

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

WILLIAM CROSS, JR.,

Plaintiff,

v.

C.A. No. 2:19-cv-11326-AJT-SDD

KEWADIN CASINOS GAMING  
AUTHORITY, a political subdivision of  
the SAULT STE. MARIE TRIBE OF  
CHIPPEWA INDIANS, a/k/a  
SAULT STE. MARIE TRIBAL  
GAMING AUTHORITY,

SENIOR U.S. DISTRICT JUDGE  
ARTHUR J. TARNOV

U.S. MAGISTRATE JUDGE  
STEPHANIE DAWKINS DAVIS

Defendant.

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**DEFENDANT KEWADING CASINOS GAMING AUTHORITY'S  
RESPONSE TO ORDER TO SHOW CAUSE**

**BRIEF IN SUPPORT**

**ORAL ARGUMENT REQUESTED**

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Dated: June 7, 2019

## **RESPONSE**

Defendant Kewadin Casinos Gaming Authority (“Kewadin”), by its undersigned counsel, respectfully submits this written response (with supporting brief) to the Court’s *sua sponte* Order to Show Cause why this matter should not be remanded to Wayne County Circuit Court (Business Court). This Court should not enter an Order of Remand and should retain this matter for the following reasons:

1. As Kewadin pled in its Notice of Removal (Doc. 1, Pg ID 6-7, ¶¶ 7 and 9), this Court has federal question jurisdiction and removal jurisdiction under the “complete preemption” corollary to the well-pleaded complaint rule, pursuant to 28 U.S.C. §§ 1331, 1441(a) and 1446, the Supremacy Clause, and the Indian Gaming Regulatory Act, 25 U.S. § 2701 *et seq.* (“IGRA”). Congressional intent serves as the touchstone of the inquiry under the complete preemption corollary, i.e., Congress intends that the federal statute enjoy such strong preemptive force that it occupies the field and displaces state law.

2. Federal courts have applied the principles of the complete preemption corollary and have found IGRA a statute of extraordinary preemptive force, providing for federal and tribal governance of gaming on Indian lands to the exclusion of the states, except as provided in tribal/state compacts recognized under IGRA, as more fully explained in the brief accompanying this response. See, e.g., *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 542-48,

550 (8th Cir. 1996) (determining that “IGRA has extraordinary preemptive power” to completely preempt state-law claims, and reversing remand order where dispute involved non-management contract agents (attorneys) who assisted in the process of regulating gaming and from whom the tribe expected candor relating to the licensing of potential managers and employees for gaming operations); *Missouri ex rel. Nixon v. Coeur D’Alene Tribe*, 164 F.3d 1102 (8th Cir.), *cert. denied*, 426 U.S. 1039 (1999) (recognizing that IGRA has complete preemptive force and that state-law claims are preempted if they interfere with processes mandated and regulated by IGRA relating to gaming activities on Indian land, and vacating remand order where district court had failed to resolve threshold issue of whether gaming (lottery) occurred on Indian land).

3. Contrary to the Court’s concern in its Order, Kewadin does not simply raise a federal defense to Plaintiff’s claim, because a field preemption statute such as IGRA not only provides a federal defense to the state common law claim but converts [it] into one stating a federal claim *for purposes of the well-pleaded complaint rule.*” *Metropolitan Life*, 481 U.S. at 65 (italics added).

4. Kewadin contends that IGRA’s strong preemptive force confers sufficient federal removal jurisdiction upon this Court to interpret or to apply IGRA provisions, not only to determine the status of the contract at issue under IGRA, but also to determine the contract’s interference with the Tribe’s

governance of its gaming operations as mandated and regulated under IGRA and reflected in the tribe's federally approved Gaming Ordinance and Tribal/State Compact. See, *inter alia*, IGRA §§ 2701, 2702, 2710(d)(1)(c), and 2710(e) and the provisions of the Tribe's Gaming Authority Charter and Gaming Ordinance related to those provisions discussed in the accompanying brief.

