separate *actions*, but separate actions carried out by separate *parties*"). Here, the wrongful conduct that injures Running Aces and the wrongful conduct that draws away gaming patrons are one and the same.

In *Subramanian v. Tata Consultancy Services Ltd.*, the "fraudulent scheme allegedly injured *other* employees, not" the plaintiff. 352 F. Supp. 3d 908, 918 (D. Minn. 2018), *cited in* MLCV MTD p.29. In *Los Angeles Turf Club, Inc. v. Horse Racing Labs, LLC*, the court said that the plaintiff had to allege "that at least some of those who play

[the defendant's] fantasy horse race betting online are those that would otherwise place bets at the [plaintiff's] race tracks," but the complaint's allegations actually showed the opposite: that the defendant was "targeting a different customer base" from the plaintiff. No. 15-cv-09332, 2016 WL 6823493, at *4 (C.D. Cal. May 2, 2016). And in *Club One Casino, Inc. v. Sarantos*, the defendants' gaming itself was not illegal; rather, the plaintiff alleged that the defendants had taken illegal steps to "avoid a lengthy licensing process," thereby hastening the defendants' expansion of their gaming operations. No. 1:17-cv-00818, 2018 WL 4719112, at *1 (E.D. Cal. Sept. 28, 2018), *cited in* PIIC MTD p.29. And if the *Club One* court meant that the defendants' illegal gambling business did not cause a "decrease" in the plaintiff casino's business, that conclusion could not be squared with the traditional proximate-cause standard governing RICO claims and therefore would be wrong. *See* 2018 WL 4719112, at *4-6.

2. Citing *Hamm v. Rhone-Poulenc Rorer Pharmaceuticals, Inc.*, 187 F.3d 941, 953 (8th Cir. 1999), defendants contend that Running Aces "cannot establish the required 'direct relation'" for RICO causation because (they say) Running Aces' injury "is derivative and incidental to the harm [defendants' casinos'] patrons would suffer were the games at issue actually illegal." MLCV MTD pp.33-34. Defendants misunderstand the RICO concept of derivative injury. Likening the RICO standard to the antitrust indirect-purchaser rule, the Eighth Circuit has explained that it bars recovery where "the plaintiff's injury is one directly passed-through to the plaintiff by a target of the … violation." *Newton*, 207 F.3d at 447. That does not apply here: there is no indication or suggestion that defendants' RICO violations inflicted economic loss on their *patrons*, but

even if that happened, Running Aces' lost income would not be the loss suffered and passed through by those "intermediaries." *Id.*; *see Bridge*, 553 U.S. at 658 (even though defendants had made misrepresentations to third-party county, not to plaintiffs, plaintiffs had RICO standing because they "were the *only* parties injured by [defendants'] misrepresentations").

Hamm does not help defendants, either. There, the plaintiffs did not claim to be injured by any RICO predicate acts; they claimed to be injured by the RICO violators in retaliation for "critiz[ing] or refus[ing] to participate in the [RICO] scheme." 187 F.3d at 952. Put simply, as in *Anza* and *Hemi*, in *Hamm* the acts that harmed the plaintiffs were different from the RICO violations, whereas here, a straight line runs from defendants' RICO violations through patrons' choices about where to game to Running Aces' lost income.

That Running Aces' claims meet RICO's proximate-cause requirement is confirmed by *Bridge*, which defendants ignore. There, the plaintiff alleged that competing bidders had fraudulently won valuable rights on certain real estate from the county. The Court found proximate cause: "Because of the zero-sum nature of the auction, and because the county awarded bids on a rotational basis, each time a fraud-induced bid was awarded, a particular legitimate bidder was necessarily passed over." *Hemi*, 559 U.S. at 14; *see Bridge*, 553 U.S. at 658-659. Here, each patron decision about where to gamble is zero-sum between Running Aces and defendants' casinos, and by enticing patrons with their illegal games, defendants cause Running Aces to be passed over by patrons at least sometimes. *See also Bridge*, 553 U.S. at 659-660 ("[S]uppose an

enterprise that wants to get rid of rival businesses mails misrepresentations about them to their customers and suppliers, but not to the rivals themselves. If the rival businesses lose money as a result of the misrepresentations, it would certainly seem that they were injured in their business 'by reason of' a pattern of mail fraud."); *Mid Atlantic Telecom, Inc. v. Long Distance Service, Inc.*, 18 F.3d 260, 263 (4th Cir. 1994) (RICO proximate cause met where defendant used fraudulent scheme to "entice customers away" from plaintiff); *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995) (same); *see also Lexmark*, 572 U.S. at 137.

3. Defendants also invoke a "zone of interest" test, arguing: "There is no evidence that the alleged predicate acts and underlying statutes Running Aces seeks to enforce were designed to protect competition among casinos and card clubs or ensure that they compete." MLCV MTD pp.34-35 (citing *Newton*, 207 F.3d at 445-447, and *Hamm*, 187 F.3d at 953-954); *see also* PIIC MTD p.30 n.8. Yet, *Hamm* shows that the principle amounts to nothing more than the proximate-cause requirement: RICO damages were barred for "injuries [that] were derivative and incidental, not direct." 187 F.3d at 953; *see Baisch v. Gallina*, 346 F.3d 366, 373 (2d Cir. 2003) (under RICO, "it is inappropriate to apply a zone-of-interests test independent of this circuit's proximate cause analysis"); *Phoenix Bond & Indemnity Co. v. Bridge*, 477 F.3d 928, 933 (7th Cir. 2007) (A "zone-of-interests approach [to RICO] drive[s] home the point that the *injury* must be direct rather than derivative. … When the injury satisfies [RICO's proximate-cause] requirements …, it cannot be knocked out by a zone-of-interests requirement ….").

In any event, Running Aces is within any statutory zone of interest. As *Hamm* shows, RICO is the only statute whose zone matters because that is the statute providing Running Aces' cause of action, *see* 187 F.3d at 953-954, and as *Bridge* shows, competitors like Running Aces are within RICO's zone, *supra* pp.59-61. Defendants cite no basis to conclude otherwise. But the same conclusion holds for Minnesota gambling law: Minnesota enacted its criminal gambling prohibitions "to regulate lawful gambling," Minn. Stat. § 349.11, which encompasses protecting *lawful* competitors, like Running Aces, from the harms of *unlawful* gambling operations.

4. Finally, defendants argue that RICO "require[s] evaluating the relative causal roles" of each defendant individually, which the Complaint fails to do by "lump[ing] all the Defendants and the casinos together." PIIC MTD p.30. Defendants are wrong about what RICO requires. A civil RICO plaintiff need show only that *the scheme or* "*conspiracy* … proximately cause[d]" the injury. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 276 (1992) (emphasis added).

