IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MUSCOGEE (CREEK) NATION, a federally recognized Indian tribe, HICKORY GROUND TRIBAL TOWN, and MEKKO GEORGE THOMPSON, individually and as traditional representative of the lineal descendants of those buried at Hickory Ground Tribal Town in Wetumpka, Alabama.

Plaintiffs,

v.

STEPHANIE A. BRYAN, individually and in her official capacity as Chair of the Poarch Band of Creek Indians Tribal Council; ROBERT R. MCGHEE, individually and in his official capacity as Vice Chair of Poarch Tribal Council and board member of PCI Gaming Authority; AMY BRYAN GANTT, in her official capacity as Treasurer of the Poarch Band of Creek Indians Tribal Council; CHARLOTTE MECKEL, in her official capacity as Secretary of the Poarch Band of Creek Indians Tribal Council; DEWITT CARTER, in his official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; SANDY HOLLINGER, individually and in her official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; KEITH MARTIN, individually and in his official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; ARTHUR MOTHERSHED, individually and in his official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; JUSTIN STABLER, in his official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council and board member of PCI Gaming Authority; BUFORD ROLIN, an individual; DAVID GEHMAN, an individual; GARVIS SELLS, an individual; BILLY BAILEY, in his official capacity as Acting Poarch Band of Creek Indians Tribal Historic Preservation Officer; TIMOTHY A. MANNING, in his official capacity as Chair of the board of the PCI Gaming Authority; TERESA A. POUST, in her official capacity as board member of the PCI Gaming Authority; BRICE MCGHEE, in his official capacity as board member of the PCI Gaming Authority; EDDIE L. TULLIS, individually and in his official capacity as board member of the PCI Gaming Authority; RACHEL HARRIS in her official

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capacity as board member of the PCI Gaming Authority; THE DEPARTMENT OF THE INTERIOR; BRYAN NEWLAND, in his official capacity as Assistant Secretary of Indian Affairs; DEB HAALAND, in her official capacity as Secretary of the United States Department of the Interior; CHARLES F. SAMS III in his official capacity as Director of the National Park Service; and AUBURN UNIVERSITY;

Defendants.

PLAINTIFFS' RESPONSE AND MEMORANDUM IN SUPPORT OF RESPONSE TO INDIVIDUAL DEFENDANTS' MOTION TO DISMISS THIRD AMENDED COMPLAINT AND SUPPLEMENTAL COMPLAINT

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I. INTRODUCTION

Plaintiffs file this Response to the Motion to Dismiss (Doc. 273) Plaintiffs' Third Amended and Supplemental Complaint ("TASC") (Doc. 261), filed by Buford Rolin, David Gehman, Garvis Sells, Stephanie A. Bryan, Robert R. McGhee, Sandy Hollinger, Keith Martin, Arthur Mothershed, and Eddie Tullis (collectively, the "the Individual Defendants").[1]

The TASC contains three claims against the Individual Defendants in their individual capacities: Count III (unjust enrichment under Alabama law); Count IX (unjust enrichment under federal common law); and Count V (outrage under Alabama law). These claims sound in tort and in equity. The individuals who assisted in bulldozing a burial ground to build a casino are not without fault or liability, and these causes of action are necessary to bring accountability and serve the interests of justice.

The Individual Defendants contort the allegations in the TASC and offer a narrative that does not align with the plausible allegations in Plaintiffs' operative complaint. For instance, the Individual Defendants contend they cannot be held liable for outrage because their excavation and desecration of the Hickory Ground Site was nothing more than a "scientific excavation, study, and storage" (Doc. 273 at 38), when in reality, there is nothing scientific in excavating 57 human remains to make room for a casino.

Ultimately, the Individual Defendants offer no legal theory or authority that warrants dismissal of Counts III, IX, or V at this time. The Individual Defendants vigorously disagree with many of Plaintiffs' plausible allegations, but on a Rule 12(b)(6) motion to dismiss, such a

[1] Plaintiffs concede that Timothy Manning is not an Individual Defendant. (*See* Doc. 261 at 11, ¶ 47). The TASC's caption correctly reflects that Timothy Manning is sued solely in his official capacity and Mr. Manning is not included in the definition of "the Individual Defendants." (*See* Doc. 261 at 10, ¶ 40).

disagreement does not warrant dismissal. For the reasons provided in greater detail below, the Court should deny the Individual Defendants' Motion to Dismiss.

II. PROCEDURAL BACKGROUND

For the sake of efficiency and to save the parties' and the Court's resources, Plaintiffs incorporate Section II, Procedural Background, in Plaintiffs' Response to the Poarch Officials' Motion to Dismiss, filed Apr. 30, 2026.[2]

III. FACTUAL BACKGROUND

Plaintiffs incorporate herein the Section III, Factual Background, in Plaintiffs' Response to the Poarch Officials' Motion to Dismiss, filed Apr. 30, 2026.[3]

IV. STATEMENT OF DISPUTED FACTS

Although the parties have not yet engaged in discovery,[4] the Individual Defendants' Motion to Dismiss contains factual assertions that directly contradict allegations made in the TASC, as well as evidence currently in the record (including exhibits attached to the TASC and exhibits previously and recently filed by various parties). The following are the issues of fact presently in dispute in the Individual Defendants' Motion.

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[2] All pincites to previously filed documents are to the ECF generated page number.

[3] The Poarch Officials include Stephanie A. Bryan, Robert R. McGhee, Amy Bryan Gantt, Charlotte Meckel, Dewitt Carter, Sandy Hollinger, Keith Martin, Justin Stabler, and Arthur Mothershed, in their official capacities as Poarch Tribal Council members ("**Tribal Council Officials**"); Timothy Manning, Teresa E. Poust, Brice McGhee, Eddie L. Tullis, Rachel Harris, Robert McGhee, and Justin Stabler, in their official capacities as PCI Gaming Authority members, and Eddie L. Tullis and Robert R. McGhee in their individual capacities ("**Gaming Officials**"); and Billy Bailey in his official capacity as the Tribal Historic Preservation Officer for Poarch ("**Poarch THPO**"); (collectively referred to as the "**Poarch Officials**").

[4] The Individual Defendants previously filed a motion asking this Court to stay discovery on the basis that the defendants' motions to dismiss "present[] a purely legal question so neither the parties nor the court have any need for discovery before the court rules on the motion[s]." (Doc. 127 at 3) (citations and internal quotation marks omitted).

(1) In their Grant Application for Historic Preservation ("Grant Application") to the National Park Service for the federal funds they needed to purchase Hickory Ground, the Individual Defendants, on behalf of the Poarch Band of Creek Indians ("Poarch"), "indicated that '[p]rior to any type of development of the property a scientifically sound archaeological program will be conducted . . . .'" (Doc. 273 at 10) (alteration in original) (quoting Doc. 261-1 at Ex. A, 5) (Grant Application); (*see also* Doc. 273 at 30) (same). The Individual Defendants omit the fact that the Grant Application contains *additional*, relevant language concerning "development" of the Hickory Ground Site. Additionally, the Individual Defendants said that Poarch's "[a]cquisition of the property is principally a ***protection*** measure" (Doc. 261-1 at Ex. A, 5) (emphasis added), and further stated that its "[a]cquisition would ***prevent development*** on the property." (*Id.*) (emphasis added). Indeed, they told the federal government that if the government gave Poarch money to purchase Hickory Ground, then:

> The property will serve as a valuable resource for cultural enrichment of Creek people . . . . The Creek people in Oklahoma['s] pride in heritage and ties to original homeland can only be enhanced. There is still an existing Hickory Ground tribal town in Oklahoma. ***They will be pleased to know their home in Alabama is being preserved*** . . . . The Hickory Ground site will continue to enhance their understanding of their history, without excavation.

(Doc. 261 at 22-23, ¶105) (emphasis added) (quoting Doc. 261-1 at Ex. A, 5). The Individual Defendants proclaimed that "[d]estruction of archaeological resources in Alabama . . . destroy[s] the cultural history of Creek people." (Doc. 261-1 at Ex. A, 8). Ultimately, the Individual Defendants told the federal government that their acquisition of Hickory Ground was "necessary to ***prevent destruction*** of the site." (*Id.* at 6) (emphasis added).

(2) The Individual Defendants state that "[w]hen the parties failed to reach any agreement, [they] oversaw the reinternment of excavated remains and funerary objects in 2012." (Doc. 273 at 10). The factual basis for this statement is disputed by the TASC and the exhibits

attached therein. (Doc. 261 at 45-46, ¶¶ 211-13). To the extent the parties "failed to reach any agreement" that is because, as the record demonstrates, no meaningful efforts were made to try to reach an agreement and implying otherwise is misleading. In this case, the Individual Defendants mailed a single letter to Mekko Thompson's P.O. Box (with no follow up call, email, text message, or fax) dated April 4, 2012, inviting Mekko Thompson to consult regarding reinterment. (*Id.* at 46, ¶¶ 214-18). And then when Principal Chief Tiger called Poarch's attorney and Defendant Rolin's office, within twenty-four hours of having been informed of the letter, Defendant Rolin sent another letter (dated April 17, 2012) stating that the Individual Defendants had *already* reinterred the Muscogee relatives—*less than two weeks* after having mailed a single hard copy letter to Mekko Thompson's P.O. Box. (*Id.* at 46-47, ¶¶ 218-20). The Individual Defendants' rush to reinter the Muscogee relatives they excavated was not because "the parties failed to reach any agreement." (*See id.* at 47, ¶ 221). The Individual Defendants never waited for a response from Plaintiffs and instead reburied the individuals they excavated so they could commence constructing their casino—which they did three months later. (*Id.* at 47, 50-51, ¶¶ 220-21, 239). This reburial was not performed in accordance with Muscogee culture or religion, nor were the Muscogee relatives returned to their final resting places; instead, they were reburied in a pit next to a parking lot and up against the wall of the casino. (*Id.* at 47, ¶ 222).

(3) The Individual Defendants state that their desecration of the graves at Hickory Ground was "not destruction of a family cemetery plot or desecration of a known, recently deceased person's remains . . . ." (Doc. 273 at 38). Putting aside the legal objection that Auburn University ("Auburn") and the Individual Defendants have refused to provide the Phase III archaeology report detailing the excavations that took place, this statement is disputed by the TASC and the exhibits attached therein. The TASC alleges that Mekko Thompson and all members

of Hickory Ground Tribal Town are the lineal descendants of the Hickory Ground individuals that Auburn and the Individual Defendants unlawfully excavated. (Doc. 261 at 40, ¶ 173). Furthermore, Muscogee culture and traditional kinship systems make clear that Mekko Thompson is a direct lineal descendant of the individuals buried at Hickory Ground. (*Id.* at 7, ¶ 26). Mekko Thompson is their lineal descendant matrilineally, which means that the individuals Auburn and the Individual Defendants excavated are the ancestors of his mother, and her mother, and her mother, and so on. (*Id.* at 18, ¶ 82). While the individuals that the Individual Defendants dug up from Hickory Ground are not "known" to the Individual Defendants or Poarch, they are intimately known to Mekko Thompson. (*Id.* at 19, ¶¶ 89-92). They are his fellow Tribal Town members, clan members, and family. (*Id.* at 18, 21, ¶¶ 82, 96).

The Court must take the TASC's allegations as true, and thus the Individual Defendants' disputed facts should not be considered at this stage.

V. STANDARD OF REVIEW

Plaintiffs incorporate the Standard of Review for Rule 12(b)(6) motions set forth in Section V.A of Plaintiffs' Response to the Poarch Officials' Motion to Dismiss, filed Apr. 30, 2026.

VI. ARGUMENT

A. The TASC is not a shotgun pleading.

The Individual Defendants' Motion to Dismiss states that the TASC "should be dismissed because it is an impermissible shotgun pleading that fails to give the Individual Defendants adequate notice of the claims and the grounds upon which each claim rests." (Doc. 273 at 9). Specifically, the Individual Defendants argue that the TASC constitutes a Type II and Type IV shotgun pleading under *Weiland v. Palm Beach County Sheriff's Office*, 792 F.3d 1313, 1320 (11th Cir. 2015). (*See* Doc. 273 at 13-17). Because the Individual Defendants' shotgun pleading arguments largely mirror and repeat the arguments offered by the Poarch Officials, for the sake of

convenience and efficiency, Plaintiffs incorporate the arguments and authorities in Section VI.A from their Response to the Poarch Officials' Motion to Dismiss, filed Apr. 30, 2026.

The Individual Defendants also cast aspersions at the TASC's length. (Doc. 273 at 14) (referring to the "300 paragraphs" in the General Allegations section). The Individual Defendants assert that these sections "include allegations undeniably irrelevant to Plaintiffs' claims against the Individual Defendants." (*Id.* at 14). However, the Eleventh Circuit has held that pleadings—including pleadings of significant length—are not Type II shotgun pleadings so long as it "is not a situation where a failure to more precisely parcel out and identify the facts relevant to each claim materially increased the burden of understanding the factual allegations underlying each count." *Weiland*, 792 F.3d at 1324. To determine whether a pleading has "materially increased the burden of understanding" for a defendant, the Eleventh Circuit looks to whether a party has moved "for a more definite statement under Federal Rule of Civil Procedure 12(e) or otherwise assert[ed] that they were having difficulty knowing what they were alleged to have done and why they were liable for doing it." *Id.* In this case, the Individual Defendants have adequate notice, as they have fully responded to all claims filed against them originally, and now fully responded to all claims against them in the TASC. Moreover, the Individual Defendants have never "move[d] for a more definite statement under Federal Rule of Civil Procedure 12(e)." *Id.*

The Individual Defendants also claim that the TASC constitutes an example of a Type IV shotgun pleading "because it raises multiple claims against multiple defendants without articulating which are responsible for which acts or omissions." (Doc. 273 at 15). The Eleventh Circuit, however, has noted that "[t]he fact that defendants are accused collectively does not render [a] complaint deficient" for being a shotgun pleading so long as "[t]he complaint can be fairly read to aver that all defendants are responsible for the alleged conduct." *Kyle K v. Chapman*, 208 F.3d

940, 944 (11th Cir. 2000). Here, the TASC alleges that each Individual Defendant is responsible for the collective conduct in which they participated, while also asserting specific allegations against particular individuals. As discussed in Section VI.A.4, in Plaintiffs' Response to the Poarch Officials' Motion to Dismiss, filed Apr. 30, 2026, Plaintiffs have made a good faith effort to address the Type IV shotgun pleading issues raised by the Eleventh Circuit.

"[T]his is not a situation where a failure to more precisely parcel out and identify the facts relevant to each claim materially increased the burden of understanding the factual allegations underlying each count." *Weiland*, 792 F.3d at 1324. For these reasons, the TASC does not constitute a shotgun pleading and should not be dismissed.

B. Plaintiffs have Article III standing to bring their unjust enrichment claims (Counts III and IX).

Next, the Individual Defendants argue that "Plaintiffs' unjust enrichment claim fails to meet the basic minimum requirements of Article III standing." (Doc. 273 at 21). It is hard to ascertain the reasoning for this argument, given that the Individual Defendants only dedicate five cursory sentences to it. (*Id.*). Just the same, Plaintiffs will respond with argument, authority, and citations that establish Plaintiffs do indeed have Article III standing to bring their unjust enrichment claims. To be sure, in the early stages of pleadings, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [the Court] 'presum[es] that general allegations embrace those specific facts that are necessary to support the claim.'" *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1124 (11th Cir. 2019) (quoting *Bennett v. Spear*, 520 U.S. 154, 168 (1997)). The TASC meets this threshold standard.

First, the TASC alleges facts that establish Plaintiffs have suffered an injury in fact, and that their injury is concrete and particularized, in satisfaction of Article III's standing requirements. *See id.* at 1125 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The Individual

Defendants baldly state that Plaintiffs did not suffer an injury for purposes of Article III standing, but that argument ignores the TASC entirely. The TASC details at least 57 burials of relatives disinterred with associated objects; 7,000+ cultural resources recorded and then destroyed; substandard storage, mold, and separation of funerary objects from remains; and a hasty 2012 reburial performed in violation of Muscogee religion and without Mekko Thompson's consent after sending last-minute USPS letters and then claiming reburial was "agreed to" when no such agreement existed. (Doc. 261 at 36-42, ¶¶ 153-90) (Phase III, reburial mechanics, and destruction/soil); (*Id.* at 51-53, ¶¶ 240-56) (public misstatements); (*Id.* at 59-65, ¶¶ 269-82) (2023 works and refusal to share plans). Indeed, "[t]he ongoing mistreatment of these Muscogee relatives and associated funerary objects is traumatizing and continues to cause Plaintiffs, including Mekko Thompson, significant emotional distress, trauma, agony, and heartache." (*Id.* at 50, ¶ 236). Plaintiffs have alleged that they suffered, and continue to suffer, injuries in fact sufficient to establish standing.

Second, the TASC contains allegations demonstrating causation by showing that Plaintiffs' injuries are "connect[ed] with the conduct about which [they] complain[]." *Trump v. Hawaii*, 585 U.S. 667, 697-98 (2018); *Duke Power Co. v. Envtl. Study Grp.*, 438 U.S. 59, 75 n.20 (1978) (explaining that Article III standing "require[s] no more than a showing that there is a 'substantial likelihood'" of causation). A plaintiff only needs to show that his "injury [is] fairly traceable to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014). "[E]ven harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003). Thus, a plaintiff does not need to allege that

"the defendant's actions are the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997); *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1126 (11th Cir. 2019).

The TASC alleges Plaintiffs' injuries were caused by the Individual Defendants' wrongful conduct. For example: (1) Defendant Eddie Tullis (Chair in 1980; later PCI Gaming Authority) allegedly made and repeated preservation promises, then "unjustly enriched [himself] by acquiring the Hickory Ground Site at no cost to Poarch and without objection from Plaintiffs" based on his promises, while still remaining a recipient of revenues; he is alleged personally liable for conduct spanning 1980s to present (Doc. 261 at 72, ¶ 321); (*see id.* at 10-11, 24, 58-59, 70, 73, ¶¶ 40, 42, 109, 168, 265-267, 306, 323-26); (2) Defendant Stephanie Bryan (Vice-Chair in 2006; Chair since 2014) pushed forward the casino and letter-writing campaign falsely asserting there had been a reburial "agreement" when there was none; as a beneficiary, she too receives distributions (*Id.* at 11, 51-53, 58-59, ¶¶ 44, 243-55, 265-67); (3) Defendant Buford Rolin's personal liability began in as early as 1980 and continued through 2016 when he "knowingly authorized excavation and early development plans," "allowed human remains and associated funerary objects to be removed without consulting Plaintiffs or obtaining their consent" (*Id.* at 12, 47, 49, 53, 69-70, 73, ¶¶ 51(b), (d), 220, 230, 255, 305-06, 323-27); (4) Defendant Robert McGhee, (*Id.* at 51, 53, ¶¶ 241, 255); (5) Defendant Arthur Mothershed, (*Id.* at 11, 39, 51, 84, ¶¶ 43, 169, 240, 376); (6) Defendant Keith Martin, (*Id.* at 11, 84, ¶¶ 46, 376); (7) Defendant Sandy Hollinger, (*Id.* at 11-12, 84, ¶¶ 50, 376); (8) Defendant David Gehman, (*Id.* at 11, 75-77 ¶¶ 48, 338-42); and (9) Defendant Garvis Sells, (*Id.* at 11, 75-77 ¶¶ 49, 338-42). Each Individual Defendant is tethered to roles enabling the excavation and construction of the Site, a reburial that violates Muscogee culture and religion, public misstatements and lies, and continuing operations; additionally, the TASC pleads personal receipt through membership distributions, salaries, bonuses, and other financial benefits. (*Id.* at

39, 53, 58-59, ¶¶ 168-69, 258, 265-66). Therefore, Plaintiffs' injuries are traceable to the Individual Defendants' conduct.