Moreover, individualization of causation is irrelevant because RICO liability is joint and several. For violations of § 1964(c), "the nature of the RICO offense mandates joint and several liability" for "all" who "participated in the enterprise responsible for the RICO violations." *Fleischhauer v. Feltner*, 879 F.2d 1290, 1301 (6th Cir. 1989); *see also United States v. Simmons*, 154 F.3d 765, 769-770 (8th Cir. 1998) (same for RICO forfeiture); *Honeycutt v. United States*, 581 U.S. 443, 447 (2017) ("If two or more defendants jointly cause harm, each defendant is held liable for the entire amount of the harm …."); *Lockard v. Missouri Pacific Railroad Co.*, 894 F.2d 299, 305 (8th Cir. 1990)

("The law is clear that where there is but one indivisible injury caused by the joint or concurrent acts of two tortfeasors, each tortfeasor is jointly and severally liable for the entire amount of damages."). Similarly, RICO imposes joint and several civil liability on all co-conspirators for violations of § 1962(d). *Oki Semiconductor Co. v. Wells Fargo Bank, National Ass'n*, 298 F.3d 768, 775 (9th Cir. 2002); *accord Aetna Casualty Surety Co. v. P & B Autobody*, 43 F.3d 1546, 1562-1563 (1st Cir. 1994). Therefore, because all defendants in each defense group participated in the same enterprises and agreed to participate in the scheme, they are jointly and severally liable and Running Aces need not allege or prove the specific portion of damages for which each defendant is separately responsible. *See* Compl. Prayer for Relief (b) (requesting joint and several damages).

C. The Complaint Adequately Pleads Redressability

Under Article III, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Brown*, 600 U.S. at 561.

Defendants do not question that monetary damages would redress Running Aces' *past* lost business. With respect to *future* lost business, however, defendants challenge redressability because, they say, "Running Aces failed to plead that [defendants] have the authority to … stop the operation of the [tribes'] video games of chance." SMSC MTD pp.24-25; *see* PIIC MTD p.28; MLCV MTD pp.17-19. That is incorrect. As explained above, defendants are executives responsible for gaming strategy, operations, finance, and marketing at the tribes' casinos and their broader commercial and gaming enterprises; Running Aces seeks prospective relief against them in their *official* capacity; and restraining these officials will restrain the tribes because the tribes can only act through

their officials. Once again, defendants' argument confuses the official- and personal-capacity claims and flouts the doctrine of *Ex parte Young*. *See supra* II.A.

The PIIC defendants try another tack: Running Aces "alleges an injury caused by the [tribe], the State, and the United States, who collectively authorized, approved, and regulated the games [Running Aces] challenges here. But they are not parties and would not be bound by any judgment." PIIC MTD p.28. As explained later, the State's and the United States' absence is irrelevant because Running Aces does not claim that the authorizing, approving, or regulating of defendants' gaming activities injured it; Running Aces claims that it was injured by defendants' *conducting the games*, in which neither the State nor the United States had any role. *Infra* VI.A.2.a-b.

IV. RUNNING ACES HAS RIGHTS OF ACTION FOR DAMAGES AND EQUITABLE RELIEF

Defendants argue that Running Aces lacks a private right of action because IGRA precludes the RICO damages claims and because equity cannot enjoin future criminal conduct. Both arguments are wrong.

A. IGRA Did Not Impliedly Repeal RICO's Private Right of Action

Defendants argue that IGRA impliedly repealed RICO's civil right of action: "IGRA's detailed remedial scheme forecloses private RICO claims against gaming on Indian land to the same extent as claims invoking IGRA directly." PIIC MTD pp.15-17; *see also* SMSC MTD pp.29-30. Defendants are incorrect.

"[R]epeals by implication are not favored and are a rarity." *Maine Community Health Options v. United States*, 590 U.S. 296, 315 (2020). "An implied repeal will only

be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009). IGRA does not meet this standard. Publicly enforced criminal law is the foundation on which civil RICO sits: RICO allows a private victim to bring a civil lawsuit predicated on violations of various criminal statutes, 18 U.S.C. § 1961(1), which the "Executive Branch has exclusive authority … to prosecute," *United States v. Nixon*, 418 U.S. 683, 693 (1974); 28 U.S.C. §§ 516, 547. IGRA is just another brick in that foundation, specifying the applicability of federal and state laws that can in turn undergird predicate acts under, e.g., § 1952 and § 1955, and allocating public responsibility to enforce those offenses among the federal government, the State, and the tribe. *Supra* I.A-B. Thus, IGRA is no more irreconcilable with RICO than is any other statute that may supply the basis for a RICO predicate act.

Moreover, in the remedial context, "the *sine qua non* of a finding that Congress implicitly intended to preclude a private right of action under [a general remedial statute] is incompatibility between enforcement under [that general statute] and the [more specific] enforcement scheme that Congress has enacted." *Health & Hospital Corp. v. Talevski*, 599 U.S. 166, 187 (2023). Thus, "the existence of a more restrictive *private* remedy for statutory violations has been the dividing line between those cases in which [the Supreme Court has] held that an action would lie under [a general remedial statute] and those in which [the Court has] held that it would not." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005). But as defendants note, SMSC MTD p.30; PIIC MTD pp.13-15; MLCV MTD p.14, IGRA "contains no express private remedy, much

less a more restrictive one" than RICO, and therefore Congress could not have intended IGRA to be a substitute for civil RICO. *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246, 256 (2009); *see Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 660-661 (7th Cir. 2015) (because Higher Education Act lacks private right of action, it does not preclude civil RICO claim); *cf. Rancho Palos Verdes*, 544 U.S. at 121 ("The provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy" under a general remedial statute).

Defendants' cases refute their own position or are irrelevant. In several, the court held that one federal statute impliedly precluded a more general statute's remedial scheme, but in all those cases the court tracked the Supreme Court's dividing line just described. For example, in the only cited case involving RICO, the court held the other statute impliedly repealed civil RICO only to the extent that the other statute provided a *private* means of redress "for th[e] same substantive rights." *Torres v. Vitale*, 954 F.3d 866, 876 (6th Cir. 2020) ("the claim is precluded by the FLSA because it is seeking the exact same remedy that is provided by the FLSA"), *cited in* PIIC MTD p.15; *see also* PIIC MTD pp.15-16 (citing *EC Term of Years Trust v. United States*, 550 U.S. 429, 433 (2007), *Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273, 284-286 (1983), and *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942)).

Defendants mischaracterize *Danielsen v. Burnside-Ott Aviation Training Center*, 941 F.2d 1220 (D.C. Cir. 1991), as involving preclusion of civil RICO, *see* PIIC MTD

p.15. It held only that the Service Contract Act was not a RICO predicate act. 941 F.2d at 1229. The story is similar with respect to the nonprecedential decision in *Adams v. Eureka Fire Protection District*, where the court held only that 42 U.S.C. § 1983 could not be used to enforce another federal statute because § 1983 enforces federal "rights" and the other statute did "not create a private right" at all. 352 F. App'x 137, 138-139 (8th Cir. 2009), *cited in* PIIC MTD p.17.

Defendants also cite a line of cases from other circuits holding that another statute could not form the basis of a RICO predicate act because the statute did not create a criminal offense or provide any private right of action. *See* PIIC MTD p.16 (citing *Ayres v. General Motors Corp.*, 234 F.3d 514, 522 (11th Cir. 2000), *Arruda v. Curves International, Inc.*, 861 F. App'x 831, 835 (5th Cir. 2021), and *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1226-1227 (11th Cir. 2002)). Those cases are irrelevant because here, the predicate acts are undisputedly grounded on criminal offenses (including IGRA itself) and the pertinent question is whether one statute's remedial scheme (IGRA's) precludes another's (RICO's). If those cases addressed the question presented here, they would be foreclosed by the Supreme Court precedent just discussed holding exactly the opposite: that a statute's lack of a private remedy *defeats* the notion that it precludes the general remedial scheme.