Third, in establishing redressability, a plaintiff need not allege anything "'more than . . . a substantial likelihood' of redressability." *Wilding*, 941 F.3d at 1126-27 (alteration in original) (quoting *Duke Power Co. v. Envt'l. Study Grp.*, 438 U.S. 59, 79 (1978)); *see also Made in the USA Found. v. United States*, 242 F.3d 1300, 1310-11 (11th Cir. 2001) (explaining that even partial relief suffices for redressability). Indeed, "[d]isgorgement is an equitable remedy intended to prevent unjust enrichment." *SEC v. Levin*, 849 F.3d 995, 1006 (11th Cir. 2017) (quoting *SEC v. Monterosso*, 756 F.3d 1326, 1337 (11th Cir. 2014); *see also Guyana Tel. & Tel. Co. v. Melbourne Int'l Commc'ns, Ltd.*, 329 F.3d 1241, 1249 (11th Cir. 2003) ("Restitution is a remedy that is often available to victims of a wrong.").

Plaintiffs' injuries are redressable because the relief Plaintiffs seek—disgorgement—would directly remedy the unjust gains obtained through the Individual Defendants' wrongful conduct, as discussed in more detail in Section VI.G. As the Supreme Court explained in *Kokesh v. SEC*, disgorgement requires a defendant to surrender profits "'properly attributable to the defendant's interference with the claimant's legally protected rights.'" *Kokesh v. SEC*, 581 U.S. 455, 459 (2017). Here, the Individual Defendants directly interfered with Plaintiffs' legally protected rights when they dug up Plaintiffs' relatives and funerary objects to construct a casino on sacred burial grounds. (Doc. 261 at 59, ¶ 267). Requiring the Individual Defendants to disgorge profits derived from that conduct would deprive them of benefits obtained through their alleged violations and provide a concrete form of equitable relief tied to Plaintiffs' injuries. It would also serve as a significant disincentive for the Individual Defendants to continue to violate federal law,

as they would no longer be able to maintain the financial benefits they continue to receive as a result of their ongoing destruction of a significant historic site.

Article III does not require that a remedy fully restore what was lost—"even partial relief suffices for redressability." *Made in the USA Found.*, 242 F.3d at 1310-11. Disgorgement does exactly that: it eliminates the wrongful enrichment from the disturbance of Plaintiffs' ancestors and ensures that the Individual Defendants do not retain profits derived from that harm. Because a favorable decision would result in the surrender of those gains, Plaintiffs' injuries are redressable. Plaintiffs, therefore, have Article III standing to bring Counts III and IX.[5]

C. Plaintiffs have stated a claim for unjust enrichment under Alabama law (Count III) and a claim for unjust enrichment under federal common law (Count IX).

To state a claim for unjust enrichment under Alabama law,[6] "a plaintiff must show that: (1) the defendant knowingly accepted and retained a benefit, (2) provided by another, (3) who has a reasonable expectation of compensation." *Portofino Seaport Vill., LLC*, 4 So. 3d 1095, 1098 (Ala. 2008) (citing *Am. Family Care, Inc. v. Fox,* 642 So. 2d 486, 488 (Ala. Civ. App. 1994)). Alternatively, instead of alleging an expectation of compensation, the plaintiff may establish that the defendant's retention of a benefit is unjust if the plaintiff acted under a mistake of fact, or if

[5] To the extent the Individual Defendants attempt to make an argument that Mekko Thompson does not have Article III standing to bring Count V, Plaintiffs incorporate herein by reference Section VI.B.

[6] The Individual Defendants do not take a position on what law governs Count IX. (Doc. 273 at 17-28) (containing no mention of what law applies to Count IX). Because Alabama and federal common law on unjust enrichment are virtually identical, and because the Individual Defendants' Motion to Dismiss "treat[s] Counts III and IX as a single claim . . . to avoid repetition" (Doc. 273 at 9 n.1), Plaintiffs will do the same. To be sure, the differences between Alabama and federal common law here are marginal. In each framework, a plaintiff must show that a benefit was conferred upon the defendant, that the defendant had knowledge of and accepted or retained that benefit, and that it would be inequitable to allow the defendant to retain it without payment. *In re Fortra File Transfer Software Data Sec. Breach Litig.*, 749 F. Supp. 3d 1240, 1266 (S.D. Fla. 2024) (hereinafter "*In re Fortra File*"); *Carn v. Heesung PMTech Corp.*, 579 B.R. 282, 309 (M.D. Ala. 2017); *Am. Nat'l Red Cross v. ASD Specialty Health Care, Inc.*, 325 F. Supp. 2d 1322, 1334 (S.D. Ala. 2002). Both doctrines operate as equitable remedies designed to prevent defendants from retaining benefits where doing so would result in an unjust outcome.

the defendant engaged in some unconscionable conduct to obtain the benefit. *Mantiply v. Mantiply*, 951 So. 2d 638, 654-55 (Ala. 2006). Unjust enrichment is "'an old equitable remedy,'" grounded in the principle that a defendant should not be permitted to "'be unjustly enriched at the expense of another.'" *Laborde v. Citizens Bank, N.A.*, No. SC-2025-0014, 2025 WL 3684583, at *8 (Ala. Dec. 19, 2025) (quoting *Avis Rent A Car Sys., Inc. v. Heilman*, 876 So. 2d 1111, 1123 (Ala. 2003)).

The Individual Defendants argue that Plaintiffs' unjust enrichment claims fail because Plaintiffs "identify no benefit retained by the Individual Defendants that rightfully belongs to Plaintiffs." (Doc. 273 at 19). Alabama law, however, imposes no such strict requirement. Instead, the Alabama Supreme Court has emphasized that a "'money had and received' (i.e. 'unjust enrichment')" claim does not turn upon rigid formalities. *Am. Nat'l Red Cross*, 325 F. Supp. 2d at 1333. Such a claim "is not limited to an exchange of 'money,' literally, but can encompass 'other pecuniary gain' by the defendant." *Id*. at 1334 (quoting *Jordan v. Mitchell*, 705 So. 2d 453, 460 (Ala. Civ. App. 1997)).

Consistent with that principle, Alabama courts have made clear that "privity of contract between the litigant parties" is not required for claims based in equity. *Ala. Dry Dock & Shipbuilding Co. v. Ward*, 27 So. 2d 710, 713 (Ala. Civ. App. 1946), *cert. denied*, 27 So. 2d 716 (Ala. 1946). Instead, the focus is on the receipt and retention of a benefit and whether, under the circumstances, it would be inequitable for the defendant to retain that benefit. *See id.* (explaining that for claims founded upon equitable principles, those claims "should not be labored with strict legal rules; that because of its equitable character great latitude should be permitted in its use; that it should be favored by our courts the end that justice may be attained . . . ."). To succeed on their unjust enrichment claims, Plaintiffs do not have to establish that they are contractually entitled to the millions of dollars the Individual Defendants have personally made from digging up Plaintiffs'

relatives and building a casino over their final resting place. Instead, Plaintiffs need only demonstrate that the Individual Defendants' retention of those gains—made possible from Plaintiffs' benefit—would be unjust.

Ultimately, whether a defendant has been unjustly enriched is inherently a fact-intensive determination. *Mantiply*, 951 So. 2d at 655 ("The success or failure of an unjust-enrichment claim depends on the particular facts and circumstances of each case."). These fact-intensive determinations—the nature of the benefit, how it was obtained, and whether retention of that benefit would be unjust—are not generally questions that can be resolved on the pleadings alone. *See generally id.* (reversing summary judgment due to a genuine issue of material fact). At this stage, Plaintiffs need only plausibly allege that the Individual Defendants received and retained a benefit under circumstances that make it inequitable to do so. Here, Plaintiffs have done so.

Still, the Individual Defendants aver that Plaintiffs' unjust enrichment claims merely seek to disgorge Defendants of their "lawfully gotten gains." (Doc. 273 at 19). That characterization misses the mark. As the TASC alleges—and as Plaintiffs have a good faith belief that discovery will confirm—the Individual Defendants' conduct violated—and continues to violate—numerous federal laws enacted to protect Native burials and sacred historical sites like Hickory Ground. The gains at issue are anything but lawful. For the reasons discussed below, the TASC sufficiently alleges all elements of an unjust enrichment claim under Alabama law and federal common law.

1. Plaintiffs conferred a benefit to the Individual Defendants.

"The first requirement of unjust enrichment under [] Alabama law . . . is that one party must have conferred a benefit on another." *Portofino Seaport Vill., LLC*, 4 So. 3d at 1098. The Individual Defendants' effort to impose a categorical rule requiring Plaintiffs to show that Defendants possess money directly belonging to Plaintiffs improperly narrows Alabama unjust enrichment law and ignores its equitable foundation. (Doc. 273 at 20) (claiming Plaintiffs must

demonstrate "that the Individual Defendants have money . . . belonging to Plaintiffs."). The doctrine is not so limited. *See, e.g.*, *Am. Nat'l Red Cross*, 325 F. Supp. 2d at 1334 (quoting *Jordan*, 705 So. 2d at 460) (explaining that the plaintiff's allegations—that the defendant "acquired [blood] product from plaintiff under fraudulent pretenses"—taken as true, "would appear, at the very least, to represent 'wrongful conduct on the part of the recipient of a benefit.'").[7]

In this instance, the benefits offered by Plaintiffs—specifically, the absence of any objection to the Individual Defendants' Grant Application and request to become a federally recognized tribe, coupled with support for both—clearly meet the bar under Alabama law. *See, e.g.*, *Mazer v. Jackson Ins. Agency*, 340 So. 2d 770, 771-75 (Ala. 1976) (holding that the developers were estopped from constructing within a buffer zone after the homeowners reasonably relied on assurances—intended to induce their support for annexation—that the area would remain protected, and would suffer injustice if those assurances were disregarded)[8]; (Doc. 261 at 22-25, ¶¶ 102-10, 112). Just like the homeowners in *Mazer*, the Muscogee (Creek) Nation's ("Nation")

[7] The same is true under federal common law. *See, e.g.*, *In re Fortra File*, 749 F. Supp. 3d at 1254, 1266 (finding the benefit that plaintiffs conferred was intangible, specifically the plaintiffs' confidential information, and thus the benefit did not involve money). This is because under federal common law, the question is not literally whether the Individual Defendants have Plaintiffs' *money*, but rather, whether allowing the Individual Defendants to retain the ill-gotten benefits "'would give them a windfall,'" which is "'a classic case of unjust enrichment.'" *In re Peterson Distrib., Inc*., 82 F.3d 956, 960 (10th Cir. 1996).

[8] *Mazer* addressed claims for equitable estoppel and promissory estoppel, rather than unjust enrichment. 340 So. 2d at 772. But that distinction does not limit the broader equitable principles the Court articulated. *Id.* The Court's analysis focused on the purpose of equity itself, which "is to promote equity and justice in an individual case by preventing a party from asserting rights under a general technical rule of law when his own conduct renders the assertion of such rights contrary to equity and good conscience." *Id.* (citing *First Nat'l Bank of Opp v. Boles*, 165 So. 586, 592 (Ala. 1936)). Likewise, those same principles underlie a court's consideration of unjust enrichment and restitution. *See Avis Rent A Car Sys., Inc.*, 876 So. 2d 1111, 1123 (Ala. 2003) ("The doctrine of unjust enrichment is an old *equitable* remedy permitting the court in equity and good conscience to disallow one to be unjustly enriched at the expense of another.") (citation omitted); *see also id.* ("A claim for restitution is equitable in nature, and permits a trial court to balance the equities and to take into account competing principles to determine if the defendant was unjustly enriched.") (citation omitted). Accordingly, Plaintiffs' reliance on *Mazer* for the underlying equitable principles the *Mazer* Court espoused is appropriate.

forbearance and lack of objection in reliance on the Individual Defendants' promises resulted in Poarch obtaining federal preservation funds and purchasing Hickory Ground—two things the Nation would have acted to prevent had the Individual Defendants revealed their intent to desecrate Hickory Ground and build a casino. (*Id.* at 22-26, ¶¶ 102-116). Here, Plaintiffs' forbearance was "definite and substantial" and therefore undoubtedly served as a benefit to the Individual Defendants. *Mazer*, 340 So. 2d at 772-74.

The Individual Defendants argue that Plaintiffs did not confer a benefit because Plaintiffs "did not grant PCI federal recognition or place the land into trust" or "give the land to PCI." (Doc. 273 at 20). Under Alabama law, however, "it is sufficient to show that . . . the defendant [] received the benefit *indirectly*." *Jewett v. Boihem*, 23 So.3d 658, 662 (Ala. 2009) (quoting 42 C.J.S. Implied Contracts § 19, at 27 (2007)). "'Often a person owes restitution for a benefit he received through entirely innocent behavior, and even *through a transaction in which he took no part.*'" *Id.* 23 So.3d at 662 (quoting *Pratt v. Watkins,* 946 F.2d 907, 909 (Temp. Emer. Ct. App. 1991)).[9] Therefore, although Plaintiffs did not *directly* give the preservation grant funds to the Individual Defendants, and did not *directly* give Poarch its federal recognition, the benefits conferred by Plaintiffs made those two realities possible. Under Alabama law and federal common law, this is sufficient to demonstrate that Plaintiffs conferred a benefit to the Individual Defendants.

[9] Nor does federal common law require Plaintiffs to allege that they conferred a benefit directly to the Individual Defendants. *See, e.g.*, *In re Fortra File*, 749 F. Supp. 3d at 1266. For instance, in *United States ex rel. Borges v. Doctor's Care Medical Ctr., Inc*., the Court explained that federal common law does not require the plaintiff to "allege that it conferred a benefit directly upon [the defendant] to plead a claim of unjust enrichment." *United States ex rel. Borges v. Doctor's Care Medical Ctr., Inc*., No. 01-8112-CIV-RYSKAMP/VITUNAC, 2007 WL 9702639, at *18 (S.D. Fla. Jan. 29, 2007) (concluding that the plaintiffs do not need to "prove that the [benefit] payments were made directly to each of the Defendants."). Thus, the Individual Defendants' argument that Plaintiffs did not confer a benefit because Plaintiffs were not the ones to "grant PCI federal recognition or place the land into trust" or "give the land to PCI" is irrelevant to the Court's consideration of Count IX. (Doc. 273 at 20).

2. The Individual Defendants knowingly accepted and retained Plaintiffs' benefit.

Alabama courts find that a defendant knowingly accepts a benefit when the defendant is aware of the benefit and retains it without returning its value. *See Pentagon Fed. Credit Union v. McMahan*, 343 So.3d 485, 489 (Ala. 2021); *Scrushy v. Tucker*, 955 So. 2d 988, 1012 (Ala. 2006) (concluding that Scrushy "was unjustly enriched by the payment of [] bonuses" and that "it would be unconscionable to allow Scrushy to retain millions of dollars awarded to him . . . ."). Here, the Individual Defendants knew that Plaintiffs' support for their Grant Application and federal recognition helped them achieve both, and even worse, the Individual Defendants never had any intention of protecting or preserving Hickory Ground; they only made those statements to secure Plaintiffs' support and prevent Plaintiffs' opposition. (Doc. 261 at 44-45, ¶ 208). Notably, the Individual Defendants have never rejected the millions of dollars that have flowed to them as a result of their unlawful, egregious conduct. (*Id.* at 53, 59, 77, ¶¶ 258, 267, 341). Such knowing acceptance and retention of a benefit conferred satisfies the applicable standard under Alabama law.

Specifically, the TASC alleges that the Individual Defendants accepted and retained the fruits of federal recognition and trust land status based on (1) their "participat[ion] in decisions to excavate and disturb the burial grounds . . . despite having made promises to Plaintiffs that the Site would be preserved"; (2) their "development, construction, and operation of the Wind Creek Wetumpka Casino Resort on the Site"; and because (3) as a result of their unlawful actions, they "received significant financial benefits . . . including through: a. direct distributions from casino revenues; b. salaries, salary increases, bonuses and increased employee benefits; and c. other direct or indirect personal compensation through their increased personal status and influence[.]"(*Id.* at 76-77, ¶¶ 338(e), 339(b), 341). The TASC alleges that the Individual Defendants accepted the

benefits knowingly by overseeing and authorizing the construction on top of the Hickory Ground Site even "*after* Plaintiffs filed a complaint emphasizing the religious and cultural importance of the Site, notifying all Defendants of violations of applicable law." (*Id.* at 41, ¶ 187). The TASC additionally alleges that the Individual Defendants "obstruct[ed] [] Plaintiffs' and Mekko Thompson's rights to participate in the reburial through intentional misrepresentations and/or concealment of their intentions to quickly rebury Mekko Thompson's ancestors so they could personally gain from the start of the casino." (Doc. 261 at 42-43, 75-76, ¶¶ 196, 338(a), 338(d)).

Contrary to the Individual Defendants' efforts to suggest that they must hold Plaintiffs' literal money to be liable under Alabama law, the nature of the benefit—Plaintiffs' support for federal recognition and the Grant Application—is sufficient under Alabama law. 340 So. 2d at 771-75; *Jewett*, 23 So.3d at 662. Here, the Individual Defendants' increases in salaries, bonuses, and per capita payments constitute their ongoing acceptance of the benefits Plaintiffs have conferred. (Doc. 261 at 53, 58-59, 77, ¶¶ 258, 265-67, 341).[10]

3. The Individual Defendants' retention of Plaintiffs' benefit is unjust under the circumstances alleged in the TASC.

Next, the Individual Defendants contend that, in order to sustain a claim for unjust enrichment, Plaintiffs must demonstrate that in exchange for their support for the Grant

[10] The Individual Defendants erroneously cite to the District Court's decision in *Decatur Hotels* (Doc. 273 at 19-20) (citing *United States ex rel. Mathews v. Decatur Hotels, L.L.C.*, No. 2:06-CV-1317-VEH, 2008 WL 11375354 (N.D. Ala. Aug. 21, 2008)). In *Decatur Hotels*, the District Court dismissed plaintiff's unjust enrichment claim because she admitted she did not confer any benefit on defendant and argued she had a "right to pursue an unjust enrichment claim against Decatur even if she has suffered no personal loss by" Decatur Hotels' actions. *Decatur Hotels*, *L.L.C.*, 2008 WL 11375354, at *6. This is not the case here, where Plaintiffs have alleged that they conferred benefits by actively supporting, and not opposing, the Individual Defendants' efforts to obtain federal preservation funds and federal recognition status. (Doc. 261 at 24, 25, ¶¶ 110, 112-13). Furthermore, in contrast to the plaintiff in *Decatur Hotels*, Plaintiffs have suffered significant loss as a result of the Individual Defendants' wrongful conduct. (Doc. 261 at 75-76, ¶ 338). The Individual Defendants' desecration of their religious, ceremonial site has caused and continues to cause Plaintiffs significant grief and anguish. (Doc. 261 at 81, 84, ¶¶ 364, 377).