Finally, defendants' throwaway invocation of the "primary jurisdiction" doctrine adds nothing. PIIC MTD pp.16-17. They do not contend that the doctrine actually applies here, nor could they, *see Chase v. Andeavor Logistics, L.P.*, 12 F.4th 864, 870, 876-878 (8th Cir. 2021). The one case they cite, *Hemi*, did not involve the doctrine; the

Court held only that the causal chain between the defendants' wrongful act and the plaintiffs' injury, which ran through two government agencies, was too attenuated for liability. 559 U.S. at 11-12. That is not a problem here. *See supra* III.B.

B. Equity Allows Injunction Against Defendants' Future Violations of State Criminal Law

Invoking the general principle that where "'the sole object of the suit is to enforce a criminal statute, courts will not exercise equity jurisdiction,'" defendants argue the Minnesota Legislature did not provide a private right of action for Running Aces to enjoin defendants' future violations of state criminal law. PIIC MTD p.15 (quoting *State v. Red Owl Stores, Inc.*, 92 N.W.2d 103, 109 (Minn. 1958)); MLCV MTD p.40. That argument does not touch Running Aces' request for injunctive relief *under RICO*. *See* Compl. Prayer for Relief (c). Regardless, defendants overlook that, under Minnesota law, "[a]lthough equity will not enjoin a criminal act, [equity] does have jurisdiction to enjoin an act which actually injures or threatens to injure property or rights of a pecuniary nature," even if "the act … is itself[] a violation of the criminal law." *Miller v. Minneapolis Underwriters Ass'n*, 33 N.W.2d 48, 51 (Minn. 1948); *accord Campbell v. Motion Picture Mach. Operators' Union*, 186 N.W. 781, 783 (Minn. 1922). This more-specific principle recognizes Running Aces' right of action because Running Aces alleges that defendants' criminal acts inflicted pecuniary injury to its business or property.

V. OFFICIAL OR GOVERNMENTAL IMMUNITY DOES NOT BAR RUNNING ACES' DAMAGES CLAIMS

Defendants invoke a smorgasbord of personal immunities: legislative, quasi-judicial, qualified, and *Westfall*. These defenses could apply only against the damages

claims, and thus they do not touch the equitable claims. And none save defendants from damages here.

A. Legislative and Quasi-Judicial Immunities Are Irrelevant Because Defendants' Wrongful Conduct Was Neither Legislative nor Judicial

The SMSC and PIIC defendants argue that those among them who are or were members of a tribal council are absolutely immune. SMSC MTD pp.26-27; PIIC MTD pp.26-27; *see* Compl. ¶¶ 81.a-e, 184-190. This argument is refuted by defendants' own words. Defendants explain that "legislators are entitled to absolute immunity from civil liability for their legislative activities," and legislative activities consist of "introducing, voting for, and signing an ordinance" or "resolution," SMSC MTD p.26, as well as "governmental budgeting and financial management," PIIC MTD p.27. Defendants also explain that tribal officials have absolute immunity for their "adjudicative functions." SMSC MTD p.27. But defendants identify no such legislative or adjudicative acts for which Running Aces' claims would hold them liable—and there are none in the Complaint.

Defendants point to "entering into compacts with the State; adopting gaming ordinances to permit and regulate gaming at [their casinos]; [and] establishing the Gaming Commission." PIIC MTD p.27. They add that the tribes' "elected leaders must be able to rely on the Gaming Compact and Gaming Ordinance." SMSC MTD p.27. Once again, however, Running Aces' claims would not invalidate any compact, any ordinance, or any gaming commission, let alone hold anyone liable for taking, participating in, or relying on such actions. None of the compacts or ordinances

implicated by this suit requires any tribe to offer any particular gaming activity. *Supra* Background.B.1-3.

Rather, Running Aces' claims are based on defendants' decisions about what particular gaming activities to offer at their casinos and the actions that defendants took to operate, finance, and promote those particular gaming activities. Defendants call these actions "strategy, financing, and operational decisions for … a department of the government." PIIC MTD p.27; *see* SMSC MTD p.26. Just as with the federal and state governments, however, such departmental decisions are executive in nature—or, more accurately here, proprietary and commercial. *See Smith v. Lomax*, 45 F.3d 402, 405-406 (11th Cir. 1995); *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 22-23 (1st Cir. 1992); *Hughes v. Tarrant County*, 948 F.2d 918, 920-921 (5th Cir. 1991); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984); *Scott v. Greenville County*, 716 F.2d 1409, 1423 (4th Cir. 1983).

B. Qualified Immunity Is Unavailable

Defendants contend that they are entitled to "qualified immunity" under the test first formulated by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982): qualified immunity shields federal and state officials from money damages "unless [they] violated a clearly established right of which a reasonable person would have known." *Walker v. City of Pine Bluff*, 414 F.3d 989, 991 (8th Cir. 2005); *see* SMSC MTD pp.28-29; MLCV MTD pp.24-26. "To prevail at this stage in the proceedings, [defendants] must show they are entitled to qualified immunity on the face of the

complaint." *Baude v. Leyshock*, 23 F.4th 1065, 1071 (8th Cir. 2022). For several reasons, defendants' contention fails.

1. Qualified immunity does not apply to Running Aces' damages claims. Qualified immunity governs monetary liability for violations of civil rights, such as liability arising under 42 U.S.C. § 1983 or the Constitution directly (a.k.a. *Bivens* actions). *See Camreta v. Greene*, 563 U.S. 692, 705 (2011). RICO says nothing about qualified immunity, and neither the Supreme Court nor the Eighth Circuit has held that qualified immunity applies to RICO damages claims, which is not a civil rights statute but rather imposes civil liability for criminal conduct. *Cf. Sinclair v. Hawke*, 314 F.3d 934, 943-944 (8th Cir. 2003) (applying qualified immunity to civil rights claims under 42 U.S.C. §§ 1981-1982 but not to RICO claims based on same conduct).

Nor would it make sense to extend qualified immunity to RICO claims, particularly in a case like this. The purpose of qualified immunity is to "protect[] government's ability to perform its traditional functions" by "prevent[ing] the distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Wyatt v. Cole*, 504 U.S. 158, 167 (1992). Those concerns do not arise when the governmental defendants were acting in a proprietary capacity, i.e., "function[ing] as any private corporation," because, by definition, that is not a traditional governmental function. *Owen v. City of Independence*, 445 U.S. 622, 644-645 (1980) (explaining that at common law, municipalities generally lacked immunity when acting in proprietary capacity).

Here, the damages claims are based on actions taken by defendants in a proprietary, commercial capacity: operating massive, highly lucrative gambling businesses that attract non-tribal patrons from all over and compete with non-tribal casinos. Compl. ¶¶ 10, 78, 80, 130, 182, 236, 252, 268. Therefore, qualified immunity is unavailable.

2. Even if qualified immunity were available against RICO liability, it would not take *Harlow*'s form. RICO was enacted in 1970, Pub. L. 91-452, 84 Stat. 922, thirteen years before *Harlow* was decided. Therefore, even if Congress implicitly incorporated established background immunity principles into RICO, Congress could not have incorporated *Harlow*'s standard. *See Bridge*, 553 U.S. at 650-653 (discussing conditions under which RICO incorporates common-law principles). Rather, Congress would have incorporated the immunity standard as it existed in 1970: officials are immune only if they "reasonably believed in good faith" that their conduct was lawful. *Pierson v. Ray*, 386 U.S. 547, 557 (1967); *see Wood v. Strickland*, 420 U.S. 308, 322 (1975).

3. Defendants do not qualify for immunity under either the *Pierson* standard or the *Harlow* standard. To determine whether the violated right was "clearly established" under the *Harlow* standard—an irrelevant issue under the *Pierson* standard—courts often ask whether there was "existing precedent" addressing "the particular circumstances." *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014). However, "[e]ven when no [judicial] decision involves similar facts, a right can be 'clearly established' if a reasonable public official would have known that the conduct

complained of was unlawful." *Williams v. Herron*, 687 F.3d 971, 977 (8th Cir. 2012). "The more obviously egregious the conduct in light of prevailing [legal] principles, the less specificity is required from prior case law to clearly establish the violation." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004).

Further, although "[s]uch specificity is especially important in the Fourth Amendment context, where the [Supreme] Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, [e.g.,] excessive force, will apply to the factual situation the officer confronts," *Mullenix v. Luna*, 577 U.S. 7, 12 (2015), having specific judicial precedent is much less important in a case like this, where the offenses are precisely defined in codes and the defendants' conduct does not stem from snap judgments made under pressure of the kind that police officers typically have to make, *see Walker*, 414 F.3d at 993 ("In close qualified immunity cases, the absence of judicial guidance can be significant because police officers are not expected to parse code language as though they were participating in a law school seminar."). Because the "clearly established" requirement "'is simply the adaptation of the fair warning standard' to government officials facing civil liability, … if the text of a statute clearly establishes the contours of a right, the statute alone is sufficient to put an objectively reasonable official on notice that conduct within the plain text of the statute violates that right for purposes of qualified immunity." *Robbins*, 433 F.3d at 771 (quoting *United States v. Lanier*, 520 U.S. 259, 270 (1997)); *see also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("*Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances.").

Defendants could not reasonably have believed, in good faith, that their gaming activities were illegal (under *Pierson*) and a reasonable person would have known that those activities violated clearly established law (under *Harlow*). As explained, defendants' video and card gaming activities were clearly illegal under the plain text of the Minnesota criminal code, IGRA, and RICO, as well as relevant judicial precedents, and certainly a reasonable tribal official would and should have known that. *Supra* I.A-C.

Indeed, the evidence plausibly shows (all that is required at this stage) that defendants *actually knew* their gaming conduct was illegal. With respect to defendants' video games of chance, all the tribes have repeatedly said—in letters to the governor and in filings in this case and other cases—that Minnesota law categorically prohibits such gaming activity. *Supra* I.A.1. The compacts long ago also put defendants on specific notice that if State law prohibited video games of chance, the tribes could not conduct that gaming activity: "if the Minnesota Legislature prohibits the operation or use of video games of chance for all purposes as against public policy and as a matter of criminal law, this [compact] shall not be construed to provide for continued operation by the [tribe] of video games of chance pursuant to this compact." SMSC Video Game Compact § 2.1; ML Video Game Compact § 2.1; PIIC Video Game Compact § 2.1.

As for defendants' non-compact card gaming (other than blackjack), the website for the Mille Lacs' two casinos presents those games under the heading "Blackjack," even though the games undisputedly are not blackjack. Grand Casino Mille Lacs,

"Blackjack";[22] Grand Casino Hinckley, "Blackjack".[23] It is reasonable to infer that the MLCV defendants did that to conceal that they were offering class III card games outside their compact; if they believed the games were class II, there would have been no reason to try to inaccurately stuff them under the "blackjack" label. Further, the fact that the SMSC—the biggest casino operator of them all—refrained from operating any non-blackjack casino card games before its March 2024 compact covering such games strongly suggests that the SMSC defendants knew that such gaming activity was class III and was illegal because it was not covered by a gaming compact, and thus that the Mille Lacs and PIIC defendants also knew. *See E.C. Investments*, 77 F.3d at 331 ("a 'person of ordinary intelligence' would have known that operating Class III games in Indian country without a Tribal-State compact violated IGRA" and could be prosecuted under § 1955).

4. The SMSC defendants add: "Absent sufficient allegations" "that the SMSC Officials acted outside their authority, … the suit is one against the sovereign and must be dismissed." SMSC MTD pp.28-29. Although acting outside the scope of authority would be sufficient to defeat an assertion of qualified immunity, it is not necessary to do so under either the *Pierson* or *Harlow* test just described. *See Harlow*, 457 U.S. at 819 n.34.

[22] https://www.grandcasinomn.com/Play/Mille-Lacs/Blackjack.

[23] https://www.grandcasinomn.com/Play/Hinckley/Blackjack.

C. *Westfall* Immunity Is Inapplicable to Tribal Officials Facing Federal Liability

The PIIC defendants contend that they are entitled to so-called *Westfall* immunity because their "wrongful actions are 1) discretionary, and 2) within the scope of [their tribal] authority." PIIC MTD p.25. That is incorrect.

Westfall immunity does not apply to tribal officials facing federal damages liability, as defendants do here. In *Westfall v. Erwin*, the Supreme Court held that "absolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope of their official duties *and* the conduct is discretionary in nature." 484 U.S. 292, 297-298 (1988); *see Midland Psychiatric Associates v. United States*, 145 F.3d 1000, 1004-1005 (8th Cir. 1998). The Court created this protection because "the civil liability of federal officials for actions taken in the course of their duty" is an "area … of peculiarly federal concern, warranting the displacement of state law." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 505 (1988). Thus, *Westfall* immunity was a flavor of "implied conflict preemption." *Houston Community Hospital v. Blue Cross & Blue Shield of Texas, Inc.*, 481 F.3d 265, 268 n.9 (5th Cir. 2007); *see Boyle*, 487 U.S. at 507-508.

Although *Westfall* immunity was superseded by the Federal Employees Liability Reform and Tort Compensation Act, a.k.a. the Westfall Act, which does not cover tribal officials, 28 U.S.C. § 2679, the doctrine lives on for non-federal-employee defendants facing *state*-law liability who are *federal* "agents," "contractors" or otherwise exercising "delegated" *federal* authority. *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71-73

(2d Cir. 1998); *see also, e.g.*, *Slotten v. Hoffman*, 999 F.2d 333, 336-337 (8th Cir. 1993). Consistent with *Westfall*'s preemption rationale, however, *Westfall* immunity does not extend to defendants facing *federal* liability or to actors who are not exercising federal authority. *See Forrester v. White*, 484 U.S. 219, 225 (1988) ("Nor are the highest executive officials in the States protected by absolute immunity under federal law."). Defendants cite no cases holding otherwise.