Application and Poarch's federal recognition, Plaintiffs expected to receive millions of dollars in casino funds. (Doc. 273 at 21) ("Plaintiffs have not alleged a reasonable expectation of compensation."). Such a claim threatens to turn Alabama law on its head. Unjust enrichment, under Alabama law, is an equitable doctrine. Plaintiffs do not need to show that they supported the Grant Application because Plaintiffs expected to profit from a casino that would one day destroy the sacred site the preservation funds were supposed to preserve. Plaintiffs *expected* that their support for the Grant Application would result in Hickory Ground's protection and preservation—because that is what the Individual Defendants promised. Under Alabama law, that is enough to demonstrate that the Individual Defendants' retention of Plaintiffs' benefit would be unjust. *See Mantiply*, 951 So. 2d at 654-55 (quoting *Welch v. Montgomery Eye Physicians, P.C.*, 891 So. 2d 837, 843 (Ala. 2004)) (explaining that a defendant's "retention of a benefit is unjust if '(1) the donor of the benefit . . . acted under a mistake of fact or in misreliance on a right or duty, or (2) the recipient of the benefit . . . engaged in some unconscionable conduct, such as fraud, coercion, or abuse of a confidential relationship.").[11]

[11] Federal common law likewise does not require demonstration that plaintiff expected to receive a payment if society's reasonable expectations of right and wrong would be defeated by failure to order Defendants to disgorge themselves of their ill-gotten gains. *See, e.g.*, *Nossen v. Hoy*, 750 F. Supp. 740, 745 (E.D. Va. 1990) (noting that if a plaintiff demonstrates that "[s]ociety's reasonable expectations of security of person and property would be defeated by nonpayment," then there is no need to establish that the "plaintiff had a reasonable expectation of payment."); *United States v. R.J. Zavoral & Sons, Inc*., No. 12–668 (MJD/JJK), 2014 WL 5361991, at *17 (D. Minn. Oct. 14, 2014) (concluding that the United States may pursue unjust enrichment to protect society's interest in maintaining the integrity of federal contracting programs, even if the United States had no expectation of compensation). Under federal common law, courts will award unjust enrichment where doing so upholds "the interests of society," even in instances where the plaintiff had no expectation of compensation for the benefit conferred. *Provident Life & Acc. Ins. Co. v. Waller*, 906 F.2d 985, 994 (4th Cir. 1990) (awarding unjust enrichment because "the interests of society, as reflected by the goals of ERISA and efficient plan administration, would be served by allowance of an equitable remedy."). Here, the interests of society would be served by upholding the goals of the National Historic Preservation Act ("NHPA"), Native American Graves Protection and Repatriation Act ("NAGPRA"), and the Archaeological Resources Protection Act ("ARPA")—all of which have been and continue to be violated by the Individual Defendants' ongoing illegal conduct.

First, the TASC alleges that Plaintiffs withheld their objection to Poarch's federal recognition *mistakenly* believing the Individual Defendants'—including Defendant Tullis' and Rolin's—fraudulent misrepresentations that the Site would be preserved. *See, e.g.*, *supra* Section IV, ¶ 1; (Doc. 261 at 75, ¶ 338(a)) ("Each of the Poarch the Individual Defendants personally engaged in . . . [m]isrepresentations and false promises to protect the Hickory Ground Site . . . "); (*Id.* at 72-73, ¶ 322) ("Tullis and Rolin expressly represented that Poarch's acquisition of the Hickory Ground Site would result in the 'existing Hickory Ground tribal town in Oklahoma . . . know[ing] their home in Alabama is being preserved,' 'without excavation;' and that Poarch would provide 'permanent protection of the site.'"); (*Id.* at 73, ¶ 323) ("Tullis and Rolin continued to promise the Muscogee (Creek) Nation they would protect the Hickory Ground Site prior to Poarch's federal recognition."); (*Id.* at 73, ¶ 326) ("In justifiable reliance on . . . Tullis'[] and Rolin's promises in the Grant Application, including promises that Poarch would provide 'permanent protection of the site,' 'without excavation,' so that 'Creeks from Oklahoma may return and visit their ancestral home,' . . . the Muscogee (Creek) Nation did not object to Poarch's acquisition of the Hickory Ground Site in fee or in trust. Instead, the Muscogee (Creek) Nation supported Poarch's bid for federal recognition."). But for the Individual Defendants' misleading and fraudulent promises, Plaintiffs would never have supported Poarch's federal recognition and acquisition of the Site. (*Id.* at 24-26, ¶¶ 110, 112, 115-16).

Moreover, the TASC ties the Individual Defendants' misrepresentations to their purpose—inducing Plaintiffs to rely on their false promises so they could develop the Site and produce significant financial gains: Poarch's Alabama casinos now earn over $2,000,000,000 per year, they bought a $1.3 billion Pennsylvania casino in 2019, and under the Revenue Allocation Plan, 20% of net gaming funds are distributed to 2,200 Poarch citizens, including the Individual Defendants;

member distributions escalated from $100/year (2005) to over $21,000/year (2014) and are "higher now." (*Id.* at 39, 53, 58-59, ¶¶ 168, 258, 265). Thus, the TASC identifies when, where, and how each Individual Defendant acted outside of their official capacity by making these fraudulent and misleading statements for their own benefit. The TASC alleges that Plaintiffs mistakenly relied upon the Individual Defendants' promises and therefore, Defendants' retention of the benefits conferred by Plaintiffs, under these circumstances, would be unjust.

Second, even if the Court does not find that Plaintiffs mistakenly relied on Individual Defendants' misrepresentations, the Individual Defendants' retention of Plaintiffs' benefit is unjust because Individual Defendants engaged in unconscionable conduct. The Individual Defendants suggest that unconscionable conduct requires fraud and that the TASC does not meet the heightened pleading requirements under Federal Rules of Civil Procedure 9(b). (Doc. 273 at 23-26). However, fraud is just one example of unconscionable conduct. *See Mantiply*, 951 So. 2d at 654-55 (emphasis added) (holding the retention of a benefit is unjust if "'the recipient of the benefit . . . engaged in *some* unconscionable conduct, *such as* fraud, coercion, or abuse of a confidential relationship'").

The TASC alleges that the Individual Defendants engaged in unconscionable conduct, including fraud, coercion, and/or abuse of a confidential relationship with Plaintiffs. (*See, e.g.*, Doc. 261 at 38 ¶ 167) (alleging that each "Individual Defendant knew of the sacred and cultural significance of Hickory Ground to Plaintiffs and was aware that their actions would cause significant harm. Despite this knowledge, [each Individual Defendant] [p]ersonally misrepresented and fraudulently concealed the degree of desecration their actions would cause at the Hickory Ground Site."); (*Id.* at 76, ¶ 339(d)) (same); (*Id.* at 26, ¶ 116) (alleging that the Poarch Officials promises "were fraudulent because [they] . . . never intended to keep their promises and

knew it was more likely than not that the Muscogee (Creek) Nation would rely on the false promises they made."); (*Id.* at 70, ¶ 306) ("Tullis and Rolin, knowingly and intentionally misrepresented Poarch's historical status and relationship with the federal government and falsely represented to Plaintiffs that the Hickory Ground Site would be preserved . . . and the Individual Defendants misrepresented and/or concealed their excavation of the burial grounds and their desecration of the sacred Site for the purpose of developing gaming facilities."); (*Id.* at 76, ¶ 338(d)) (alleging that the Individual Defendants obstructed "Plaintiffs' and Mekko Thompson's rights to participate in the reburial through intentional misrepresentations and/or concealment of their intentions to quickly rebury Mekko Thompson's ancestors so they could personally gain from the start of casino operations"); (*Id.* at 76, ¶339(a)) ("Each Poarch Individual Defendant . . . [h]ad knowledge of the cultural and religious importance of the Site to Plaintiffs and that their actions would cause Plaintiffs substantial harm"); (*Id.* at 77, ¶ 339(f)) (alleging that each Individual Defendant "[p]ersonally used deceit, concealment, and misrepresentations to evade enforcement of the applicable laws."). These allegations, taken together, describe far more than mere dealing––they plausibly establish a pattern of deceptive, fraudulent, coercive, and abusive conduct undertaken to secure and retain a benefit at Plaintiffs' expense.

The Individual Defendants also argue that Plaintiffs' allegations concerning fraud do not meet the pleading requirements of Federal Rules of Civil Procedure 9(b). (Doc. 273 at 23-26). However, "a court considering a motion to dismiss for failure to plead fraud with particularity should always be careful to harmonize the directives of [R]ule 9(b) with the broader policy of notice pleading." *Gose v. Native Am. Servs. Corp.*, 109 F.4th 1297, 1318 (11th Cir. 2024) (alteration in original) (quoting *Friedlander v. Nims*, 755 F.2d 810, 813 n.3 (11th Cir. 1985), *abrogated on other grounds by* Wagner v. Daewoo Heavy Indus. Am. Corp., 314 F.3d 541 (11th

Cir. 2002) (en banc)). Accordingly, "a court should 'hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial pre[-]discovery evidence of those facts.'" *Id.* at 1318 (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)). Here, the Individual Defendants' misconduct, whether in their personal or official capacity, has been at the center of this dispute since 2012 and, as the TASC alleges, Plaintiffs have substantial pre-discovery evidence of those facts including inventories and reports from excavations, federal applications, press releases, and letters from the Individual Defendants. (*See, e.g.*, Doc. 261 at 51-53, 72-73, ¶¶ 240-57, 322). Therefore, it would be premature to dismiss Plaintiffs' unjust enrichment claim solely based on the fraud-specific allegations, especially when fraud is just one method of proving unconscionable conduct.

This Court's broad equitable powers are especially important where, as here, the Individual Defendants' unjust enrichment arises from a course of conduct that cannot be neatly reduced to a single transaction and was never codified in a contractual relationship. *See, e.g.*, *Avis Rent A Car Sys., Inc.*, 876 So. 2d at 1123 ("The doctrine of unjust enrichment is an old *equitable* remedy permitting the court . . . ," along with its remedy of restitution, "to *balance the equities* and to take into account *competing principles* to determine if the defendant was unjustly enriched.") Because Plaintiffs have alleged that the Individual Defendants secured and retained substantial benefits from Plaintiffs through conduct that equity may ultimately deem unjust, dismissal at this early stage would be inappropriate. Plaintiffs' unjust enrichment claim should instead be allowed to proceed to discovery, where the Court can fully assess whether permitting the Individual Defendants' retention of Plaintiffs' benefit violates principles of equity and good conscience.

D. Plaintiffs' unjust enrichment claims do not violate the statute of frauds (Counts III and IX).

1. Plaintiffs' unjust enrichment claim under Alabama law does not violate Alabama's Statute of Frauds (Count III).

Alabama's Statute of Frauds does not apply, nor does it preclude Plaintiffs' unjust enrichment claim against the Individual Defendants in Count III. The Individual Defendants posit that Alabama's Statute of Frauds requires dismissal of Plaintiffs' unjust enrichment claim because "Plaintiffs have not alleged the existence of a written agreement" between the parties where the Individual Defendants contractually agree to preserve Hickory Ground. (Doc. 273 at 29). Thus, according to the Individual Defendants, Plaintiffs' unjust enrichment claim "is barred unless the promise [made by the Individual Defendants] is set forth in an enforceable written contract." (*Id.* at 29).

The Individual Defendants are wrong. Under Alabama law, a claim for unjust enrichment exists only in the *absence* of a written contract—and in fact, the absence of a written contract, in this instance, is the reason Plaintiffs' claim for unjust enrichment survives dismissal under Rule 12(b)(6). Indeed, "the existence of an express contract extinguishes an unjust enrichment claim altogether because unjust enrichment is an equitable remedy which issues only where there is no adequate remedy at law." *Univalor Tr., SA v. Columbia Petroleum*, *LLC*, 315 F.R.D. 374, 382 (S.D. Ala. 2016); *see also 1021018 Alberta Ltd. v. Netpaying, Inc.,* No. 8:10–CV–568–T–27MAP, 2011 WL 1103635, at *6 (M.D. Fla. Mar. 24, 2011) ("proof of an express contract between the parties to a contract defeats a claim for unjust enrichment"). This is because "[t]he doctrine of unjust enrichment . . . permit[s] the court in equity and good conscience to disallow one to be unjustly enriched at the expense of another." *Flying J Fish Farm v. Peoples Bank of Greensboro*, 12 So.3d 1185, 1193 (Ala. 2008) (citation omitted). The Restatement reinforces this principle: unjust enrichment is "an independent basis of liability" and restitution "describe[s] the cause of

action as well as the remedy." Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. a (A.L.I. 2011); *see also Berry v. Druid City Hosp. Bd.*, 333 So. 2d 796, 798-99 (Ala. 1976) (claims for unjust enrichment are not based on breach of contract theory but instead constitute an independent equitable basis for liability). The Individual Defendants' argument misconstrues the governing standard under Alabama law.

As a result, the authorities the Individual Defendants rely on are irrelevant, as they are all cases where the plaintiff's unjust enrichment claim relied on or arose out of a written contract and where plaintiff also brought a claim for breach of that contract. (*See* Doc. 273 at 29–30). First, the Individual Defendants cite *Branch Banking*, but in that case, the Alabama Supreme Court determined the statute of frauds applied because the plaintiffs' claims relied on a written contract that was unenforceable in a breach of contract action. *See Branch Banking & Tr. Co. v. Nichols*, 184 So. 3d 337, 346-48 (Ala. 2015) (quoting *Holman v. Childersburg Bankcorporation, Inc.*, 852 So. 2d 691, 699 (Ala. 2002)). Similarly, in *Davis v. Wells Fargo Home Mortg. Inc.*, the District Court held that the statute of frauds barred the plaintiff's unjust enrichment claim because it was based on the same oral promise as the plaintiff's breach of contract claim pursuant to the parties' written contract. No. 2:15-cv-00329-JEO, 2016 WL 393850, at *4–5 (N.D. Ala. Feb. 2, 2016). And in *Lambert v. First Fed. Mortg.*, the plaintiff did not bring an unjust enrichment claim but instead brought a breach of contract claim which was barred by the statute of frauds. 47 F. Supp. 3d 1310, 1318-19 (N.D. Ala. 2014). The Individual Defendants' authorities are inapplicable; Plaintiffs' unjust enrichment claim does not rely on or arise out of a promise made in an enforceable contract. Instead, Plaintiffs' unjust enrichment claim constitutes an independent equitable cause of action, and as a result, the statute of frauds does not apply.[12]

[12] While the Alabama statute of frauds does not apply to unjust enrichment claims, it would nevertheless be

2. Alabama's Statute of Frauds does not apply to Plaintiffs' unjust enrichment claim under federal common law (Count IX).

The Individual Defendants do not argue that Alabama's Statute of Frauds applies to Plaintiffs' federal law unjust enrichment claim, nor could they. (*See* Doc. 273 at 29-30). The statute of frauds is a state-law doctrine, adopted through a state statute, not federal common law. Ala. Code. § 8-9-2. While federal courts may apply a state's statute of frauds to state-law claims, Count IX is not a state law claim. Where a claim arises under federal law, federal law will govern. *See Kossick v. United Fruit Co*., 365 U.S. 731, 732-33, 741-42 (1961) (holding that the validity of a shipowner's oral promise to a seaman is governed by federal maritime law rather than New York's Statute of Frauds); *Agent-cee v. Nelson*, No. 1:23-cv-04380-VMC, 2024 WL 4868283, at *2 (N.D. Ga. Sep. 12, 2024) (holding that "federal copyright law, not Georgia simple contract law or Georgia's Uniform Commercial Code, applies to [p]laintiff's claims for breach of contract").

Moreover, both the Northern and Southern District Courts in Alabama have been reluctant to rely on a statute of frauds defense at the pleading stage. *See ANZ Advanced Techs., LLC, v. Bush Hog*, LLC, No. 09–00228–KD–N, 2009 WL 3415650, at *4 n.4 (S.D. Ala. Oct. 20, 2009) (concluding that the defendants' statute of frauds "defense [did] not render Plaintiff's claims

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inapplicable to this case because Alabama courts bar its use in cases involving fraud. *See Rice v. Barnes*, 149 F. Supp.2d 1297, 1301 (M.D. Ala. 2001) (quoting *Leisure Am. Resorts, Inc. v. Knutilla*, 547 So. 2d 424, 427 (Ala. 1989) ("where 'fraud operates from the beginning—that is, when the breaching party procured the land with no intent to perform the oral agreement admitted to have been made' then equity will intervene" and the statute of frauds does not apply). The TASC alleges that the Individual Defendants Tullis' and Rolin's promises "were misleading and fraudulent" because they "never intended to keep their promise[]" to Plaintiffs that the Site would be preserved, knowing "it was more likely than not that the Muscogee (Creek) Nation would rely on the false promises they made." (Doc. 261 at 26, ¶ 116); (*see also id.* at 70, ¶ 306). The TASC also alleges that the "the Individual Defendants never intended to comply with Plaintiffs' requests and never intended to protect the [] Site." (*Id.* at 44, ¶ 208). The Individual Defendants, including Tullis and Rolin, made "fraudulent and misleading" statements in their application for federal preservation grant funds by "expressly represent[ing] . . . that Poarch would provide permanent protection of the [S]ite.'" (*Id.* at 72-73, ¶¶ 322-23). Taking Plaintiffs' allegations as true, the fraud exception applies to Plaintiffs' unjust enrichment claim and the statute of frauds is inapplicable.

implausible nor authorize [the court] to ignore the material issues of fact which have yet to be addressed with any discovery by either side"); *Abernathy v. Church of God*, No. 4:11-CV-2761-VEH, 2011 WL 13135285, at *2 (N.D. Ala. Nov. 28, 2011) ("The court finds particularly problematic [the defendant's] position that the court should find in its favor on its statute of frauds defense at the pleadings stage . . .").

Therefore, Plaintiffs' federal law unjust enrichment claim is not barred by Alabama's Statute of Frauds. Even if Alabama's Statute of Frauds applies (it does not), dismissal on that basis would be premature at this stage in the proceeding.

E. Plaintiffs' unjust enrichment claims are not time barred (Counts III and IX).

Plaintiffs' unjust enrichment claims are timely because: (1) the TASC alleges concrete actions the Individual Defendants took within six years of Plaintiffs' filing of the Complaint for Declaratory and Injunctive Relief ("Original Complaint") in 2012; (2) the TASC alleges that the Individual Defendants continue to commit specific ongoing violations; and (3) the statute of limitations is tolled as a result of the Individual Defendants' fraudulent actions in concealing information related to their desecration of the Hickory Ground Site. Plaintiffs will address these arguments in turn.

The Individual Defendants argue that Plaintiffs' unjust enrichment claims are untimely because, under Alabama law, the statute of limitations is "no more than six years" and "most of the conduct alleged fell well outside the limitations period . . . ." (Doc. 273 at 31). While the Individual Defendants are not necessarily wrong about Alabama law,[13] they misconstrue the

[13] While the Individual Defendants argue that the statute of limitations for unjust enrichment can be "no more than six years," they also acknowledge that in Alabama, there is a lack of authority definitively identifying the statute of limitations applicable to an unjust enrichment claim. (Doc. 273 at 31); *Ex Parte Abbott Laboratories*, 342 So. 3d 186, 194 n.7 (Ala. 2021) (citing *Snider v. Morgan*, 113 So.3d 643, 655 (Ala. 2012)). Regardless of whether the statute of limitations is six years or longer, the TASC alleges

conduct alleged in the TASC. The Individual Defendants misleadingly state that Plaintiffs do not "articulate what specific conduct underlines the unjust enrichment claim," (*Id.* at 31), but Count III (and Count IX by incorporation) contain numerous, specific allegations regarding conduct the Individual Defendants undertook between 2006 and 2012, including but not limited to: the improper reburial of Plaintiffs' relatives in 2012 (Doc. 261 at 75-76, ¶ 338(c)); "[t]he obstruction of Plaintiffs' and Mekko Thompson's rights to participate in the reburial through intentional misrepresentations and/or concealment of their intentions to quickly rebury Mekko Thompson's ancestors so they could personally gain from the start of casino operations" in 2012 (*Id.* at 76 ¶ 338(d)); the "development, construction, and ongoing operation" of the casino at the Hickory Ground Site from 2012 until now (*Id.* at 76, ¶ 338(e)); and the ongoing refusal to allow Plaintiffs and Mekko Thompson to repatriate their relatives and funerary objects extracted from Hickory Ground from 2006 until now (Doc. 261 at 76, ¶ 338(f)).[14] Any one of these events satisfies the statute of limitations.

Next, the Individual Defendants concede that "Alabama law does appear to allow for a form of continuing unjust enrichment under limited circumstances" (Doc. 273 at 32-33), but, according to the Individual Defendants, "no such serial performance obligation is present here." (*Id.* at 31-32). A serial performance obligation, however, is precisely what the TASC alleges: the Individual Defendants promised to preserve the Site in perpetuity. (Doc. 261 at 24, 72-73, 75-77, ¶¶ 108-09, 321-23, 326, 338-39). Indeed, in their statute of frauds argument, the Individual

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significant conduct that occurred from 2006 to 2012, when the original complaint was filed. Furthermore, because Congress has not prescribed a statute of limitations for unjust enrichment claims grounded in federal common law (*i.e.,* Count IX), federal courts may look to the forum State's applicable law. *Chau Kieu Nguyen v. JP Morgan Chase Bank, NA*, 709 F.3d 1342, 1345 (11th Cir. 2013).

[14] Plaintiffs' unjust enrichment claim under federal law (Count IX) incorporates the factual allegations from the claim under Alabama law (Count III). (Doc. 261 at 88, ¶ 407).

Defendants suggest that their "promise to protect land 'in perpetuity' necessarily cannot be performed within one year" as the obligation to protect the land presumably requires serial acts of performance in the form of continual efforts to preserve the site. (Doc. 273 at 29). The Individual Defendants' failure to uphold their perpetual promise to protect the Hickory Ground Site cannot be both a one-time event that has concluded *and* an event that continues beyond one year and into perpetuity. The Individual Defendants cannot have it both ways.

The promise the Individual Defendants made to protect the Hickory Ground Site—set forth in the very Grant Application they submitted to secure funding for the Site's purchase—contained *no* time limitation. (Doc. 261-1, Ex. A at 4-8). Instead, the Individual Defendants stated that if they were given the funds they need to purchase Hickory Ground, Hickory Ground Tribal Town in Oklahoma "will be pleased to know their home in Alabama is being preserved." (*Id.* at 5); (Doc. 261 at 22-23, ¶ 105). Nothing in the Grant Application suggests that the promise underlying their acquisition of historic preservation funds was anything other than a serial performance obligation. Like the defendant in *Snider v. Morgan*, the Individual Defendants "continue[] to be unjustly enriched by [their ongoing] alleged failure to" preserve the Hickory Ground Site. *Snider v. Morgan*, 113 So. 3d 643, 655-56 (Ala. 2012); *see also id.* (alleging ongoing violations prevents an unjust enrichment claim from being barred by the statute of limitations).

Furthermore, the TASC alleges that the Individual Defendants' conduct stemmed not from single, discrete acts arising from one violation, but instead from several independent violations—each harming Plaintiffs. Specifically, the TASC alleges that:

- The Individual Defendants continue to "insist that Auburn not repatriate the Muscogee relatives currently at Auburn to the Muscogee (Creek) Nation and Mekko Thompson." (Doc. 261 at 50, ¶ 237).
- After unlawfully reburying Plaintiffs' relatives in 2012 in a manner that violates Muscogee religion, the Individual Defendants "unlawfully and fraudulently

pressed forward with casino construction beginning in October 2012" after Defendant Arthur Mothershed confirmed that the human remains "'found'" were reburied. (*Id.* at 51, ¶ 240).

- Defendant Robert McGee falsely states that Plaintiffs' relatives were reburied "'in a manner previously agreed to by traditional leaders in Oklahoma.'" (*Id.* at 51, ¶ 241).

- In 2013, Defendant Stephanie Bryan mailed a letter to tribal leaders nationwide including a fact sheet "full of egregious lies," including assertations that the "'Ceremonial Grounds have never been disturbed[] [and] remain protected'" and that there "was no visible evidence of a burial ground." (*Id.* at 51-53, ¶¶ 243-55); (*cf. id.* at 51, ¶ 240).

- "In February 2023, Plaintiffs received reports that during the last week of January or the first week of February 2023, cultural resources, including possible human remains, were discovered and excavated from the new construction at the [] Site." (*Id.* at 61, ¶ 275).

The Alabama Supreme Court has found that a defendant's repeated wrongful conduct constitutes a continuing violation in several instances. *See, e.g.*, *Ex Parte McKesson Co*., 393 So.3d 1180, 1200 (Ala. 2023) (citing *Am. Mut. Liab. Ins. Co. v. Agricola Furnace Co*., 183 So. 667 (Ala. 1938) (finding a continuous violation where an employer repeatedly submits its employee to harmful conditions); *see also Ala. Power Co. v. Gielle*, 373 So. 2d 851, 854 (Ala. Civ. App. 1979) (explaining that when a trespass is ongoing, it gives rise to separate causes of action over time, and the plaintiff may recover damages for the portions occurring within the limitations period).

In *Snider*, the Alabama Supreme Court explained that the statute of limitations for an unjust enrichment claim runs from the *last date* the defendant was unjustly enriched. 113 So. 3d at 656. According to the TASC, the Individual Defendants are unjustly enriched every time they receive "direct distributions from casino revenues." (Doc. 261 at 77, ¶ 341(a)). Plaintiffs currently do not have access to documentation showing when the Individual Defendants began to receive these distributions from the casino in Wetumpka—or if and when they stopped. However, once discovery takes place, it is likely that discovery will establish that the Individual Defendants

continue to receive significant distributions from the casino they built by excavating Plaintiffs' relatives. (*Id.* at 39, ¶ 169) (quoting Defendant Arthur Mothershed regarding how the Individual Defendants continue to receive more money whenever the casino makes more money).[15]

Finally, Alabama recognizes that a cause of action may be tolled where a defendant fraudulently concealed their actions to prevent a plaintiff from discovering facts concerning fraud. *Ex Parte McKesson Co*., 393 So. 3d 1180, 1201 (Ala. 2023); Ala. Code § 6-2-2. The TASC alleges that the Individual Defendants continuously concealed their fraudulent actions to prevent Plaintiffs from discovering their injuries. (*See* Doc. 261 at 42-43, ¶¶ 196) ("[T]he Individual Defendants personally misrepresented and fraudulently concealed the degree of desecration at the [Site] that would be suffered from the excavation and casino construction in an effort to *delay* Plaintiffs' actions until the excavation and construction could be completed."). Furthermore, despite repeated requests from Plaintiffs to produce the Phase III inventory report—a report that would inform Plaintiffs as to where, how, and exactly when each of their relatives were exhumed—the Individual Defendants have, inexplicably, refused to produce—and instead have concealed—the report and the critical information contained therein. (*Compare* Doc. 271 at Ex. D, 114) (Letter from Robert Thrower to Mekko Thompson) (referring to the Poarch Officials' "current Phase III work") (*with* Doc. 261 at 36, ¶ 154) (noting a Phase III archaeological survey of Hickory Ground was conducted); (*with* Doc. 261 at 92, ¶ 422(i) (alleging that Defendants have never provided the Phase III report to Plaintiffs).

[15] Indeed, the Individual Defendants' argument that the statute of limitations began to run when they first failed to preserve the Site ignores the purpose of the continuing violations doctrine, which serves to protect plaintiffs against a defendant's ongoing harm. *Ex Parte McKesson Co*., 393 So. 3d at 1201 (explaining that "the reason the statute of limitations does not expire for a continuous tort is because the defendant's conduct is ongoing within the period of the statute of limitations").

Plaintiffs' unjust enrichment claims against the Individual Defendants (Counts III and IX) do not violate the statute of limitations and should not be dismissed on those grounds.

F. Plaintiffs' unjust enrichment claims relate back to the Original Complaint (Counts III and IX).

Finally, the Individual Defendants' relation-back argument is a red herring. (Doc. 273 at 33-35). As discussed above in Section VI.E., Plaintiffs' unjust enrichment claims under federal common law and Alabama law are continuing torts, meaning they extended through—and past—the filing of the TASC. Therefore, the relation-back doctrine is flatly inapplicable.

However, even if relation back is required, the unjust enrichment claims relate back to the filing of the Original Complaint because (1) they arise out of the same conduct, transaction, or occurrence set forth in the Original Complaint; and (2) the Individual Defendants were already parties to the case, and the TASC merely clarifies that they are being sued in their individual capacities, in addition to their official capacities. (*Compare* Complaint for Declaratory and Injunctive Relief, Doc. 1 at 4-5, ¶ 13); (*with* Doc. 261 at 10, ¶ 40).

Plaintiffs agree with the Individual Defendants that Alabama's Rules of Civil Procedure 15(c) is complementary to the Federal Rules of Civil Procedure 15(c). *Chumney v. U.S. Repeating Arms Co*., 196 F.R.D. 419, 428 (M.D. Ala. 2000) (explaining that Alabama's Rule 15(c) is "virtually identical to its federal counterpart," and that an Alabama state court would have "presumably reached a result identical to the one which a federal court would reach in applying Rule 15(c) of the Federal Rules of Civil Procedure."). Here, Plaintiffs apply the Federal Rules of Civil Procedure.

1. The unjust enrichment claims arise out of the same conduct, transaction, and occurrence alleged in the Original Complaint.

Under the Federal Rules of Civil Procedure 15(c)(1), an amendment to a pleading relates back to the original pleading when:

> (A) the law that provides the applicable statute of limitations allows relation back;
>
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; ***or***
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> > (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
> >
> > (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(emphasis added). Although no statute of limitations applies because Plaintiffs' claims arise from continuing torts, the Alabama Supreme Court has nevertheless recognized that unjust enrichment claims may relate back under Rule 15(c), thus satisfying Rule 15(c)(1)(A). *Ex parte Johnston-Tombigbee Furniture Mfg. Co*., 937 So. 2d 1035, 1042-43 (Ala. 2005) (concluding that "the Court of Appeals erred in determining that Johnston-Tombigbee's amended complaint" including an unjust enrichment claim, "could not relate back . . . under Rule 15(c), Ala. R. Civ. P.").

The Individual Defendants, however, ignore Rule 15(c)(1)(A)-(B) entirely and only argue that Plaintiffs' unjust enrichment claims do not relate back under Rule 15(c)(1)(C). (Doc. 273 at 33-35). Because Plaintiffs' unjust enrichment claims arise out of the same conduct alleged in the Original Complaint, this Court does not need to reach the question of whether Plaintiffs meet Rule 15(c)(1)(C)'s requirements. Just the same, Plaintiffs will address both (1)(B) and (1)(C)'s requirements in turn.

Ultimately, allowing the TASC's addition of two unjust enrichment claims against the Individual Defendants satisfies the fundamental purpose of Rule 15(c), which "'is to permit a claim

to be tried on its merits rather than being dismissed based on a technicality so long as the purpose underlying the statute of limitations has been satisfied.'" *Ex parte Novus Utils., Inc.*, 85 So. 3d 988, 997 (Ala. 2011) (quoting *Mitchell v. CFC Fin., LLC*, 230 F.R.D. 548, 549-50 (E.D. Wis. 2005)); *see also* 15 *Moore's Federal Practice* § 15.19(3)(a) (3d ed. 2020). And as the District Court in *Novus* noted:

> The primary purpose of statutes of limitation is to ensure that defendants have notice of an action against them before evidence has been lost or becomes unavailable and with enough time to prepare an adequate defense. Thus, if a party has been notified of litigation involving a specific factual occurrence, it has received the protection that the statute of limitations requires. Under such circumstances, courts should freely grant leave to amend.

Ex parte Novus Utils., 85 So. 3d at 997 (internal citations omitted) (quoting *Mitchell v. CFC Fin.*, LLC, 230 F.R.D. 548, 549-50 (E.D.Wis.2005)). Accordingly, when an amended complaint adds claims that are "closely related" to claims asserted in the original complaint, "the amendment relate[s] back to the filing of the original complaint." *Iriele v. Griffin*, 65 F.4th 1280, 1287 (11th Cir. 2023); *see also Wells v. HBO & Co.*, 813 F. Supp. 1561, 1566 (N.D. Ga. 1992) (citing Fed. R. Civ. P. 15(c)) (explaining that because "Rule 15(c) states flatly that amendments relate back if they arise out of the same conduct . . . . the Court would be hard-pressed to say in spite of this fairly clear language that the amended complaint does not relate back"). Additionally, "amendments relate back only if the original pleading gave adequate notice of the subject of the amendment." *Id.* (citing Fed. R. Civ. P. 15(c)).

Here, Plaintiffs' unjust enrichment claims arise out of the same conduct alleged in Plaintiffs' Original Complaint, and the Original Complaint put the Individual Defendants on notice that Plaintiffs could complain of their conduct personally and individually, as it relates to their unjust enrichment. The Original Complaint, filed in 2012, states that Poarch "is currently engaged in ground disturbing and construction activity in furtherance of the [casino] [p]roject, and shall be

unjustly enriched as a result of its wrongful and unlawful conduct . . . .” (Doc. 1 at 2, ¶ 2) (emphasis added). Additionally, the Original Complaint alleges that the “Defendants” used the “cultural items and human remains for *profit* without the right of possession to those remains.” (*Id.* at 21, ¶ 87) (emphasis added). As for notice, the Original Complaint also alleges that “[s]eparately and severally, the actions of the Defendants have caused and continue to cause immediate and irreparable harm,” and then names each Individual Defendant. (*See id.* at 2, ¶ 1); (*id.* at 4, ¶ 13) (“Defendants Buford Rollin, Stephanie Bryan, Robert McGhee, David Gehman, Arthur Mothershed, Keith Martin, Sandy Hollinger, Garvi[s] Sells, and Eddie Tullis are members of the [Poarch] Tribal Council and officials of [Poarch].”). The Individual Defendants cannot now argue that they were unaware that Plaintiffs could allege that they were unjustly enriched based on the facts alleged in the Original Complaint.

Additionally, the TASC’s allegations add newly discovered information, all arising under the same conduct, transaction, or occurrence as the allegations made in Plaintiffs’ Original Complaint. The Original Complaint alleges misrepresentations made by Poarch to the Nation to induce Plaintiffs’ support. (*Compare id.* at 1-2, ¶ 1) (alleging that Poarch “obtained Hickory Ground with federal funds under the false pretense of preservation”); (*id.* at 6, ¶ 23) (stating that Poarch misrepresented their purpose in acquiring the Site, which they said was “to protect the archeological remains ‘without excavation’”); (*with* Doc. 261 at 22, ¶ 102) (restating the Poarch Officials’ promises to protect the Site in their federal Grant Application); (*id.* at 26, ¶ 116) (alleging that the Poarch Officials’ promises to protect the Site were “misleading and fraudulent”).

The Original Complaint details Poarch’s desecration of the Site. (*Compare* Doc. 1 at 7, ¶ 26) (explaining that Poarch violated its duty “to preserve Hickory Ground by commencing construction of a gaming facility at Hickory Ground”); (*id.* at 8, ¶ 29) (“[Poarch] has excavated

funerary objects and human remains belonging to the lineal ancestors of MCN . . . to construct a gambling facility at [the Site]."); (*id.* at 8, ¶ 31) (alleging that Poarch "excavated some human remains and archaeological resources without a permit" under the Archaeological Resources Protection Act); (*id.* at 8, ¶ 31) ("There is a strong likelihood that the current [2012] excavation will disturb human remains and cultural items."); (*with* Doc. 261 at 70, ¶ 306) (alleging that the "Poarch Officials and the Individual Defendants . . . desecration of the sacred Site [was] for the purpose of developing gaming facilities."); (*id.* at 75-76, ¶ 338) (stating that the Individual Defendants "personally engaged in conduct and unjustly enriched themselves through . . . [d]esecration of the Plaintiffs' sacred burial grounds at the Site . . . [and because they] remov[ed], misue[d], and improper[ly] reburi[ed] Plaintiffs' ancestors' remains and funerary objects"); (*id.* at 76, ¶ 339) (alleging that each Individual Defendant "[p]ersonally participated in decisions to excavate and disturb the burial grounds in violation of clearly established laws").

The Original Complaint alleges that Poarch concealed the degree of their desecration of the Site. (*Compare* Doc. 1 at 22, ¶ 92) (stating that the "Defendants" failed to "share information they possessed" regarding the human remains and associated funerary items with the Nation); (*with* Doc. 261 at 82, ¶ 367) (alleging that the Individual Defendants "intentionally concealed what was happening to Mekko Thompson's ancestors"); (*id.* at 42, ¶ 196) ("The Poarch Officials and the Individual Defendants misrepresented and fraudulently concealed the degree of desecration at the Hickory Ground Site"); (*id.* at 49, ¶ 233) ("Poarch Officials and the Individual Defendants have maliciously withheld from Plaintiffs an inventory documenting how many of Mekko Thompson's relatives Poarch reburied in April 2012").

The Original Complaint alleges that Poarch failed to conduct consultations regarding the proper reinterring process with the Nation. (*Compare* Doc. 1 at 9, ¶ 34) ("[Poarch] failed to provide

notice or initiate meaningful consultation or take into account comments of MCN or its relevant officials prior to commencing construction" at the Site); (*id.* at 9, ¶ 36) (alleging that Plaintiffs made repeated requests that the human remains be reinterred, to stop excavations, and to stop construction, but that the "Defendants [] refused all these requests."); (*with* Doc. 261 at 61, ¶ 273) ("The Poarch Officials refused to provide Plaintiffs with any of this information. The Poarch Officials also refused the Muscogee (Creek) Nation's request to cease all new construction pending the Nation's ability to review the information and engage in consultation, as required by federal law . . . ."); (*id.* at 44, ¶ 206) (restating allegations made in Doc. 1 at 9, ¶ 36); (*id.* at 45, ¶ 211) (alleging that after Plaintiffs notified the Poarch Officials and the Individual Defendants that "Plaintiffs' religion required" the human remains excavated to be reinterred only "under Mekko George Thompson's guidance and exclusive direction," the Poarch Officials and the Individual Defendants "hurriedly reburied most of those remains and cultural items . . . without Mekko Thompson's participation or consent.").