Therefore, *Westfall* immunity is inapplicable here. Defendants do not and cannot contend that they were exercising delegated federal authority in conducting their illegal gaming. On the contrary, they consistently claim to have been exercising the *tribes' sovereign* authority. *See, e.g.*, PIIC MTD p.26; SMSC MTD pp.7, 14. Moreover, their liability arises under federal law (RICO) for violations of federal law (§ 1952 and § 1955), based in turn on violations of federal law (IGRA) and state criminal law, *see supra* pp.14-15, I.B.1; the tribal authority they exercised is inferior to all those laws and therefore cannot preempt any of them.

Regardless, defendants' conduct was not plausibly within the boundaries of their legitimate "discretion" because federal and state law clearly prohibited it. *Supra* I.A-B; *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1141, 1143 (D.C. Cir. 2015) (no *Westfall* immunity for conduct that "violate[s] … prohibitions" or is "beyond [official's] authority" under governing statutes).

VI. THE ABSENCE OF THE THREE TRIBES, THE STATE, AND THE UNITED STATES DOES NOT WARRANT DISMISSAL

Defendants (echoed by the tribal amici) argue that the Court should dismiss under Federal Rule of Civil Procedure 19because the SMSC, the PIIC, and the MLCV, as well as the State of Minnesota and the United States (all together, "Sovereigns"), are required but immune parties. Defendants are wrong: although the Sovereigns are immune, their joinder is not required, and even if it were, dismissal would be inappropriate under the circumstances.

A. The Sovereigns Are Not Required Parties

A nonparty's joinder is required only if one of three conditions is satisfied. Here, none are satisfied.

1. The Court Can Accord Complete Relief Without the Sovereigns

A person "must be joined as a party if[] … in that person's absence, the court cannot accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A). Defendants contend that the "Sovereign Parties … are each a required party" because "[j]udgment against [the tribal] officials would not be binding on the" tribes, "which could assert [their] right to continue to offer" the games at issue. SMSC MTD pp.9-10; SMSC MTD p.7 (defining "Sovereign Parties"); *see also* Tribes Br. pp.13-14. That argument is nonsensical with respect to the State and the United States because neither conducts the gaming at issue. With respect to the three tribes, that argument is wrong in multiple ways.

Running Aces' individual-capacity damages claims undisputedly would afford it complete relief with respect to its *past* injuries despite the tribes' absence. *See supra* II.B; SMSC MTD p.9 (addressing only requests for prospective relief); *EEOC v. Peabody Western Coal Co.*, 400 F.3d 774, 780 (9th Cir. 2005) (recognizing that "monetary damages" would provide complete relief "without the [tribe]'s participation").

As for its *future* injuries, Running Aces can obtain complete relief through its official-capacity claims against defendants for equitable relief without the tribes because, as explained, under *Ex parte Young* the prospective relief would restrain the tribes' relevant *officeholders* in perpetuity. *Supra* II.A. Indeed, if defendants' Rule 19 argument were sound, then—as then-Judge Kavanaugh wrote for the D.C. Circuit—"official-action suits against government officials would have to be routinely dismissed" under Rule 19, "[b]ut that is not how the *Ex parte Young* doctrine and Rule 19 case law has developed." *Vann*, 701 F.3d at 928, 930; *see also Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1232 (10th Cir. 2014) (Rule 19 dismissal of official-capacity suit against tribal officials based on tribe's absence "conflicts with the purpose of the *Ex parte Young* doctrine"). None of defendants' cited cases involved Rule 19 dismissal of an *Ex parte Young* claim against an official of the absent sovereign, and therefore all are irrelevant. *See* SMSC MTD pp.9-10, 13 (citing, e.g., *Pit River Home & Agriculture Cooperative Ass'n v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994), and *Dawavendewa v. Salt River Project Agricultural Improvement & Power District*, 276 F.3d 1150, 1156, 1160 (9th Cir. 2002)).

2. Judgment Without the Sovereigns Would Not Jeopardize Their Ability to Protect Their Interests

Next, a person "must be joined as a party if[] … that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may … as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). Defendants incorrectly argue this will be true for the Sovereigns. The Sovereigns are addressed seriatim.

a. The State of Minnesota

Defendants argue: "The State … has a legal protected interest in defending the validity of its gaming compacts." PIIC MTD p.20. Running Aces' claims cannot affect that interest, however, because they do not impugn the validity of any gaming compact. Running Aces claims that defendants' video games of chance are illegal because state law does not "permit[] such gaming for any purpose by any person," § 2710(d)(1)(B), and claims that defendants' non-blackjack class III card games were illegal because they were not "conducted in conformance with a Tribal-State compact … that is in effect." § 2710(d)(1)(C). Therefore, as explained—and as recognized by the State's amicus brief and the compacts themselves—the gaming activities at issue are illegal *notwithstanding* the tribes' *valid* gaming compacts. *See supra* I.A.1-2.

If anything, Running Aces' claims would vindicate the State's interest in ensuring that tribes comply with the State's criminal gambling laws when their gaming activity does not conform to IGRA's requirements. *See supra* I.B.

b. The United States

Defendants argue that the United States' interest is jeopardized because Running Aces' claims "*directly* attack[] the federal government's decision that the Community's compacts are valid." PIIC MTD pp.20-21. Notably, however, the United States has not claimed such an interest in this case. Nor could it because, again, Running Aces' claims do not impugn any compact's validity. When the Secretary approves a gaming compact, she does not assess whether any particular gaming activity within the scope of the compact would be lawful under IGRA or state law; she inquires "'only'" into the legality of the compact itself: whether "the compact violates IGRA, another federal law, or the federal government's trust obligations to Indians." *West Flagler*, 71 F.4th at 1062-1063 (quoting § 2710(d)(8)(B)). Accordingly, as with other gaming compacts, the Secretary approved the three tribes' compacts without any indication that she considered whether the State permitted the covered gaming activity or whether the gaming activity was otherwise lawful under IGRA. On the contrary, the Secretary described the compacts as "permit[ting]" the covered gaming activity "if the State permits" it. SMSC Card Game Addendum at PDF.4; *see also, e.g.*, ML Card Game Addendum at PDF.1.

Finally, as with the State's interest, Running Aces' claims would vindicate the United States' interest—expressed in IGRA itself—that tribes comply with state criminal gambling laws when the tribe's gaming activity does not conform to IGRA's requirements. *See supra* I.A-B.

c. The Three Tribes

Defendants' and the tribal amici's laundry list of supposedly jeopardized tribal interests is substantially overstated. For example, as explained, Running Aces' claims do not call for "adjudication of[] the legality of [any tribe's] gaming compacts" or gaming ordinances. PIIC MTD p.19; SMSC MTD p.8 ("Running Aces' suit undermines the SMSC's Gaming Compact …."); MLCV MTD p.12; Tribes Br. p.12. Nor could Running Aces' claims impair the tribes' "sovereign right[] to exercise regulatory authority … over a gaming establishment within the Indian tribe's jurisdiction" (an interest defendants and the tribal amici reformulate in various ways), SMSC MTD pp.7-8, 10, 14; Tribes Br. p.17, because the claims address only the legality of particular gaming activities. The tribes' supposed "interest in protecting their officials and employees from bogus RICO lawsuits," SMSC MTD p.8, is tendentious, *cf.* SMSC MTD p.10 (baselessly criticizing Running Aces for "inappropriately presuppos[ing] [its] success on the merits" for purposes of Rule 19 even though Running Aces' only prior filing, the Complaint, never addressed Rule 19).