The Individual Defendants do not argue that Plaintiffs cannot meet Rule 15(c)(1)(B)'s requirement that Plaintiffs' unjust enrichment claims arise out of the same conduct, transaction or occurrence as the allegations made in the Original Complaint—and rightfully so. Plaintiffs' unjust enrichment claims arise directly out of the same conduct alleged in the Original Complaint. The addition of new facts and clarification of capacity does not usurp—nor should it—Plaintiffs' ability to allege unjust enrichment against the Individual Defendants. The Individual Defendants were, and have always been, on notice that they unjustly enriched themselves. (Doc. 1 at 2, ¶ 2).

2. A change in capacity is not a change in parties for purposes of Rule 15(c)(1)(C).

The Individual Defendants' entire Rule 15 argument rests on Rule 15(c)(1)(C). (Doc. 273 at 33-35). However, because Plaintiffs have not added any new defendants, there is no need to consider whether the TASC's addition of Counts III and IX satisfies Rule 15(c)(1)(C).

Presumably, the Individual Defendants rely exclusively on Rule 15(c)(1)(C) because they claim that Plaintiffs "sought to add a new claim of unjust enrichment against *new* defendants." (*Id.* at 33) (emphasis added). But the Individual Defendants were already parties to this case from its inception, initially named in their official capacities, and their conduct has always been central to the claims. (*See* Doc. 1 at 1-2, ¶¶ 1, 2); (*id.* at 21, ¶ 87); (*id.* at 4, ¶ 13). The Individual Defendants, therefore, do not constitute "new" defendants for purposes of Rule 15.

Several courts have rejected the Individual Defendants' argument that a change in capacity constitutes adding a "new" defendant for purposes of Rule 15. For instance, in *Itel Capital Corp. v. Cups Coal Co., Inc.*, the Eleventh Circuit held that an amendment adding a company owner as a defendant related back because the original complaint named his company as a defendant. 707 F.2d 1253, 1258 (11th Cir. 1983). The Eleventh Circuit held that as owner of the company, he "was on notice as to the action when it was first filed," and "knew or should have known, but for a mistake by [the plaintiff], that he would have been named as a defendant when the complaint was filed." *Id*. Here, all nine the Individual Defendants that Plaintiffs name in their *individual and official* capacities in the TASC were *already named* in the Original Complaint in their *official* capacities. (*Compare* Doc. 1 at 4-5, ¶ 13); (*with* Doc. 261 at 10, ¶ 40). The relation-back principle under Rule 15(c) focuses on whether defendants were aware of the claims asserted against them in an amended complaint within the statute of limitations. The Individual Defendants were aware, since 2012, that their unjust enrichment is central to Plaintiffs' claims. (*See* Doc. 1 at 2, ¶ 2).

Furthermore, the Individual Defendants' reliance upon *Powers v. Graff* does not support their position. (Doc. 273 at 34); *Powers v. Graff*, 148 F.3d 1223 (11th Cir. 1998). In *Powers*, the plaintiff sued a corporation and then, in their Fourth Amended Complaint, added control persons of the corporation as defendants. 148 F.3d at 1225. Notably, these defendants were not previously parties to the case *in any capacity*—they were entirely new defendants. *Id.* at 1227-28. Therefore, Rule 15(c)(1)(C) did not apply in *Powers*.

The other cases the Individual Defendants rely upon are distinguishable because in each, the plaintiffs sought to add entirely *new* defendants to the action. *See Wells*, 813 F. Supp. at 1567 (holding that plaintiff cannot amend her complaint to add officers of HBO, who were entirely new defendants to the case); *see also Stewart v. Bureaus Inv. Grp., LLC*, 309 F.R.D. 654, 659-61 (M.D. Ala. 2015) (denying plaintiff's amendment to add an attorney and his firm as defendants who were not named in plaintiff's original complaint); *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 552 (2010) (concluding that the plaintiff's amendment to add entirely new defendants do not meet the requirements of Rule 15(c)(1)(C)(ii) because the plaintiff knew of the defendant's identity but did not include them in the original complaint). In contrast, the TASC does not add entirely new defendants because the Individual Defendants were already named in their official capacity in the Original Complaint. (Doc. 1 at 4, ¶ 13). Instead, Plaintiffs bring an additional legal theory against those same individuals, arising under the same facts and circumstances as Plaintiffs' Original Complaint. For purposes of Rule 15(c)(1)(C)(i), the Individual Defendants had notice that they unjustly enriched themselves (*id.* at 2, ¶ 2), as a result of their desecration of the Hickory Ground Site. *See supra* Section VI.C.

As for the second requirement under Rule 15(c)(1)(C), Plaintiffs' "mistake" was a misnomer. Indeed, the Eleventh Circuit "read[s] the word 'mistake' in Rule 15(c) liberally." *Itel*

Capital, 707 F.2d at 1258 n.9. The Individual Defendants cling to the word "mistake," arguing that the unjust enrichment claims cannot relate back because Plaintiffs did not make a "mistake" by not naming the Individual Defendants in their individual capacities originally. (Doc. 273 at 34-35). However, the fact that "a plaintiff knows of a party's existence does not preclude her from making a mistake with respect to that party's identity." *Krupski*, 560 U.S. at 549. As the Supreme Court made clear in *Krupski*, when determining whether a plaintiff made a mistake in not naming a defendant in the original complaint, "focusing on [Plaintiffs'] knowledge" regarding defendants' identities, as the Individual Defendants do here, is "the wrong starting point." *Id.* at 548. "Rule 15(c)(1)(C)(ii) asks what the prospective *defendant* knew or should have known . . . [that it would have been name as a defendant but for an error] . . . not what the *plaintiff* knew or should have known at the time of filing her original complaint." *Id.*; *see also Patrick v. Garlick*, 66 F. Supp. 3d 325, 328 (W.D.N.Y. 2014) (quoting *Gerloff v. Hostetter Schneider Realty*, No. 12-9404, 2014 WL 1099814, at *5 (S.D.N.Y. Mar. 20, 2014)) (explaining that "in light of the Supreme Court's repeated statements in *Krupski* . . . it is a defendant's knowledge that is relevant for Rule 15(c) analysis.").

In *Hill v. Shelander*, the Seventh Circuit found that an amendment naming a defendant police officer in his individual capacity related back where the prior complaints did not identify in which capacity he was being sued. 924 F.2d 1370, 1377-78 (7th Cir. 1991). The Seventh Circuit reversed the district court's grant of summary judgment on statute of limitation grounds, concluding that:

> [the plaintiff's] amendment relates back to the filing of the suit because [the officer] was already before the court and the effect of the amendment was merely to correct the capacity in which he was sued. Since there was no surprise to defendant, and because plaintiff satisfied the requirements of Rule 15(c), it is fair and wholly consistent with the spirit of the Rule to permit relation back.

Hill, 924 F.2d at 1378. The Seventh Circuit added that "[e]ven if [the plaintiff's] first complaint named [the officer] in his official capacity rather than in no capacity at all, it would be entirely consistent with Rule 15(c) to permit relation back" because the plaintiff sought redress for alleged injuries the officer personally inflicted on the plaintiff and alleged that the officer bore responsibility for using excessive force. *Id*.[16]

The present amendment—adding individual capacities claims for unjust enrichment under Counts III and IX—makes a change identical to the one the Seventh Circuit approved in *Hill*. All individual Tribal Council members of Poarch—and not just the Poarch Band itself—were named in the Original Complaint. (Doc. 1 at 1). Furthermore, in the Original Complaint, Plaintiffs alleged that, given the Individual Defendants' knowledge that Hickory Ground "contained the burial sites of Plaintiffs' ancestors" and has "historical, cultural, and spiritual significance to Plaintiffs," "[i]t was for[e]seeable that excavating the human remains and associated funerary objects of Plaintiffs' ancestors would cause emotional harm to Plaintiffs." (*Id.* at 10, ¶ 38); (Doc. 57 at 10, ¶ 38). Plaintiffs also alleged that "Defendants excavated human remains and associated funerary objects" (Doc. 1 at 12, ¶ 49), "Defendants did not adequately consult MCN," (*id.* at 13, ¶ 53), and that the Defendants violated several federal statutes by "failing to properly preserve archeological resources . . . failing to provide for the disposition of Native American human remains and cultural

[16] The Seventh Circuit further reasoned that "[i]t would be a bizarre result were this Court to hold that a plaintiff could amend his complaint under Rule 15(c) when he identified the wrong defendant, but could not amend his complaint when the right defendant is named in the wrong capacity." *Hill*, 924 F.2d at 1377. "The very purpose underlying relation back is to permit amendments to pleadings when the limitations period has expired, so long as the opposing party is not unduly surprised or prejudiced," and a mere amendment to capacity "greatly reduces the risk that a party will be without notice, because the party itself has already been identified correctly and has received notice." *Id*. Because "Rule 15(c) is a liberal pleading rule designed to prevent parties from nipping legitimate grievances in the bud by asserting formal objections," preventing amendment "would carve out a restrictive exception to Rule 15(c), inconsistent with its broad purposes." *Id.*

items . . . currently engag[ing] in ground disturbing activity at Hickory Ground . . . .” (*id.* at 14, 16, ¶¶ 55, 58, 67). Therefore, even though Rule 15(c)(1)(C) does not apply, Plaintiffs’ unjust enrichment claims still satisfy the Rule and relate back because the Individual Defendants were on notice of the nature of Plaintiffs’ claims, but due to Plaintiffs’ misnomer, they were not named in their individual capacities.

G. Disgorgement is a proper remedy for Counts III and IX.

The Individual Defendants challenge Plaintiffs’ requested remedy of disgorgement for Counts III and IX, claiming that the money the Individual Defendants have received from the casino they built on top of Hickory Ground is “not attributable to any alleged wrongful conduct in their personal capacities.” (Doc. 273 at 27). The TASC, however, alleges that each Individual Defendant personally lied, intentionally concealed the desecration of Plaintiffs’ sacred site, and willfully violated federal laws that were enacted to protect Native graves—all to personally profit from the casino they built on top of the burial ground they destroyed. (Doc. 261 at 59, ¶ 267). Under both federal common law and Alabama law, this kind of conduct warrants the imposition of disgorgement of the profits they received as a result of their unlawful and egregious acts.

Federal common law and Alabama law both recognize disgorgement as a proper remedy when a defendant wrongly enriches his or herself. *Liu v. SEC*, 591 U.S. 71, 90 (2020) (explaining that the SEC may seek disgorgement for ill-gotten benefits under federal common law); *Heller v. Fortis Benefits Ins. Co.*, 142 F.3d 487, 494-95 (D.C. Cir. 1998) (holding that insurance company’s unjust enrichment claim under federal common law entitles company to recover benefits wrongfully obtained by claimant); *Scrushy*, 955 So. 2d at 1012 (holding that the CEO must disgorge benefits for an unjust enrichment claim under Alabama law). Thus, Plaintiffs address both Count III and Count IX together.

Courts may order disgorgement as a remedy where "'it would be inequitable [for] a [wrongdoer to] make a profit out of his own wrong.'" *Liu*, 591 U.S. at 79-80 (quoting *Root v. Railway Co*., 105 U.S. 189, 207 (1882)). A defendant's wrongfully obtained gains are frequently referred to as "disgorgement." *Liu*, 591 U.S. at 79-80. Here, Plaintiffs seek recovery of profits that the Individual Defendants obtained as "salaries" to the extent a portion or all of their salaries have been paid through the revenues of the casino they illegally built on top of the desecrated graves of Plaintiffs' relatives; indeed, all of the revenues from the Wind Creek casino in Wetumpka result from the Individual Defendants' wrongdoing. *Id.* at 83, 92 (quoting *Providence Rubber Co. v. Goodyear*, 76 U.S. 788, 803 (1869)) (explaining that courts typically "award[] the net profits from wrongdoing," but "when the entire profit of a business or undertaking results from the wrongful activity," then courts do not allow defendants to diminish the amount disgorged by claiming they contributed "personal services" or by making "other inequitable deductions").

The Alabama Supreme Court's decision in *Scrushy v. Tucker* is illustrative. In *Scrushy*, the Alabama Supreme Court allowed disgorgement of wrongfully retained bonuses that were made possible through a fraudulent accounting scheme. *See Scrushy*, 955 So. 2d at 991-92, 1012 (holding that the CEO "was unjustly enriched by the payment of the bonuses, which were the result of the vast accounting fraud perpetrated upon" the company and that "equity and good conscience require restitution in the form of repayment of those bonuses"). The *Scrushy* Court also explained that disgorgement is proper even if the defendant was innocent in receiving the bonuses. *See id.* at 1012 (concluding that the CEO had to repay his wrongfully obtained bonuses even though the CEO did not personally participate in the wrongful conduct—fraudulently inflating the company's earnings).

The Individual Defendants argue that there is not a "causal relationship" between their wrongful acts—destroying the Site to build a casino—and receiving increased salaries, bonuses, and per capita payments from the casino's revenues. (Doc. 273 at 26-27) (quoting *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000)). Their argument fails, because the causal relationship here is the same as in *Scrushy*: the Individual Defendants' misconduct—misrepresentations, fraudulent concealment, coercion, and abusive tactics used to prevent Plaintiffs from initially discovering the desecration of the Site—as well as their decision to dump Plaintiffs' relatives in a mass grave pit in April of 2012 just so they could say "reburial" happened and commence construction in July of that same year—is what made the operation of the illegal casino possible. (Doc. 261 at 38-39, 44-45, ¶¶ 167-68, 206-10).

The TASC alleges that the Individual Defendants received "direct financial distributions" as a result of their destruction of Hickory Ground and as the casino expanded: $100/year in 2005, $300/year in 2006, $10,000/year in 2012, $18,000/year in 2013, over $21,000/year in 2014 (when the casino commenced operations), and these distributions continue to grow as of 2024. (*See id.* at 58-59, ¶¶ 265-267) (alleging that "the Individual Defendants were and knew they would be unjustly enriched through increased compensation in salaries and bonuses as a result of their unlawful and outrageous personal conduct . . . through intentional misconduct, reckless behavior, fraud and misrepresentations, the excavation of Plaintiffs' ancestors and the desecration of the Hickory Ground Site to construct a multi-million-dollar casino resort atop Plaintiffs' most sacred burial and ceremonial site in order to gain profit, with knowledge that it would cause irreparable harm . . . .").

Despite the Individual Defendants' argument that they were not involved in wrongful conduct in their personal capacities, the TASC alleges that they (1) "personally used deceit and

misrepresentations to evade enforcement of the applicable laws" (Doc. 261 at 77, ¶ 339(f)); (2) "personally misrepresented and fraudulently concealed the degree of desecration their actions would cause" at the Site (*id.* at 38, ¶ 167); (3) "[p]ersonally participated in decisions to excavate and disturb the burial grounds in violation of clearly established laws and despite having made promises to Plaintiffs that the Site would be preserved and having received repeated requests by the Plaintiffs to preserve the Site" (*id.* at 76, ¶ 339(b)); and specifically, that (4) Buford Rolin "personally assured Plaintiffs, including Mekko Thompson," that the Site "would be preserved as a sacred ceremonial and burial site" (*id.* at 12, ¶ 51(a)). Therefore, the TASC alleges that the Individual Defendants personally participated in wrongful conduct. Given that Plaintiffs have not yet been permitted to conduct discovery, and that the Individual Defendants continue to conceal and misrepresent material facts concerning their past and ongoing desecration of Hickory Ground, Plaintiffs cannot reasonably be expected to provide more detailed allegations as to each Individual Defendant at this stage; accordingly, Rule 12(b)(6) is more than satisfied.

Alternatively, if the Court finds that the Individual Defendants did not personally engage in wrongful conduct, *Scrushy* still requires disgorgement of an innocent actor's unjustly retained financial gains. *Scrushy*, 955 So. 2d at 1012. Contrary to the Individual Defendants' argument that their misconduct in 1980 makes their financial benefits "too far removed both in time and causation" (Doc. 273 at 28), and that only two of the Defendants served on Tribal Council at the time, the Supreme Court explained that "joint-and-several disgorgement liability" is appropriate "where there is a close relationship between the defendants and collaboration in executing the wrongdoing." *Liu*, 591 U.S. at 90 (citing *SEC v. Whittemore*, 659 F.3d 1, 10 (D.C. 2011)); *see also Whittemore*, 659 F.3d at 10 (concluding that the "allegations in the complaint made clear that the [plaintiff] claimed . . . [the] defendants acted in concert" when executing their fraudulent scheme).

Here, the TASC alleges that each Individual Defendant took part in the overall fraudulent plan and execution to build and expand a casino. (Doc. 261 at 59, ¶ 267). And, of course, the desecration of Hickory Ground did not take place in 1980. It may be that only two of the Individual Defendants fraudulently misrepresented their intentions to preserve and protect Hickory Ground in 1980, but the TASC is full of allegations of wrongful conduct from 1980 clear up until today—including the sacrilegious reburial the Individual Defendants performed in 2012, the 2023 construction, as well as their ongoing refusal to permit Auburn to repatriate the remaining relatives and cultural resources in Auburn's possession today. (*Id.* at 48, 50, ¶¶ 226, 237). The requested remedy of disgorgement is not to address wrongful conduct limited to 1980. Rather, it is to address all of the Individual Defendants' wrongful conduct from 1980 until today—with the goal of stopping the conduct from continuing.

The Individual Defendants rely on *Pidcock* and *Janigan*—fraudulent purchase and resale cases—to argue that Plaintiffs cannot recover compensation or distributions derived from casino revenues. (Doc. 273 at 27-28) (citing *Pidcock v. Sunnyland Am., Inc*., 854 F.2d 443 (11th Cir. 1988); *Janigan v. Taylor*, 344 F.2d 781 (1st Cir. 1965)). But *Pidcock* and *Janigan* address whether a plaintiff may recover profits a defendant improperly realized after acquiring an asset through fraud and later selling it at a gain. *Pidcock*, 854 F.2d at 448 (holding that the district court erred by failing to consider an alternative disgorgement remedy that allows Pidcock to recover damages equal to the profits the defendant realized); *Janigan*, 344 F.2d at 786-87 (holding that the seller could recover the profits the buyer realized as a result of the buyer's fraudulent conduct). These cases do not apply because Plaintiffs did not *sell* their relatives' bodies to the Individual Defendants. Plaintiffs are not claiming they are entitled to the value of anything the Individual Defendants have "resold." Instead, Plaintiffs claim that the Individual Defendants should be

disgorged of the profits they have made from violating federal law and engaging in conduct that shocks the moral conscience.

Therefore, disgorgement is an appropriate remedy for Counts III and IX.