Regardless, the tribes' ability to protect those interests, their interest in conducting the particular gaming activities at issue (including deriving revenue therefrom), or any other asserted interest, *see* SMSC MTD pp.7-8, 10-12, 14; PIIC MTD pp.19-20; MLCV MTD p.12; Tribes Br. pp.12-13, 17, would not be jeopardized by the tribes' absence from this case because defendants adequately represent those interests. "It is not enough under [Rule 19] for a third party to have an interest, even a very strong interest, in the litigation. Nor is it enough for a third party to be adversely affected by the outcome of the

litigation." *MasterCard International Inc. v. Visa International Service Ass'n*, 471 F.3d 377, 387 (2d Cir. 2006). Rather, the moving party must show that the absent party's "ability to protect their interests would be impaired *because of* [their] absence from the litigation." *Id.* Consequently, a nonparty is not required under Rule 19 if its interest would be "adequately represented" by an existing party. *Welsch v. Likins*, 550 F.2d 1122, 1131 (8th Cir. 1977).

Yet again, defendants' and the tribal amici's argument is foreclosed by *Ex parte Young*, as then-Judge Kavanaugh explained: Because the tribes and the defendant officials sued "in [their] official capacity are one and the same in an *Ex parte Young* suit …, [defendants] can adequately represent the [tribes] in this suit, meaning that the [tribes themselves are] not a required party for purposes of Rule 19." *Vann*, 701 F.3d at 929-930.

The adequacy of defendants' representation of the tribes is confirmed by more-detailed analysis. The tribes would be required only if defendants "show[ed] that [their] interests actually differ from or conflict with" the tribes'. *South Dakota ex rel. Barnett v. United States Department of Interior*, 317 F.3d 783, 785-786 (8th Cir. 2003) (applying Rule 24(a)'s "parallel" standard); *compare United States ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249, 1252 (8th Cir. 1998) (nonparty tribe not required where it "agree[d]" with positions advanced by existing party), *with Two Shields v. Wilkinson*, 790 F.3d 791, 799 (8th Cir. 2015) (nonparty required where existing parties had "strong incentives" to blame nonparty for their wrongful conduct). Here, there obviously is no conflict.

As the officials responsible for managing and conducting the tribes' gaming, defendants' interests are perfectly aligned with the tribes' interests. *See, e.g.*, *Salt River Project Agricultural Improvement & Power District v. Lee*, 672 F.3d 1176, 1180 (9th Cir. 2012) (in *Ex parte Young* suit, "the officials' interests are aligned with the tribe's interests: The officials are responsible for enforcing the Navajo Preference in Employment Act, and there is no suggestion that the officials' attempt to enforce the statute here is antithetical to the tribe's interests"). Predictably, defendants' motions to dismiss have zealously and exhaustively defended the legality of defendants'—and therefore the tribes'—gaming activities. *See, e.g.*, SMSC MTD p.33 ("The SMSC's operation of video games of chance … is … conducted in full compliance with IGRA"); PIIC MTD p.20 (claims challenge "the legality of the Community's gaming operations"); MCLV.MTD.27 (Mille Lacs' "gaming operations are legal"). And the tribal amici identify no overlooked arguments, let alone contrary views or interests. Because defendants face not only official but also personal liability for those gaming activities, their interest in vigorously defending the activities' legality will surely remain strong and aligned with the tribes' interest in doing the same. *See Rochester Methodist Hospital v. Travelers Insurance Co.*, 728 F.2d 1006, 1016 (8th Cir. 1984) (nonparty not required because existing party "is making every argument that [nonparty] would or could make"); *Gwartz v. Jefferson Memorial Hospital Ass'n*, 23 F.3d 1426, 1429 (8th Cir. 1994) (same).

None of defendants' cited cases supports a contrary conclusion. The only argument defendants muster is their bald assertion—in a footnote—that "it would be unfair to burden them with representing the sovereign interests" because "such a duty

could be at odds with their personal interests" in "defending their personal livelihoods and reputation." PIIC MTD p.21 n.6. As just explained, however, defending the tribes' interests is inextricably intertwined with defending their own conduct, their livelihoods, and their reputation. And there is no reason to believe that defendants are incapable of doing that as well as the tribes could themselves, or that defendants' ability to do so will be diminished, because successfully doing so would also vindicate the tribes. Indeed, defendants' lawyers in this case *are* the tribes' lawyers. *See MRC*, 2024 WL 4259301 (identifying Richard Duncan, Joshua Peterson, Allison Mitchell, and Greg Paulson as counsel for SMSC); Tribes Br. (identifying Joseph Halloran as counsel for another Chippewa band).

3. Judgment Without the Sovereigns Would Not Subject an Existing Party to Inconsistent Obligations

Finally, a person "must be joined as a party if[] … that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may … leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(B)(ii). "The key [for this test] is whether the possibility of being subject to multiple obligations is real; an unsubstantiated or speculative risk will not satisfy the Rule 19(a) criteria." *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001). But all defendants say about this condition is that the gaming activities at issue have been "viewed as lawful" by NIGC, the Minnesota Department of Public Safety, and the tribes' own gaming commissions, given that those activities have

"occurred for nearly 35 years" without eliciting enforcement action. SMSC MTD p.12. Defendants' theory of conflict is nonsense.

To start, defendants cite nothing substantiating that the federal and state governments have actually viewed defendants' gaming activities at issue as "lawful," rather than the governments being either unaware of the violations or exercising discretion to decline enforcement. And the self-serving views of the tribes' own gaming commissions are meaningless.

More fundamentally, whether any governmental authority viewed the gaming activities at issue as lawful is irrelevant. No federal, state, or tribal law *requires* defendants to conduct the particular gaming activities; IGRA, the compacts, and the tribal gaming ordinances and regulations merely *permit* certain types of gaming, subject to IGRA's requirements. *Supra* Background.A.2, B.1-3. Thus, a judgment finding defendants' gaming activities illegal would not put any defendant "between the proverbial rock and a hard place." *Peabody Western*, 400 F.3d at 780.

B. Even if the Sovereigns Were Required Parties, Their Absence Would Not Warrant Dismissal

When a required party cannot be joined, "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). To make that determination, the court must "consider" four "factors." *Id.* "[C]ourts are generally reluctant to grant motions to dismiss" under Rule 19(b). *Fort Yates Public School District No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 671 (8th Cir. 2015); *West Flagler*, 71 F.4th at 1071 ("Rule 19's

guiding philosophy is to avoid dismissal whenever possible"). Because no Sovereign is "required" (as just explained), "the [Rule 19] inquiry is at an end." *Rochester Methodist*, 728 F.2d at 1016. Regardless, the Rule 19(b) factors strongly weigh against dismissal.

First, the Court must consider "the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties." Fed. R. Civ. P. 19(b)(1). The prejudice must be "immediate and serious," not "remote and minor." *Turn Key Gaming*, 135 F.3d at 1251. Defendants do not claim *they* would be prejudiced. Insofar as this factor addresses potential prejudice to the Sovereigns, it "duplicates" the required-party test under Rule 19(a)(1)(B)(i). *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024-1025 (9th Cir. 2002); *accord* SMSC MTD p.12; Tribes Br. p.16. Therefore, this factor is not satisfied for the same reasons as Rule 19(a)(1)(B)(i). *Supra* VI.A.2; *see Turn Key Gaming*, 135 F.3d at 1251-1252 (absent tribe would not be prejudiced because it "unequivocally agree[d]" with existing party's position); *De Csepel v. Republic of Hungary*, 27 F.4th 736, 748 (D.C. Cir. 2022) ("If a party remaining in the case is both capable of and interested in representing the interests of the absent party, the party's exit or exclusion from the suit exposes it to no additional risk of an adverse decision."); *cf. Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1494, 1498-1499 (D.C. Cir. 1995) (Rule 19 dismissal of non-*Ex parte Young* suit where remaining official "had legally defined interests that diverged from the" absent State's).

Second, the Court must consider "the extent to which any prejudice could be lessened or avoided." Fed. R. Civ. P. 19(b)(2). Because the Sovereigns would not be

prejudiced by their absence, this factor is irrelevant. Moreover, the Court has already allowed the tribes and the State to file amicus briefs on defendants' motions to dismiss (and the United States could have proceeded similarly if it wanted to), which "lessens whatever prejudice [the Sovereigns] would suffer from having th[e] issue[s] resolved … in [their] absence." *West Flagler*, 71 F.4th at 1071.

Third, the Court must consider "whether a judgment rendered in the person's absence would be adequate." Fed. R. Civ. P. 19(b)(3). This factor is not met because, as explained with respect to the criteria under Rule 19(a)(1)(A) and 19(a)(1)(B)(ii), the judgment will yield a "complete, consistent, and efficient settlement of controversies." *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1292-1293 (10th Cir. 2003). For example, defendants' assertion that the tribes "would not be bound by the judgment" and would persist in the challenged conduct, SMSC MTD p.15; Tribes Br. pp.18-20, is, again, foreclosed by the nature of Running Aces' *Ex parte Young* claims. *Supra* II.A. The tribal amici go further, asserting: "The individual defendants themselves have no legal authority to determine which games the Tribes can offer at their casinos or to stop offering particular games." Tribes Br. p.19. That unsubstantiated assertion defies the Complaints' allegations, common sense, and *Ex parte Young*: the individual defendants are senior officials responsible for managing and conducting the tribes' gaming operations; no federal, state, or tribal law *requires* the tribes or defendants to conduct any particular gaming activity; and if tribal law did so require, it would conflict with IGRA and therefore be invalid and unenforceable. *See supra* II.A.2.

Fourth, the Court must consider "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b)(4). Defendants argue that Running Aces could obtain relief by lobbying the Minnesota Legislature to change its gaming laws or by reporting defendants' IGRA violations to federal, state, or tribal regulators. SMSC MTD p.16; *see* Tribes Br. p.21. Those alternatives are patently inadequate to compensate Running Aces for its *past* lost business caused by defendants' illegal gaming. As for *future* injury, those alternatives would also be inadequate. State law already criminalizes the video and card gaming activities at issue here, *supra* I.A.1-2, but defendants conduct them anyway. And Running Aces cannot be confident that federal, state, or the tribal regulators would take enforcement action, particularly given that they have not so far despite the obvious illegality of defendants' gaming activities.

Finally, defendants claim a categorical rule to trump all these factors: under the Supreme Court's decision in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008), they say, "dismissal is required … because significant sovereign interests are implicated" and the sovereigns have immunity from suit. SMSC MTD p.8; *see also* PIIC MTD p.21. Defendants further quote *Pimentel*: "Dismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity." 553 U.S. at 872, *quoted in* SMSC MTD p.16.

As the D.C. Circuit concluded in rejecting the same argument, however, "*Pimentel* cannot bear the weight Defendants place on it." *De Csepel*, 27 F.4th at 749. "If the …

sovereign interest in the disputed issues were alone dispositive in *Pimentel*," as defendants contend, the Supreme Court "would have ended the inquiry there. Instead, it proceeded to weigh each of the Rule 19(b) equitable factors." *Id.*; *accord Gensetix, Inc. v. Board of Regents of University of Texas System*, 966 F.3d 1316, 1325-1327 (Fed. Cir. 2020). Consistent with *Pimentel* but contrary to defendants' per se rule, courts regularly refuse Rule 19 dismissal despite the absence of a "required" sovereign that is immune and has a strong interest in the outcome. *See, e.g.*, *De Csepel*, 27 F.4th at 746; *University of Utah v. Max-Planck-Gesellschaft Zur Forderung Der Wissenschaften E.V.*, 734 F.3d 1315, 1326-1328 (Fed. Cir. 2013).

Indeed, under *Pimentel*'s own factor analysis, it was "[c]ritical[] [that] no party with interests aligned with the Philippine government's remained in the case to guard against prejudice in its absence," *De Csepel*, 27 F.4th at 750—unlike here, where, again, defendants' interests are perfectly aligned with the tribes'. *Cf., e.g.*, *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 999, 1001 (10th Cir. 2001) (Rule 19 dismissal where existing party "cannot adequately represent [absent tribes'] varied interests" and "absent tribes would suffer substantial prejudice if the action proceeded without them"), *opinion modified in irrelevant part on reh'g*, 257 F.3d 1158 (10th Cir. 2001), *cited in* SMSC MTD p.17.

VII. RUNNING ACES' CLAIMS ARE NOT TOO LATE

Defendants contend that Running Aces claims are barred by RICO's statute of limitations and the common-law doctrine of laches. Neither bar applies.

A. RICO's Statute of Limitations Does Not Bar Running Aces' Damages Claims at Least to the Extent They Are Based on Injuries That Occurred Within Four Years of the Complaint's Filing

RICO's limitations period is four years. *Rotella v. Wood*, 528 U.S. 549, 552-553 (2000). According to defendants, the illegal gaming activities at issue began more than four years before the Complaint was filed and therefore Running Aces' claims are barred because "RICO claims accrue when the plaintiff discovers or should have discovered the injury." SMSC MTD p.37; *see* PIIC MTD p.34; MLCV MTD p.38. Defendants are wrong.

1. "[T]he possible existence of a statute of limitations defense is not ordinarily a ground for Rule 12(b)(6) dismissal unless the complaint itself establishes the defense." *Joyce v. Teasdale*, 635 F.3d 364, 367-368 (8th Cir. 2011). The Complaint itself does not establish that all of defendants' illegal gaming activities began more than four years before filing. Defendants cite the Video Game Compacts, SMSC MTD p.37; PIIC MTD p.34; MLCV MTD p.38, but those do not establish *when* defendants actually conducted such games, nor do they bear on the timing of defendants' illegal *non*-compact card gaming. And the old webpages defendants cite, PIIC MTD pp.34-35; MLCV MTD pp.38-39—besides not being in the Complaint—do not identify all the illegal gaming activities that are the basis of this lawsuit.