H. Plaintiff Mekko Thompson has stated a claim for outrage (Count V).

The Individual Defendants next argue they cannot be liable for outrage under Alabama law because their destruction of Hickory Ground was not "destruction of a family cemetery plot or desecration of a known, recently deceased person's remains." (Doc. 273 at 38). The Individual Defendants are wrong on the law and on the facts—which, at this stage, constitute plausible allegations pleaded in the TASC accepted as true under Rule 12(b)(6). *See Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1215 (11th Cir. 2012) (plausible allegations must be accepted as true under Rule 12(b)(6)); *see also* Pls.' Stmt. Disp. Facts, ¶ 7, Section IV, in Resp. to Poarch Officials' Mot. to Dismiss, filed Apr. 30, 2026. Under Alabama law, destroying a family cemetery plot gives rise to a claim for outrage, even if the individuals were buried in that cemetery during the 1800s. *See, e.g.*, *Whitt v. Hulsey*, 519 So. 2d 901 (Ala. 1987). Furthermore, to state a claim for outrage, Mekko Thompson does not have to provide the names of the specific relatives that the Individual Defendants excavated and bulldozed. *See, e.g.*, *Codell Constr. Co. v. Miller*, 202 S.W.2d 394, 397, 399 (Ky. Ct. App. 1947). Finally, as discussed in greater detail below, the individuals that the Defendants excavated are Mekko Thompson's relatives and family. *See also* Pls.' Stmt. Disp. Facts, Section IV, ¶ 7, Resp. to Poarch Officials' Mot. to Dismiss, filed Apr. 30, 2026. None of the Individual Defendants' conflicting facts undermines the plausibility of the allegations in the TASC at this stage.

1. The TASC plausibly alleges outrage under Alabama law.

The Alabama Supreme Court recognizes "that one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such

emotional distress and for bodily harm resulting from the distress." *Am. Rd. Serv. Co. v. Inmon*, 394 So. 2d 361, 365 (Ala. 1980) (internal citations omitted). The Court described emotional distress as being "so severe that no reasonable person could be expected to endure it," and explained that extreme conduct is "conduct [being] so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society. *Id*.

Under Alabama law, for a plaintiff to state a claim for the tort of outrage, a plaintiff must allege:

> (1) that the defendants either intended to inflict emotional distress, or knew or should have known that emotional distress was likely to result from their conduct; (2) that the defendants' conduct was extreme and outrageous; and (3) that the defendants' conduct caused emotional distress so severe that no reasonable person could be expected to endure it.

Callens v. Jefferson Cnty. Nursing Home, 769 So. 2d 273, 281 (Ala. 2000); *see also, e.g.*, *Exford v. City of Montgomery*, 887 F. Supp. 2d 1210, 1230 (M.D. Ala. 2012). Alabama courts typically recognize the tort of outrage in three circumstances: "(1) wrongful conduct in the family burial context; (2) barbaric methods employed to coerce an insurance settlement; and (3) egregious sexual harassment." *Little v. Robinson*, 72 So. 3d 1168, 1172 (Ala. 2011) (internal citations omitted) (quoting *Potts v. Hayes*, 771 So. 2d 462, 465 (Ala. 2000)).

Courts interpreting Alabama law have concluded that the tort of outrage can be adequately alleged and supported by evidence involving the mishandling of human remains. In *Gray Brown-Service Mortuary, Inc. v. Lloyd*, the Alabama Supreme Court affirmed a $2 million general verdict for claims including outrage where defendant disinterred the remains of plaintiff's family member. 729 So. 2d 280, 284, 286 (Ala. 1999). In *Whitt v. Hulsey*, the Alabama Supreme Court upheld an outrage claim when a portion of an old nineteenth century cemetery was damaged when the defendants bulldozed and cleared the land. 519 So. 2d at 905-06. In *Levite Undertakers Co. v.*

Griggs, the Alabama Supreme Court found a funeral home liable for outrage for refusing to turn over a family member's remains until the family paid for services the home claimed it had already rendered. 495 So. 2d 63, 64-65 (Ala. 1986) (affirming judgment in favor of plaintiffs, albeit without analysis of the outrage claim); *see also Cates v. Taylor*, 428 So. 2d 637, 640 (Ala. 1983) (holding a cemetery operator liable for outrage when they refused to allow burial in a particular cemetery lot just thirty minutes before the funeral, forcing plaintiffs to procure a different lot).

Given the powerful emotional, cultural, religious, and personal interests surrounding the handling of human remains, it is no surprise that outrage claims have been recognized in circumstances similar to the conduct alleged in the TASC. As shown below, Mekko Thompson has pleaded a plausible claim for outrage. Mekko Thompson's outrage claim should not be dismissed at the pleading stage "because reasonable [people] could differ as to the outrageousness of [a] defendant's conduct, [and] it [is] for the jury to determine whether the conduct was sufficiently extreme and outrageous to result in liability." *Rubin v. Matthews Int'l Corp.*, 503 A.2d 694, 699 (Me. 1986). Accordingly, the Individual Defendants' Motion to Dismiss Count V should be denied.

a. The Individual Defendants either intended to inflict emotional distress or knew or should have known that emotional distress was likely to result from their conduct.

The Individual Defendants grossly mischaracterize their excavation and desecration of the Hickory Ground Site as nothing more than a "scientific excavation, study, and storage," as though the matter were akin to a routine academic exercise.[17] (Doc. 273 at 38). As discussed in Plaintiffs'

[17] Moreover, the Individual Defendants do not even attempt to explain how wrapping human remains in newspapers, stuffing them into plastic bins, and leaving them to decompose in a non-air-conditioned shed through several hot Alabama summers bears any resemblance to a professional scientific excavation. (Doc. 261 at 81-82, ¶¶ 361-368).

Response to the Poarch Officials Motion to Dismiss, NAGPRA was passed precisely to *stop* archaeologists from digging up Native remains from Native burial grounds and using them for scientific study. *See* Pls.' Resp. to Poarch Officials' Mot. to Dismiss, Section VI.J.2, filed Apr. 30, 2026. As Senator McCain put it, in passing NAGPRA, Congress concluded that "the interest of Native Americans in the rightful and respectful return of their ancestors" trumps the goals of scientific study or preservation in museums. 136 Cong. Rec. S17173-02, *S17173 (daily ed. Oct. 26, 1990) (statement of Sen. John McCain) (Westlaw). The fact that the Individual Defendants ordered Auburn archaeologists to do precisely what NAGPRA forbids renders the Individual Defendants' desecration of Hickory Ground more outrageous, not less.[18]

Putting the Individual Defendants' mischaracterization aside, the TASC clearly alleges that the Individual Defendants knew, or should have known, their conduct would cause emotional distress. Among other things, Mekko Thompson alleges that:

> *Each* Poarch Individual Defendant, *knowing* that Hickory Ground and the human remains and associated funerary objects buried there were sacred in the culture and traditional religion of Mekko Thompson, *intentionally and outrageously* caused the desecration of the Hickory Ground Site by ordering that the bodies and associated funerary objects buried there be exhumed, disassociated, dismantled, analyzed, and reinterred in a manner considered abhorrent in the Muscogee (Creek) traditional religion.

(Doc. 261 at 81, ¶ 362) (emphasis added). As Alabama precedent on outrage demonstrates desecration of burial grounds is widely recognized across cultures as a source of severe emotional distress, and, as Mekko Thompson alleges, such acts constitute a profound violation of Muscogee

[18] The Individual Defendants' argument that their desecration of burial sites and human remains was nothing more than a "scientific excavation" is further belied by the fact that the ARPA permit the Auburn archaeologists obtained to conduct the excavation required Auburn and the Individual Defendants to "leav[e] the area in as or near to original condition as is practicable" (Doc. 261-1 at Ex. W, 308) (Auburn's Federal Archeological Permit)—not to build a casino on top of it. It is not "scientific" to bulldoze a cemetery in order to build a casino.

culture and religious traditions. (*Id.*); (*see also* Doc. 276 at Ex. D, 26) (Letter from Hickory Ground Tribal Town to Poarch Band) ("There is nothing in our culture which is more reprehensible than the opening of a grave, unless it is the removal of the burial and its associated items offered in mourning."). The TASC plausibly alleges the Individual Defendants knew, or should have known, their actions would cause distress.

Mekko Thompson also alleges several other acts by the Individual Defendants that a reasonable person would know, or should know, were likely to result in emotional distress. Without limitation, these acts include that each Individual Defendant: "desecrated . . . Mekko Thompson's ancestors' remains by dismembering them through removing and discarding soil—part of those ancestors' bodies." (Doc. 261 at 83, ¶ 372); "failed to stop construction even after cultural items were discovered, intentionally desecrating gravesites of extreme religious and cultural importance to Mekko Thompson." (*Id.* ¶ 373); "engaged in reburial practices that violated Mekko Thompson's religious beliefs and sacred protocols, further desecrating the remains" and falsely claiming that the Mekko Thompson consented to the reburial. (*Id.* ¶ 374).

The Individual Defendants argue that the TASC does not separate out how the specific conduct of the Individual Defendants varies from one to the other, citing this Court's decision in *Ferrell* for the proposition that a plaintiff must state "what it is that each particular defendant has done that entitles her to relief." (Doc. 273 at 37) (quoting *Ferrell v. Bd. of Adjustment*, No. 3:12CV973–MHT, 2012 WL 7746770, at *1 (M.D. Ala. Nov. 28, 2012)). When compared to the plaintiff's complaint in *Ferrell*, however, the TASC clearly contains sufficient allegations to entitle Mekko Thompson to his requested relief. In *Ferrell*, the plaintiff brought claims against the City of Auburn and the Auburn Police Department, but her complaint "allege[d] *no conduct whatsoever* on the part of the Auburn Police Department or the City of Auburn . . . ." *Ferrell*, 2012 WL

7746770, at *3. The issue here is not a complete absence of any allegations regarding the Individual Defendants, but rather, the Individual Defendants seem to be arguing that because they acted in concert, Mekko Thompson's complaint has to state more about how their actions differ and vary from one to another—despite the fact that the TASC makes clear they *all* ordered and authorized the desecration of graves and the sacrilegious reburial of Mekko Thompson's relatives. (Doc. 261 at 83, ¶¶ 371-73). For this proposition, however, the Individual Defendants cite no authority.

The Individual Defendants cite no authority because there is no obligation to plead facts showing the Individual Defendants' intent with specificity. Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). Nor is it reasonable to expect Mekko Thompson to be able to identify with specificity all of the acts each Individual Defendant exclusively undertook that led to the overall and ongoing desecration of Hickory Ground since, at this point in the proceedings, no discovery has taken place. To the extent Plaintiffs have been able to identify, through their own investigational efforts, specific acts by specific individuals, they have alleged those acts with specificity. (*See, e.g.*, Doc. 261 at 51, ¶ 240) (stating that Individual Defendant Arthur Mothershed denied Mekko Thompson's request to give his relatives a proper Muscogee reburial in October of 2012, stating that their "remains are now reinterred and we cannot support disturbing those remains again."); (*id*. ¶ 241 (alleging that Individual Defendant Robert McGhee lied, stating that the remains of Mekko Thompson's relatives "have been reinterred at Hickory Ground Town [sic] in a manner previously agreed to by traditional leaders in Oklahoma" when he knew Mekko Thompson had never agreed to the sacrilegious April 2012 reburial the Individual Defendants performed); (*id*. at 12, ¶ 51) (describing

Individual Defendant Rolin's conduct giving rise to his personal liability).[19] These allegations are sufficient to survive the Individual Defendants' Motion to Dismiss.

b. The Individual Defendants' conduct was extreme and outrageous.

While Alabama law independently compels this conclusion, the Individual Defendants' conduct at Hickory Ground offends something far deeper—a principle courts have long recognized and that no civilized society has ever abandoned. "The sentiment of all civilized peoples regards the resting place of the dead as hallowed ground." *Smith & Gaston Funeral Dirs., Inc. v. Dean*, 80 So. 2d 227, 232 (Ala. 1955) (quoting 10 Am. Jur., *Cemeteries* § 22); (Doc. 261 at 82, ¶ 368) (explaining that it "would have been unthinkable" for the Individual Defendants to "commit such a sacrilege against the ancestors of any people or the desecration of any people's hallowed ground."). "The tenderest feelings of the human heart center around the remains of the dead." *Lamm v. Shingleton*, 55 S.E.2d 810, 813 (N.C. 1949); (*see also* Doc. 261 at 82, ¶ 367) (alleging that the desecration of the Site and Mekko Thompson's ancestors' remains "has imposed an enduring feeling of helplessness and fear in Mekko Thompson.").

Accordingly, Alabama courts have recognized viable claims of outrage in a number of circumstances involving damage to burial grounds; improper disinterment, desecration, and/or reinterment of human remains; and other conduct involving the dead and their burial rites resulting in severe emotional distress. *See, e.g.*, *Lloyd*, 729 So. 2d at 284, 286 ("It has long been the law of

[19] One action stands out as particularly egregious. In 2013, Individual Defendant Stephanie Bryan circulated a letter to tribal leaders nationwide stating that when she and other Individual Defendants began construction there "was no visible evidence of a burial ground" at Hickory Ground (Doc. 261 at 52, ¶ 247), despite the fact that the Auburn archaeologists had told the Poarch Officials in the 1990s that there was "no area where such resources were totally absent." (Doc. 261-1 at Ex. V, 303) (2001 Bureau of Indian Affairs ("BIA") Briefing Statement); (*see also* Doc. 271 at Ex. A, 32) (1990 Auburn Archaeologist Report) (attached by the Poarch Officials as an exhibit, documenting widespread "evidence of well preserved archaeological remains still present beneath the disturbed plow zone" across all of Hickory Ground).

Alabama that mistreatment of burial places and human remains will support the recovery of damages for mental suffering."); *Whitt*, 519 So. 2d at 905-06; *Griggs*, 495 So. 2d 63, 64-65 (Ala. 1986); *Cates*, 428 So. 2d at 640.

The Individual Defendants aver that their conduct was not extreme or outrageous because they simply undertook an "archeological excavation and analysis of the remains of unidentified historic individuals . . . ." (Doc. 273 at 38).[20] However, Mekko Thompson's relatives buried at Hickory Ground are not "unidentified historic individuals," as the Individual Defendants acknowledged in their Grant Application for federal preservation funds, wherein the Individual Defendants Tullis and Rolin specifically stated that the descendants of the original Hickory Ground Tribal Town removed on the Trail of Tears now "exist[at] Hickory Ground tribal town in Oklahoma," and "[t]hey will be pleased to know their home in Alabama is being preserved." (Doc. 261-1 at Ex. A, 5). The individuals buried at Hickory Ground may be nothing more than "unidentified historic individuals" to the Individual Defendants, but that is irrelevant to the fact that the Individual Defendants knew—the moment they sought to purchase Hickory Ground—that the present-day descendants are members of Hickory Ground Tribal Town, in Oklahoma.[21]

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[20] The Individual Defendants' claim that the burial sites were "unmarked" reveals more than they intend. Prior to the 1830s and forced removal, Muscogee graves were intentionally unmarked, as Muscogee religious practice at that time did not use headstones or markers. (Doc. 261 at 39, ¶ 170). Today, following the incorporation of Christianity into the Nation, many Muscogee people use headstones. But the absence of markers does not signify what the Individual Defendants think it does; instead, the absence of headstones is tradition. *Id*. In any event, Plaintiffs' ability to identify the remains is not required under Alabama law. *Whitt*, 519 So. 2d at 902.

[21] This also underscores why the Individual Defendants' reliance on *Gray Brown-Service Mortuary, Inc. v. Lloyd* is misplaced. (Doc. 273 at 38) (citing 729 So. 2d 280 (Ala. 1999)). Alabama law does not require Mekko Thompson to establish that the relatives excavated by the Individual Defendants are Mekko's wife, mother, father, grandmother, etc. The TASC alleges they are his "family" (Doc. 261 at 81, ¶ 364), and under Alabama law, that is enough. *See Whitt*, 519 So. 2d at 902, 904-06. Given that the Individual Defendants previously recognized that the present-day living descendants of those buried at Hickory Ground are living in Oklahoma (Doc. 261-1, at Ex. A, 5), it is repugnant for the Individual Defendants to now call them "unidentified archaeological findings." (Doc. 273 at 38).

In any event, the Individual Defendants' argument is without merit since the fact that a person is "historic" or "unidentified" does not render it acceptable to bulldoze a cemetery or excavate remains under Alabama law. For instance, in *Whitt v. Hulsey*, the Hulseys were unspecified "descendants" of an ancestor who had died in 1853. 519 So. 2d at 902. Plaintiffs alleged that Whitt damaged a portion of an old nineteenth century family cemetery in which their ancestor was buried, including by clearing a portion of the land and knocking down a fence and several tombstones. *Id.* at 902, 904-06. They sued for outrage, among other claims. *Id.* at 902. The Alabama Supreme Court affirmed judgment in the plaintiffs' favor, stating with respect to the outrage claim:

> We are persuaded that sufficient evidence was presented to support the submission of the outrageous conduct count to the jury. The evidence at the very least supports an inference that Whitt acted recklessly in clearing the land around the cemetery where relatives of the plaintiffs were buried. We realize that there may be differences of opinion regarding the dividing line between merely offensive conduct and conduct that is atrocious and intolerable in a civilized society. Great respect is afforded the resting place of the dead . . . . Under the particular facts of this case, and in view of the deep human feelings involved, we find the evidence sufficient to support the claim of outrageous conduct, where the alleged act was the desecration and destruction of a portion *of a family burial ground.*

Id. at 906 (emphasis added) (internal citations omitted) (second and third alterations in original). The fact that the relatives the Individual Defendants excavated remain "unidentified" is legally irrelevant to the success of Count V of the TASC.

Furthermore, and also contrary to the Individual Defendants' argument, a plaintiff need not establish direct descendancy or recency of death to plausibly allege a claim for outrage. For example, in *Whitt*, there was neither a finding of direct descendancy, nor a finding that the grave of the ancestor in question was one of those damaged. 519 So. 2d 901. And the ancestor in question had passed away in the 1800s—not recently. *Id.* at 902; *see also Ceasar v. Shelton Land Co., Inc.*, 646 S.E.2d 689, 690-91 (Ga. Ct. App. 2007) (finding defendants are not entitled to summary

judgment on plaintiff's outrage claim where defendants had bulldozed over an old cemetery containing children of plaintiffs' indirect ancestors, even though plaintiffs did not know the children's names and nobody had been buried there in many years). Here, Mekko Thompson alleges that the Individual Defendants "desecrat[ed] Mekko Thompson's deceased *family* members." (Doc. 261 at 81, ¶ 364) (emphasis added). Under Alabama law, this is enough.

And even if the Individual Defendants' removal of Mekko Thompson's relatives could be justified as "scientific excavation," Mekko Thompson has alleged numerous other actions by the Individual Defendants that in no way relate to anything "scientific," including, without limitation, the improper exhumation of his ancestors and cultural items and their removal from their final resting places, in violation of his religious beliefs (*id.* at 83, ¶¶ 370-73); their failure, or their failure to instruct personnel not to separate the surrounding soil from remains, further dismembering them (*id.* ¶ 372); the reinterment of some of the ancestors' remains without appropriate notice to Mekko Thompson, and in a location and manner that violated Mekko Thompson's religious beliefs (*id.* ¶¶ 371-74); and the subsequent nationwide issuance of false and misleading press releases and other communications regarding their actions (*id.* ¶ 375). Most recently, in 2023, the Individual Defendants rushed to complete additional construction at the Site and refused to "provide Plaintiffs with documentation to demonstrate how new, additional construction would not further disrupt and destroy" the Site. (*Id.* at 74, 84, ¶¶ 330, 376). Their 2023 acts were extreme and outrageous because archaeological surveys confirm "that the entire Hickory Ground Site contains human remains and thousands of cultural items," yet they proceeded with the 2023 construction, causing Mekko Thompson to suffer further trauma. (*Id.* at 65, ¶ 281); (*id.* at 59-65, ¶¶ 269-82). To be sure, the damage done in *Whitt* was minor in comparison to the damage the Individual Defendants caused in this case.