2. Even if defendants' illegal gaming activities began more than four years before this lawsuit, however, the statute of limitations would not bar Running Aces' RICO claims. Defendants are mistakenly confusing RICO's accrual rule with the separate "discovery" rule, "which *extend[s]* accrual periods for plaintiffs who could not

reasonably obtain certain key items of information" within the normal four-year limitations period. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 191 (1997) (emphasis added). The discovery rule does not determine when the underlying four-year limitations period initially began, and therefore does not help defendants defeat Running Aces' claims.[24]

Civil RICO claims accrue when a "predicate act" causes the plaintiff an "injury." § 1964(a). Consistent with that basic rule, to deal with situations like this—where RICO predicate acts continued over a period of years—courts have adopted the "separate accrual rule," "under which the commission of a separable, new predicate act within a 4-year limitations period permits a plaintiff to recover for the additional damages caused by that act." *Klehr*, 521 U.S. at 180-181. In other words, "*Klehr* … teaches, plaintiffs in civil RICO actions may seek redress for new injuries arising out of new predicate acts that occur within the statutory period, even if those new predicate acts and resulting injuries arise out of the same pattern of racketeering behavior that began outside the four-year statutory period." *Annulli v. Panikkar*, 200 F.3d 189, 197 (3d Cir. 1999). Importantly, under the separate-accrual rule, the limitations clock restarts with each new injurious act "regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Klehr*, 521 U.S. at 189. "[T]he only limitation on this separate accrual

[24] The discovery rule will determine whether Running Aces can recover damages for injuries suffered *more than* four years before the Complaint was filed, which bears on the measure of damages. That question cannot be resolved now because the Complaint contains no allegations regarding whether Running Aces knew or should have known about such injuries.

rule is that these new acts cannot be used 'as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the statutory period.'" *Annulli*, 200 F.3d at 197 (quoting *Klehr*, 521 U.S. at 190). Thus, the separate-accrual rule for civil RICO claims was based on and "is similar to the 'continuing violation' doctrine in antitrust," under which "each overt act that is part of the violation [e.g., the price-fixing conspiracy] and that injures the plaintiff, *e.g.*, each sale to the plaintiff, starts the statutory period running again." *Klehr*, 521 U.S. at 181, 189.

The separate-accrual rule is a necessary component of civil RICO because until the particular injury occurs, a civil RICO plaintiff lacks standing to recover damages for it and therefore no clock could begin for suit *on that injury*. *See, e.g.*, *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988) ("Until such injury occurs, there is no right to sue for damages under § 1964(c), and until there is a right to sue under § 1964(c), a civil RICO action cannot be held to have accrued."). Moreover, not having the separate-accrual rule would "produce the absurd result of allowing defendants to break the RICO laws with impunity if they began acting illegally far enough in the past." *Smith v. Allred*, No. 15-cv-6026, 2016 WL 3094008, at *5 (S.D. W. Va. June 1, 2016).

Accordingly, the circuit courts of appeals have uniformly adopted the separate-accrual rule for civil RICO claims. *See, e.g.*, *Rodriguez v. Banco Central*, 917 F.2d 664, 666 (1st Cir. 1990); *In re Merrill Lynch Ltd. Partnerships Litigation*, 154 F.3d 56, 59-60 (2d Cir. 1998); *Annulli*, 200 F.3d at 197-198 (3d. Cir.); *Lewis v. Danos*, 83 F.4th 948, 955 (5th Cir. 2023); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-1466 (7th Cir. 1992); *Grimmett v. Brown*, 75 F.3d 506, 511 (9th Cir. 1996); *Bath v. Bushkin, Gaims, Gaines &*

Jonas, 913 F.2d 817, 820 (10th Cir. 1990); *Lehman v. Lucom*, 727 F.3d 1326, 1328, 1330-1333 (11th Cir. 2013). Although the Eighth Circuit has not addressed the separate-accrual rule, it surely would adopt the rule because it not only adopted the analogous continuing-violation rule for antitrust claims, but did so *based on Klehr*. *In re Pre-Filled Propane Tank Antitrust Litigation*, 860 F.3d 1059, 1064, 1067-1068 (8th Cir. 2017) (en banc) ("Each time Defendants used that [anticompetitive] power (i.e., each sale), they committed an overt act, inflicting new and accumulating injury" and thereby "start[ing] the statutory period running again regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.").

Under the separate-accrual rule, Running Aces' claims are timely. Running Aces alleges that defendants continuously offer their illegal games at their 24/7 casinos. This conduct results in defendants' continual operation or participation in illegal gambling businesses and continual use of facilities in interstate commerce to conduct their illegal gambling activity, i.e., the predicate acts. Compl. ¶¶ 98, 130(b), 104-110, 155(b), 116-121, 149, 152, 156(b), 157-163, 166, 170(b), 171-176, 207, 210, 214(b), 215-219, 223, 238, 254, 270. And each time those predicate acts divert patrons from Running Aces to defendants' casinos, Running Aces suffers a new injury: additional lost income. Compl. ¶¶ 10, 228. Just as each new product sale starts a new limitations clock under antitrust's continuing-violation rule, each such diversion of Running Aces' patrons started a new limitations clock for RICO. Therefore, Running Aces' RICO damages claims are timely insofar as they are based on such diversions that occurred within the four years preceding this lawsuit's filing.

And insofar as Running Aces seeks prospective equitable relief against future illegal gaming, its claims certainly are timely because the relevant injuries have not even occurred yet.

B. The Doctrine of Laches Does Not Apply to Running Aces' Claims, and Its Requirements Are Not Met

Defendants are wrong that the "laches doctrine also bars RA's claims." PIIC MTD p.35. First, as defendants' precedent says, they "must demonstrate" that Running Aces' (supposed) "delay" in filing the lawsuit caused them "undue prejudice." *Roederer v. J. Garcia Carrion, S.A.*, 569 F.3d 855, 858-859 (8th Cir. 2009). Defendants do not even pretend to identify such prejudice.

Moreover, the doctrine of laches does not apply to Running Aces' claims. First, "[l]aches is an equitable defense and is not relevant to this action [insofar as Running Aces is] requesting damages"—an action at law, under a statute. *LaValle v. Kulkay*, 277 N.W.2d 400, 403 n.3 (Minn. 1979); *see Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 678 (2014) ("[L]aches is a defense developed by courts of equity …. [T]his Court has cautioned against invoking laches to bar legal relief."); *State Farm Mutual Automotive Insurance Co. v. Valery Kalika*, No. 04-cv-4631, 2006 WL 6176152, at *7 (E.D.N.Y. Mar. 16, 2006) (laches does not "bar … claim for damages under RICO"). Second, "the general rule [is] that laches does not bar future injunctive [or declaratory] relief" because, "by definition, the plaintiff's past dilatoriness is unrelated to a defendant's ongoing behavior that threatens future harm." *Danjaq LLC v. Sony Corp.*,

263 F.3d 942, 959-960 (9th Cir. 2001); *cf. id.* (holding laches barred future injunction in "special case" present "only" there).

CONCLUSION

The motions to dismiss should be denied.

October 31, 2024

Respectfully Submitted,

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