Therefore, the TASC's allegations demonstrate that the Individual Defendants engaged in extreme and outrageous conduct.

c. The Individual Defendants' conduct caused, and continues to cause, severe emotional distress.

Finally, the Individual Defendants repeat their same argument as to the third element of outrage; specifically, they contend that Mekko Thompson cannot demonstrate he suffered severe emotional distress because the Individual Defendants were merely engaged in "archeological excavation and study of an historic site." (Doc. 273 at 39). This is blatantly not the case, given that the Individual Defendants' goal was *not* to study a historic site—but rather, to destroy it and build a casino. Regardless of what spin they try to put on it today, the TASC plausibly alleges that Mekko Thompson suffered and continues to suffer severe emotional distress as a result of the Individual Defendants' extreme and outrageous conduct, and the Defendants' Motion does not even attempt to address or consider his allegations. (*see id.* at 39-40).

Indeed, "[l]egal authorities have long acknowledged the likelihood of mental anguish resulting from the mishandling of dead bodies." *Carney v. Knollwood Cemetery Ass'n*, 514 N.E.2d 430, 433 (Ohio Ct. App. 1986). Here, Mekko Thompson has alleged that the Individual Defendants' actions have caused him to fail in his moral and religious duties, and have caused him "abject pain, sorrow, anguish, torment, suffering, helplessness, grief, and anger." (Doc. 261 at 81, ¶ 364). He lives with an "enduring feeling of helplessness and fear that this will happen again," (*id.* at 84, ¶ 376), and the "irreparable anguish of knowing that his ancestors were wrenched from what was intended to be their final resting places, disrespected, and grotesquely mistreated." (*Id.* at 83, ¶ 370). He has alleged that his continuing emotional distress is so severe that no reasonable person could be expected to endure it. (*Id.* at 84, ¶ 377).

This is more than sufficient to survive a motion to dismiss for failure to state a claim. *See, e.g.*, *Thomas v. Williams*, 21 So. 3d 1234, 1240 (Ala. Civ. App. 2008) ("We further conclude that [plaintiff's] cursory statement that she was 'subjected to severe emotional distress' was sufficient to survive a motion to dismiss."); *Papieves v. Lawrence*, 263 A.2d 118, 122 (Pa. 1970) (reversing dismissal, holding that plaintiffs had stated a cause of action by averring "that they have suffered emotional disturbance, mental anguish, embarrassment, and humiliation as a direct consequence of the defendants' intentional acts in withholding the body of their son from them and burying it without authorization"); *cf. Edwards v. Hyundai Motor Mfg. Ala., LLC*, 603 F. Supp. 2d 1336, 1355 (M.D. Ala. 2009) (denying summary judgment and stating that it is for a jury to decide whether the defendant's behavior was outrageous and had caused the plaintiff to suffer extreme emotional distress); *Carney*, 514 N.E.2d at 432-33 (affirming denial of defendants' motion for directed verdict on plaintiffs' claim for emotional distress resulting from disturbance of ancestor's gravesite and improper disposal of some of ancestor's remains where the relatives "testified that they were horrified, angry, and saddened, and that they wept and were unable to sleep").

Without providing any authority, the Individual Defendants baselessly claim that when determining whether a plaintiff has suffered severe emotional distress, "the proper standard is that of an objective reasonable person." (Doc. 273 at 39-41). Even if some additional proof of objective reasonableness were necessary at this stage in the proceedings (it is not), Mekko Thompson's emotional distress is objectively reasonable. *Contreraz v. Michelotti-Sawyers*, 896 P.2d 1118, 1122 (Mont. 1995) ("It is reasonable that a family member would become emotionally distressed after learning of, but not seeing, a debasing, humiliating, or disrespectful act committed to the decedent's body."). The results favorable to the plaintiffs in *Whitt* and similar cases from other

jurisdictions discussed above (*e.g.*, *Ceasar* and *Codell Construction*) also support the objective reasonableness of Mekko Thompson's emotional distress.

Mekko Thompson has adequately pleaded each element of his outrage claim and the Individual Defendants' Motion to Dismiss Count V must, accordingly, be denied.

2. Mekko Thompson's outrage claim is not time barred.

Furthermore, Mekko Thompson's outrage claim is timely. The Alabama Supreme Court has held that the statute of limitations for the tort of outrage is two years. *Archie v. Enter. Hosp. & Nursing Home*, 508 So. 2d 693, 695 (Ala. 1987); *see also Strange v. Travelers Indem. Co.*, 915 F. Supp. 2d 1243, 1244 (N.D. Ala. 2012) (stating that Alabama's tort of outrage "has a two-year statute of limitations . . ."); Ala. Code § 6-2-38(l). A cause of action accrues from the date of the plaintiff's injury, not the date of the defendant's conduct. *See Utilities Bd. of Tuskegee v. 3M Co., Inc.*, No. 2:22-CV-420-WKW, 2023 WL 1870912, at *7 n.12 (M.D. Ala. Feb. 9, 2023) ("It does not matter how long in the past the tortious conduct occurred if the conduct has not yet caused a cognizable injury.") (citing *Payne v. Ala. Cemetery Ass'n, Inc.*, 413 So. 2d 1067, 1072 (Ala. 1982)).

The TASC alleges extreme and outrageous conduct by the Individual Defendants within the two years prior to the filing of the Original Complaint in 2012. The TASC alleges that the final excavations of Mekko Thompson's ancestors took place in 2011, just one year before the filing of the Original Complaint. (Doc. 261 at 36, ¶ 155); (Doc. 1 at 1). The TASC also alleges that the Individual Defendants refused Mekko Thompson's requests to let him rebury his relatives, and instead, in April of 2012, the Individual Defendants performed a sacrilegious ceremony, reburying Mekko Thompson's relatives in a way that violates Muscogee religion. (Doc. 261 at 45, ¶ 213); (Doc. 1 at 1). This sacrilegious "reburial" took place just eight months before the filing of the Original Complaint. (Doc. 261 at 45, ¶ 213); (Doc. 1 at 1). The Individual Defendants aver that

Mekko Thompson's outrage claim does not relate back, and therefore any conduct giving rise to the outrage claim must have occurred after June 5, 2017 (Doc. 273 at 41), but for the reasons articulated below, the outrage claim satisfies Rule 15. *See infra* Section VI.H.3. Even if June 5, 2017, was somehow the cutoff,[22] the Individual Defendants' more recent excavations and construction in 2023—again, performed without consultation and without any protective measures to safeguard the human remains and cultural resources that cover the entire Hickory Ground Site—constitutes a sufficient predicate for Mekko Thompson's outrage claim. (Doc. 261 at 84, ¶ 376). No matter how one calculates it, Count V is timely.

The TASC alleges not only conduct that falls within the two-year limitations window, but also alleges extreme and outrageous conduct that is ongoing, making Count V a continuous tort under Alabama law. *See McDonald*, 567 So. 2d at 1216. A continuous tort is "a defendant's repeated tortious conduct which has repeatedly and continuously injured a plaintiff." *Moon v. Harco Drugs, Inc.*, 435 So. 2d 218, 220 (Ala. 1983). For statute of limitations purposes, "an action such as this, arising from continuing dealings between the parties, will not be barred until *two years after the last tortious act by the defendant* . . . ." *McDonald*, 567 So. 2d at 1216 (emphasis added).

Contrary to the Individual Defendants' argument that the continuing tort doctrine is inapplicable where "the harm for concluded conduct lingers" (Doc. 273 at 42), *McDonald* is instructive, as it clearly contemplates that a plaintiff could suffer severe emotional distress as a

[22] It would be violative of Alabama law and policy favoring resolution of disputes to conclude, as the Individual Defendants suggest, that the statute of limitations for Mekko Thompson's outrage claim began to accrue in 2017, when the parties were engaged in settlement discussions and this case was stayed. As the court in *Cont'l Cas. Ins. Co. v. McDonald* has instructed: "[t]he better policy [is] to encourage cooperation and attempts to work out differences . . . and to preserve the cause of action should those attempts prove futile." 567 So. 2d 1208, 1216 (Ala. 1990); (Doc. 155) (the tribal parties' joint motion requesting a stay in the case in December 2017 pending settlement negotiations).

result of a defendant's actions on numerous occasions, without the statute of limitations beginning to run until the *last* of those occasions. *McDonald*, 567 So. 2d at 1216. The Individual Defendants cite *Jennings v. City of Huntsville* for the proposition that an outrage claim is not a continuing tort merely because a plaintiff continues to be injured by conduct that occurred in the past. (Doc. 273 at 42) (citing 677 So. 2d 228, 230 (Ala. 1996)). The TASC alleges, however, that Mekko Thompson continues to be injured by several independent violations—not merely lingering distress from past events. (*See, e.g.*, Doc. 261 at 75-76, ¶ 338(c)) (reburying Mekko Thompson's ancestors improperly and without consultation in 2012); (*id.* at 76, ¶ 338(d)) (obstructing Plaintiffs' and Mekko Thompson's rights to participate in the reburial); (*id*. ¶ 338(e)) (developing, constructing, and the ongoing operation of the casino at Hickory Ground from 2012 to the present); (*id.* ¶ 338(f)) (continuing to refuse the repatriation of Plaintiffs' and Mekko Thompson's ancestors and funerary objects).

The TASC alleges a continuing tort, such that the "the Individual Defendants' ongoing and continu[ing] lies and fraudulent misrepresentations cause and inflict harm and significant distress on all Plaintiffs, but especially Mekko Thompson . . . ." (*Id.* at 59, ¶ 268). It further alleges that some of Mekko Thompson's ancestors' remains and other sacred items have still not been reinterred and are currently being mistreated and damaged in plastic bins, and that all remains located outside of their original burial locations will not be at peace until they are back in their intended final resting places. (*Id.* at 21, 40-41, 82, ¶¶ 94, 172-86, 366). The Individual Defendants' ongoing mistreatment of the burial Site "is viewed as heinous" in the Muscogee (Creek) religion, (*id.* at 21, ¶ 98), and "continues to cause Plaintiffs, including Mekko Thompson, significant emotional distress, trauma, agony, and heartache." (*Id.* at 50, ¶ 236); (*see also id*. at 5, ¶ 15).[23]

[23] The Individual Defendants contend that claims against Defendant Tullis based on his 2023 conduct

The TASC pleads Count V as a continuing tort, and consequently, Count V should not be dismissed under Alabama's statute of limitations.

3. Mekko Thompson's outrage claim relates back to the Original Complaint.

Mekko Thompson's outrage claim, under Rule 15, relates back to the filing of the Original Complaint in 2012 because the outrage claim: (1) arises out of the same conduct, transaction, or occurrence set forth in the Original Complaint; and (2) the Individual Defendants were already parties to the case, and the TASC merely clarifies that they are being sued in their individual capacities, in addition to their official capacities.[24] (*Compare* Doc. 1 at 4, ¶ 13); (*with* Doc. 261 at 10, ¶¶ 40-41). Under Rule 15(c)(1), an amendment to a pleading relates back when:

> (A) the law that provides the applicable statute of limitations allows relation back;
>
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; ***or***
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and

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should be dismissed because he "no longer served" on the Poarch Tribal Council "or held any other formal leadership role in 2023. (Doc. 273 at 41). That argument fails for two reasons. First, the Court must accept Plaintiffs' well-pleaded allegations as true at this stage. The TASC alleges that "Tullis is personally liable for his conduct starting no later than 1980 when he served as Chair of the Poarch and continuing through his tenure on the Board of the PCI Gaming Authority until the present." (Doc. 261 at 10-11, ¶ 42). Second, Mekko Thompson's outrage claim is asserted against each Individual Defendant in their personal capacity. (*Id.* at 10, ¶¶ 40-41). Tullis' liability does not depend on his official position in 2023 but on his underlying conduct, which is not protected by legislative immunity, as explained in Section VI.I.1. Accordingly, dismissal of the outrage claim against Defendant Tullis is unwarranted.

[24] As discussed in greater detail below, if the Court concludes that Mekko Thompson's outrage claim is a continuing tort, there is no need to consider whether the claim relates back to the Original Complaint, as the claim will be timely under Alabama law. Because the Individual Defendants argue that the outrage claim does not relate back under Rule 15 (Doc. 273 at 42-43), Plaintiffs provide the Rule 15 analysis herein for the Court's consideration.

> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.
>
> Fed. R. Civ. P. 15(c)(1) (emphasis added).

a. Mekko Thompson's outrage claim arises under the same conduct, transaction, and occurrence alleged in the Original Complaint.

For purposes of Rule 15(c)(1)(A), the United States District Court for the Middle District of Alabama has recognized that an Alabama state law outrage claim may relate back. *Ashton v. Florala Mem'l Hosp.*, No. 2:06cv226-ID, 2006 WL 2864413, at *14 (M.D. Ala. Oct. 5, 2006) (citing Fed. R. Civ. P. 15(c)(2)) (rejecting the "defendants' argument that [plaintiff's] new state law claims," including outrage, "do not relate back to the original pleading" under Rule 15).

Once again, the Individual Defendants ignore Rule 15(c)(1)(A)-(B) entirely, and only argue that Mekko Thompson's outrage claim does not relate back under Rule 15(c)(1)(C). (Doc. 273 at 42-43). Because Mekko Thompson's outrage claim arose out of the same conduct alleged in the Original Complaint, this Court does not need to reach the question of whether Mekko Thompson meets Rule 15(c)(1)(C)'s requirements. Mekko Thompson addresses both (1)(B) and (1)(C)'s requirements in turn as they relate to the outrage claim.

First, Mekko Thompson's outrage claim relates back under Rule 15(c)(1)(B) because the claim arose out of the same conduct alleged in Plaintiffs' Original Complaint, and the Original Complaint put the Individual Defendants on notice that Mekko Thompson could complain of their conduct personally and individually, as it relates to their outrageous and extreme conduct.[25] The Original Complaint states that it was foreseeable to the Defendants "that excavating the human remains and associated funerary objects of Plaintiffs' ancestors would cause *emotional harm* to

[25] The Plaintiffs in the Original Complaint include Mekko Thompson, Muscogee (Creek) Nation, and Hickory Ground Tribal Town. (Doc. 1 at 4, ¶¶ 9-11).

Plaintiffs." (Doc. 1 at 10, ¶ 38) (emphasis added). Additionally, the Original Complaint alleges that the "Defendants' actions proximately caused and *continue* to cause harm to Plaintiffs," and that "Plaintiffs are experiencing *severe emotional distress* because of the violation of the burial sites of their ancestors and the violation of their religious and cultural beliefs . . . ." (*Id.* ¶ 39) (emphasis added).

As for notice, the Original Complaint also alleges that "[s]eparately and severally, the actions of the Defendants have caused and continue to cause immediate and irreparable harm," and then names each Individual Defendant. (*See id.* at 2, ¶ 1); (*id.* at 4, ¶ 13) ("Defendants Buford Rollin, Stephanie Bryan, Robert McGhee, David Gehman, Arthur Mothershed, Keith Martin, Sandy Hollinger, Garvi[s] Sells, and Eddie Tullis are members of the [Poarch] Tribal Council and officials of [Poarch]."). The Individual Defendants cannot now argue that they were not on notice that Mekko Thompson may allege that their conduct was and continues to be extreme and outrageous as a result of the factual allegations contained in the Original Complaint.

Furthermore, the Original Complaint alleges that desecration of the Site caused Plaintiffs severe emotional distress and emotional harm. (*Compare* Doc. 1 at 10, ¶ 38) (emphasis added) (alleging that "excavating the human remains and associated funerary objects of Plaintiffs' ancestors would cause *emotional harm* to Plaintiffs."); (*id.* ¶ 39) (emphasis added) (stating that the "Defendants' actions proximately caused and *continue* to cause harm to Plaintiffs," and that "Plaintiffs are experiencing *severe emotional distress* because of the violation of the burial sites of their ancestors and the violation of their religious and cultural beliefs . . ."); (*id*. at 16, ¶ 67) (alleging that the Defendants' ground disturbing activities at Hickory ground "are damaging the Plaintiffs including but not limited to causing severe emotional, spiritual, and dignitary harm."); (*with* Doc. 261 at 84, ¶ 376) (alleging that the 2023 construction "once again made Mekko

Thompson endure the unconscionable trauma of knowing that the most sacred and holy place his family and Nation have ever inhabited was being bulldozed and destroyed to make way for a new casino expansion" which in turn caused Mekko Thompson to "endur[e] feeling[s] of helplessness and fear . . ."); (*id*. ¶ 377) ("The Individual Defendants' intentional, extreme, and outrageous behavior continues to cause Mekko Thompson emotional distress so severe that no reasonable person should be expected to endure it . . ."); (*id*. at 83, ¶ 370) ("[E]ach Individual Defendant . . . caused Mekko Thompson the irreparable anguish of knowing that his ancestors were wrenched from what was intended to be their final resting places, disrespected, and grotesquely mistreated.").

The Individual Defendants do not argue that Mekko Thompson cannot meet Rule 15(c)(1)(B)'s requirement that Mekko Thompson's outrage claim must arise out of the same conduct, transaction or occurrence as the allegations made in the Original Complaint—and rightfully so. Mekko Thompson's outrage claim arises directly out of the same conduct alleged in the Original Complaint. The addition of new facts that took place after the filing of the Second Amended Complaint, as well as claims against the same Defendants in additional capacities does not prevent Mekko Thompson's ability to allege outrage against the Individual Defendants.

b. A change in capacity is not a change in parties for purposes of Rule 15(c)(1)(C).

Because the Individual Defendants' arguments concerning Count V and Rule 15(c)(1)(C) are substantially the same as their arguments concerning Counts III and IX and Rule 15(c)(1)(C), Plaintiffs adopt and incorporate by reference their arguments and authorities in Section VI.F.2.

I. Legislative immunity does not bar Plaintiffs' unjust enrichment claims (Counts III and IX) and Mekko Thompson's outrage claim (Count V).

At this stage in the proceedings, nothing in the record demonstrates that the Individual Defendants are entitled to legislative immunity, and, accordingly, the Court should deny the Individual Defendants' request to dismiss Counts III, IX, and V as a matter of law. First, the TASC

does not allege that the Individual Defendants engaged in any legislative conduct when they committed the acts that gave rise to the current litigation, and although the Individual Defendants claim they are entitled to the immunity, they offer *no* examples of how the TASC seeks to overturn or void a legislative act the Individual Defendants undertook or effectuated. The TASC demonstrates that they are not being sued for having engaged in a legislative process.

Second, as the Individual Defendants acknowledge, the Eleventh Circuit has yet to conclude that tribal officials are entitled to common law legislative immunity, and the few courts that have concluded the affirmative defense is available to tribal legislators have articulated a test that the Individual Defendants simply cannot meet. Dismissal at this stage, therefore, would be premature given the unsettled law and undeveloped factual record.[26]

1. The Individual Defendants' conduct is not protected by legislative immunity.

First, legislative immunity is an affirmative defense, not a jurisdictional bar. *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 77 n.4 (2d Cir. 2007) ("It is well-settled that

[26] A case like this should not be dismissed on grounds of legislative immunity at such an early stage of the litigation before the development of any factual record. *See N.Y. State Corr. Officers & Police Benevolent Ass'n v. New York*, 911 F. Supp. 2d 111, 136 (N.D.N.Y. 2012) ("At this stage of the litigation, based upon the sparse record, the Court cannot state as a matter of law, that defendants are entitled to legislative immunity."); *cf. Stock W. Corp. v. Taylor*, 942 F.2d 655, 664-65 (9th Cir. 1991) (concluding that it was premature for the district court to have granted summary judgment on the basis of tribal official immunity when "we cannot say on the record before us whether Taylor was acting within his representative capacity, and whether he was within the scope of his delegated authority."); *Hegner v. Dietze*, 524 N.W.2d 731, 735 (Minn. Ct. App. 1994) (affirming the district court's denial of summary judgment in favor of tribal official because a factual dispute remained over whether the official's position with the tribe was sufficient to provide him with the claimed immunity and/or privilege); *Likes v. DHL Express*, No. 10-2989, 2011 WL 13230347, at *5 (N.D. Ala. July 26, 2011) (noting the "underdeveloped record," in combination with unsettled law in the Eleventh Circuit on the issue in question, in denying the defendant's motion to dismiss for failure to state a claim). To determine whether any immunity applies, it will be necessary to analyze the precise nature of the Individual Defendants' actions to determine whether they constitute legislative acts (and, then, whether there is some reason to qualify or limit it). The record is simply not developed enough to undertake that analysis at this time. Therefore, dismissal on the basis of legislative immunity would be premature.

legislative immunity is not a jurisdictional bar, but is rather a personal defense"); *Scott v. Taylor*, 405 F.3d 1251, 1255 (11th Cir. 2005) (referring to legislative immunity, in passing, as "a personal defense"). In considering whether to grant a motion to dismiss on the basis of an affirmative defense under Rule 12(b)(6), analysis is generally limited to the face of the complaint and attachments thereto. *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1368 (11th Cir. 1997). Nowhere in the TASC do Plaintiffs allege or identify legislative acts by the Individual Defendants. For that reason alone, dismissal is not proper on the basis of legislative immunity. *Cf. Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993) (noting that an affirmative defense generally will not support dismissal on a Rule 12(b)(6) motion unless the defense "clearly appears on the face of the complaint"); *Marx v. Gumbinner*, 855 F.2d 783, 788-89 (11th Cir. 1988) (if a government official moves to dismiss, the official must point to specific acts in the complaint that are legislative in nature), *abrogated on other grounds by Burns v. Reed*, 500 U.S. 478 (1991). The Individual Defendants argue that they are entitled to immunity, yet they cannot meet this very low bar.

The Individual Defendants cannot claim legislative immunity because their conduct at issue was not legislative. Legislative immunity only attaches to actions taken "in the sphere of legitimate legislative activity." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (citation omitted). "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id.* at 54, 55-56 (1998) (finding that actions of City Council members in introducing, voting for, and signing an ordinance were legislative because they were integral steps in the legislative process). But the fact that legislators perform certain acts in their official capacity as legislators does not necessarily make all such acts legislative in nature. *Gravel v.*

United States, 408 U.S. 606, 617, 625-26 (1972) (explaining that a Senator's private publication of materials he had introduced into a subcommittee record was not legislative).

The Eleventh Circuit distinguishes legislative actions from administrative actions. *Corn v. Lauderdale Lakes*, 997 F.2d 1369, 1392 (11th Cir. 1993). "If the facts utilized in making a decision are specific, rather than general, in nature, then the decision is more likely administrative in nature." *Crymes v. DeKalb Cty.*, 923 F.2d 1482, 1485 (11th Cir. 1991). Additionally, if a "decision impacts specific individuals, rather than the general population," the decision is likely administrative. *Id*. Accordingly, the Eleventh Circuit has characterized the following types of acts as legislative: "voting, speech making on the floor of the legislative assembly, preparing committee reports, and participating in committee investigations and proceedings." *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1062 (11th Cir. 1992) (internal citations omitted). By contrast, the Eleventh Circuit has characterized the following types of acts as non-legislative: "the public distribution of press releases and newsletters, the acceptance of bribes in return for votes on pending legislative business, the administration of penal facilities, and the denial of licenses." *Id*. The Eleventh Circuit also held that personnel decisions are administrative, rather than legislative acts. *Id.* at 1062-63.

The Individual Defendants contend that Plaintiffs' claims are "based upon allegations involving the passing of PCI Tribal Council resolutions and their work as PCI Council members." (Doc. 273 at 9). Yet the TASC neither alleges nor references any legislative acts at issue. Instead, the TASC alleges that the Individual Defendants' conduct did not occur through legislative acts, as misrepresentations and fraud are the antithesis of legislative acts. (*See, e.g.*, Doc. 261 at 38, ¶ 167) (The Individual Defendants "personally misrepresented and fraudulently concealed the degree of desecration their actions would cause at the [] Site."); (*id.* at 40, ¶ 175) (directing cultural

items excavated from the Site to be stored in a wrongful manner); (*id.* at 41, ¶ 187) (undertaking a majority of construction development after Plaintiffs notified them of "the religious and cultural importance of the Site"); (*id.* at 42, ¶ 189) ("intentionally violat[ing] laws by failing to stop" after cultural items were discovered and proceeding with construction); (*id.* at 45, ¶ 211-12) (reburying remains quickly to avoid Plaintiffs' participation in the reburial); (*id.* at 46, ¶¶ 214-15) ("Defendant Buford Rolin sent letters" to Plaintiffs stating that the Individual Defendants "hope" to "work together regarding re-interment"); (*id.* at 48, ¶ 226) (effectuating "reburials in April of 2012 because they knew construction was about to commence"); (*id.* at 49, ¶ 232) (performing "ceremonies viewed as abhorrent in Muscogee (Creek) religion"); (*id.* at 50, ¶ 237) (continuing to "ask, instruct, and insist that Auburn not repatriate" the remains at Auburn); (*id.* at 51, ¶ 240) (pressing forward with the casino and issuing a press release, in which Defendant Arthur Mothershed addressed the removal of human remains on the Site); (*id.* at 52, ¶ 246) (quoting Doc. 261-1 at Ex. U, 300 (Bryan 2013 Letter)) (attaching a fact sheet to distribute in the same fashion as a press release, in which Defendant Stephanie Bryan stated egregious lies that the Ceremonial Grounds "have never been disturbed"). These are not legislative acts.

Nor have the Individual Defendants even attempted to explain how any of these actions constitutes a *legislative* act.[27] Perhaps they will point to a legislative provision during discovery—but at this stage in the proceedings, a bald assertion of legislative immunity, with nothing else, does not suffice.[28] Even assuming some of the Individual Defendants' resolutions or enactments

[27] The Individual Defendants state that their Tribal Code is publicly available online, (*see* Doc. 273 at 45), but do not offer any suggestions or citations as to where one might find a provision that the Individual Defendants worked on, legislatively, that constitutes the challenged conduct in the current litigation.

[28] Discovery may actually reveal that the Individual Defendants' actions were *not* legislative in nature when they ordered and directed the desecration of Hickory Ground because their actions were violative of Poarch law and/or regulations. (*See* Doc. 261-1 at Ex. K, 260) (Poarch Field Methodology Policy). As of 1999, the Poarch Office of Cultural and Historic Preservation Field Methodology had a policy that "[u]nder no

touch on matters that might ultimately warrant legislative immunity, Plaintiffs have also alleged numerous other actions that are not of the type normally considered legislative. (*See, e.g.*, Doc. 261 at 53, ¶ 255) (alleging that the statements made by "Defendants Mothershed, McGee, Rolin, and Bryan" concerning the excavations at the Site "were knowingly false and fraudulent . . . highlight[ing] the outrageous disrespect with which the . . . the Individual Defendants treated the religious and cultural beliefs of the Plaintiffs."); (*id.* ¶ 257) (stating that the Individual Defendants' conduct was "extreme, outrageous, intentional, and reckless."); (*id.* at 81, ¶ 362) ("Each . . . Individual Defendant, knowing that Hickory Ground and the human remains and associated funerary objects buried there were sacred in the culture and traditional religion of Mekko Thompson, intentionally and outrageously caused the desecration of the [] Site by ordering that the bodies and associated funerary objects buried there be exhumed, disassociated, dismantled, analyzed, and reinterred in a manner considered abhorrent in the Muscogee (Creek) traditional religion."); (*id.* at 81-82, ¶ 365) ("The Individual Defendants placed the remains of Mekko Thompson's deceased family members in newspaper and plastic bins and left them in a non-air conditioned shed through numerous hot Alabama summers . . . [and] [t]he the Individual Defendants even authorized the bodies of infants to be exhumed."); (*id.* at 82, ¶ 366) ("Bodies of Mekko Thompson's deceased family members were left exhumed, exposed, and disregarded for years before the Individual Defendants wrongfully reinterred them without appropriate protocols in a random location away from their final resting place, and without allowing Mekko Thompson to participate."); (*id.* at 83, ¶ 372) ("Each Individual Defendant desecrated, or caused their

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circumstances are the burials on the Poarch Creek Indians Reservations, or lands under their control, to be excavated, nor are they to be subjected to **any** examination or testing. Burial sites take precedence over any project or program plan." (*Id.*); (*see also id.*) ("If human remains are encountered on the surface of the site, they are **not** to be collected.").

construction company or other agent, to desecrate Mekko Thompson's ancestors' remains by dismembering them through removing and discarding soil—part of those ancestors' bodies."); (*id.* ¶ 373) ("Each Individual Defendant also failed to stop construction even after cultural items were discovered, intentionally desecrating gravesites of extreme religious and cultural importance to Mekko Thompson."); (*id.* ¶ 374) ("Each Individual Defendant, through his or her own actions or by his or her agents, engaged in reburial practices that violated Mekko Thompson's religious beliefs and sacred protocols, further desecrating the remains."); (*id.* ¶ 375) ("Each Individual Defendant, through his or her own actions or by his or her agents, misrepresented his or her intentions and actions to Mekko Thompson and the public, including falsely claiming that Mekko Thompson himself agreed to the desecration and reburial process."); (*id.* at 84, ¶ 378) ("The actions of the Individual Defendants were not within the scope of their discretionary authority and violated clearly established federal, state and tribal laws."). Because these acts are specific, and not general or geared towards the entire public, they are administrative in nature, as opposed to legislative, and immunity does not apply. *See Crymes*, 923 F.2d at 1485.

Further, none of the rationales offered by the Individual Defendants support the finding of legislative immunity in this case. The Individual Defendants state that the "Tribal Council legislates by memorializing final Council decisions in approved motions, ordinances, and Tribal Council Resolutions." (Doc. 273 at 45). They further contend that, as individual council members, they "cannot order or authorize archaeological excavations or construction on tribal land, nor can they engage in government-to-government consultation with other sovereign tribal nations." (*Id.* at 46). Nonetheless, Defendant Buford Rolin sent a response letter to Plaintiffs concerning reburial of the human remains, and nothing in the letter suggests it was approved by a legislative act. (Doc. 261 at 47, ¶ 220) (citing Doc. 261-1 at Ex. R, 290 (Letter from CEO Buford Rolin to Chief George

Tiger)). Thus, the Individual Defendants' conduct did not occur through the legislative mechanisms of the Council—i.e., motions, ordinances, or resolutions, but instead occurred in their personal capacities when they engaged in the reinterment of human remains. (Doc. 261 at 47, ¶ 220). And for purposes of legislative immunity, the Individual Defendants claim they cannot engage in government-to-government consultation with other sovereign tribal nations (Doc. 273 at 46), but then at the same time, the Poarch Officials cite a 2006 letter from Individual Defendant Rolin to Plaintiff Mekko Thompson, claiming that constitutes evidence of "consultation" between the two sovereign nations. (Doc. 270 at 25) (citing Doc. 271 at Ex. D, 114). Defendant Rolin cannot be simultaneously both capable and incapable of engaging in consultation.[29]

Therefore, the Individual Defendants are not entitled to legislative immunity.

2. Given the unsettled nature of this area of law, it would be improper to dismiss Plaintiffs' claims on the basis of legislative immunity at this stage in the proceedings.

Dismissal at this stage is improper given that the law on this precise issue is scarce. The United States Supreme Court has long extended legislative immunity to federal legislators but it has not yet extended legislative immunity to Tribal Council legislators. The Individual Defendants acknowledge that the Eleventh Circuit has not addressed whether legislative immunity applies to tribal councils. (Doc. 273 at 43-44); *see also Weidley v. Ainiiih Nakoda Finance LLC*, 787 F. Supp.

[29] The Individual Defendants indicate this Court should consider sanctions because the TASC allegedly "contains directly conflicting allegations regarding the nature of the Individual Defendants' personal involvement" in exhuming and reinterring the human remains. (Doc. 273 at 45 n.16). The Individual Defendants claim that the TASC's use of "directed," "caused," or "ordered," in referring to their conduct constitutes "directly conflicting allegations." (*Id.* at 38 n.16). An individual can direct and order, and in result, cause harm. Further, Plaintiffs name the Individual Defendants in their personal capacities, as it relates to their personal involvement. (*See e.g.,* Doc. 261 at 51, ¶ 240-55). Irrespective of the Individual Defendants' misunderstanding, this argument should be disregarded as it is without merit and more importantly, a waste of judicial time and resources. In sum, the Individual Defendants do not have legislative immunity and the unjust enrichment and outrage claims should not be dismissed on that basis.

3d 1255, 1281 (N.D. Ala. 2025) (noting that no case in the Eleventh Circuit "has extended legislative immunity to *tribal* legislators"). The Individual Defendants urge this Court to follow a 1985 Eighth Circuit opinion and two Arizona district court opinions. (Doc. 273 at 44) (citing *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985); *Tohono O'odham Nation v. Ducey*, No. CV-15-01135-PHX-DGC, 2016 WL 3402391, at *3 (D. Ariz. June 21, 2016); *Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe of Ariz.*, 966 F. Supp. 2d 876 (D. Ariz. 2013)). Regardless of the unsettled nature of the doctrine, none of the cited cases support the application of legislative immunity here.

In *Runs After v. United States*, the Eighth Circuit held that the tribal council member defendants had legislative immunity because "the two Tribal Council resolutions at issue are essentially legislative acts." *Runs After*, 766 F.2d at 355. *Runs After* accordingly illustrates the type of case in which legislative immunity is appropriate because plaintiff was challenging the passage of laws, a challenge that is not present in the current case. Notably, the limited case law in the Eleventh Circuit and Alabama district courts have cited *Runs After* only for the narrow proposition that tribal council members cannot conspire with one another for purposes of a civil rights deprivation claim. *See, e.g.*, *Dickerson v. Alachua Cnty. Comm'n*, 200 F.3d 761, 767 (11th Cir. 2000); *Braxton v. Stokes*, No. 2:23-00127-KD-N, 2024 WL 2163637, at *8 (S.D. Ala. May 14, 2024); *Clark v. Noe*, No. 2:16-cv-00920-MHH-TMP, 2017 WL 4707897, at *3 (N.D. Ala. Oct. 20, 2017).

The Individual Defendants next look to *Tohono O'Odham Nation* for support, but *Tohono O'Odham* furthers Plaintiffs' argument that the Individual Defendants' conduct is not protected by legislative immunity. In analyzing the question of legislative immunity, the District Court found four factors relevant: (1) "whether the act involves ad hoc decision making, or the formulation of

policy . . . (2) whether the act applies to a few individuals, or to the public at large . . . (3) whether the act is formally legislative in character; and (4) whether the action bears all the hallmarks of traditional legislation." *Tohono O'odham Nation v. Ducey*, No. 15-01135, 2016 WL 3402391, at *4 (D. Ariz. June 21, 2016) (emphasis omitted). The Individual Defendants' assertion of legislative immunity fails all four factors.

In *Tohono O'Odham*, the plaintiff sought the production of notes from a closed session conducted by the Tribe's Council (a legislative governmental body). *See id.* In applying the first of four factors, however, the District Court found that the closed session centered on advancing a specific real estate and development transaction—the acquisition of a parcel for casino development—rather than creating a policy for the general public good. *Id*. Because the sessions were driven by the circumstances of that one project and did not implement a broader tribal policy, the District Court concluded that the activity was ad hoc in nature and outside the scope of legislative immunity. *Id*. Under the second factor, the District Court found that the sessions were directed almost entirely at guiding the conduct of a single tribal entity in connection with the purchase of a single parcel, and thus legislative immunity was not available. *Id.* at *5.

Under the third factor, the District Court found no evidence that the sessions produced, considered, or were connected to any legislation passed by the subdivision council, and thus legislative immunity was not available. *Id*. Finally, under the fourth factor, the District Court found a complete absence of any traditional markers of legislative activity. *Id*. There was no legislation passed or considered, and no formal rulemaking occurred. *Id*. Accordingly, legislative immunity did not apply. *See id.*

Under these four factors, the Individual Defendants' legislative immunity defense fails. First, the entire lawsuit centers their actions vis a vis Hickory Ground, a specific parcel of land and

a specific casino—and not the Poarch Band's gaming laws or policies writ large. Second, the Individual Defendants' conduct alleged in the TASC is targeted towards Plaintiffs—not the public at large. Third, as described in greater detail above, none of their alleged acts in the TASC are legislative in nature. And fourth, the alleged conduct of the Individual Defendants does not bear any hallmarks of traditional legislative activity. Under *Tohono O'odham*, the Individual Defendants' immunity defense fails.

Finally, in *Grand Canyon Skywalk,* the Individual Defendants rely on the defendant's argument—not the District Court's finding—to claim legislative immunity applies. (*See* Doc. 273 at 44) (citing *Grand Canyon Skywalk,* 966 F. Supp. at 885-86). Irrespective of that misleading assertion, *Grand Canyon Skywalk* offers nothing new. *Id.* (explaining that the tribal council members have legislative immunity for their acts in passing an ordinance and resolution). As previously discussed, *Bogan* already recognizes lawmaking as a legislative act. *Bogan*, 523 U.S. at 54, 55-56. Therefore, the Individual Defendants' argument that "[t]his Court should follow this established body of authority" is not only unpersuasive but also overstated. (Doc. 273 at 44).

Where, as here, if the law is not settled regarding a claimed governmental immunity, it is not appropriate to dismiss a complaint at this early stage of the proceedings. *See Sass v. Columbia*, 316 F.2d 366, 366-68 (D.C. Cir. 1963); *cf. Likes v. DHL Express*, No. 10-2989, 2011 WL 13230347, at *6 (N.D. Ala. July 26, 2011) (denying a motion to dismiss for failure to state a claim where the Eleventh Circuit law on the issue in question was unsettled); *L.D.G., Inc. v. Robinson*, 290 P.3d 215, 222 (Alaska 2012) (stating, albeit with regard to a different legal issue, that where the law is unsettled, there is at least a viable claim, such that Rule 12(b)(6) dismissal is inappropriate).

Accordingly, the Court should deny the Individual Defendants' request to dismiss Plaintiffs' unjust enrichment and outrage claims on the basis that they are entitled to legislative immunity.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the Individual Defendants' Motion to Dismiss.

Respectfully submitted this 30th day of April, 2026.

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Certificate of Service

I hereby certify that on the 30th day of April, 2026, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ Stewart Davidson McKnight, III

Counsel