5. The consulting contract at issue, under which Plaintiff sought investment funds for gaming-related activities of the Tribe, falls squarely within the mandates and regulations of IGRA, which expressly recognizes the threat of organized crime to the self-sufficiency of tribes and tribal governance of gaming operations. That threat has particular force for contracts that seek financing parties, where, as here, an independent contractor provides potential investors and advises on financing mechanisms and capitalization. It is noteworthy that the Gaming Ordinance which must be approved under IGRA by the Chair of the National Indian Gaming Commission ("NIGC") created under IGRA, requires compliance with the Organized Crime Act and the Bank Secrecy Act, for purposes of avoiding money laundering through investment or gaming.

6. The purported contract, one of indefinite duration, calls for substantial "Success Fees" on extremely broadly defined "Investment Funding" with unspecified and unidentified "Finance Parties"; moreover, such "Success Fees" are purportedly due on unspecified and continuously occurring "Closings" and

providing for a high default interest rate and attorneys' fees for failure to pay each such "Success Fee," including for twelve months following the contract's termination by written notice. Yet the contract contains no identification of Finance Parties, and plaintiff never alleges that he has provided any documentation of any such investors to be vetted to avoid infiltration or other money laundering crimes or conduct in connection with the Tribe's gaming-related operations.

7. Assuming, *arguendo*, that this Court must interpret or apply IGRA in in order to fall within the complete preemption corollary of the well-pleaded complaint rule, this Court should construe, interpret and/or apply IGRA's provisions and the Tribe's related Gaming Charter, Gaming Ordinance and related ordinances in a manner to find that **a)** Plaintiff's purported consulting contract to find investors is subject to IGRA, in order to safeguard Kewadin's ability to govern its gaming operations as mandated and required under IGRA; and **b)** that permitting the state-law claims to withstand IGRA preemption would interfere with Kewadin's tribal governance of its gaming operations (including monitoring potential investors to insure that its licensing and gaming activities are free from the influence of organized crime) as mandated and required under IGRA. See, *inter alia*, IGRA §§ 2701, 2702, 2710(d)(1)(c), and 2710(e) and the provisions of the Tribe's Charter and Code related to those provisions discussed in the accompanying brief. Plaintiff's claims thus necessarily require resolution of

substantial and disputed issues of federal law necessarily embedded in the claim.

*Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005).

WHEREFORE, for the reasons discussed in the brief accompanying this response to the Court's Order to Show Cause, Kewadin Casinos Gaming Authority respectfully requests that this Honorable Court conclude that it has sufficient federal question removal jurisdiction over this matter, and that it should not remand this matter to state court.

Dated: June 7, 2019

Respectfully submitted,

KEWADIN CASINOS GAMING AUTHORITY,  
a governmental instrumentality of the SAULT  
STE. MARIE TRIBE OF CHIPPEWA INDIANS,  
a/k/a SAULT STE. MARIE TRIBAL GAMING  
AUTHORITY

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## STATEMENT OF ISSUES PRESENTED

1. Does this Court have sufficient removal federal question jurisdiction under the complete preemption corollary to the well-pleaded complaint rule to retain this matter, where:
  - a) courts have held that the Indian Gaming Regulatory Act, 25 U.S. § 2701 *et seq.* (“IGRA”), with its extraordinary preemptive sweep, falls within the complete preemption corollary for purposes of the well-pleaded rule;
  - b) this Court must interpret or apply IGRA to determine the status of the purported independent contractor consulting contract at issue under IGRA;
  - c) this Court must interpret or apply IGRA in determining whether the state-law claims relating to the purported contract would interfere with Kewadin’s governance of its gaming-related operations as mandated and regulated by IGRA?

Kewadin answers, “Yes.”

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## **SIGNIFICANT OR CONTROLLING AUTHORITY**

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Indian Gaming Regulatory Act, 25 U.S. § 2701 *et seq.* (“IGRA”)

Chapter 42: Gaming Ordinance

Chapter 44: Waiver of Tribal Immunities Ordinance

Chapter 44: Waiver of Tribal Immunities Ordinance (2009)

## Chapter 94: Gaming Authority Charter

John F. Lemon, *Organized Crime on the Indian Reservations*,

July 9, 2018,

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## INTRODUCTION

Without waiving sovereign immunity, Defendant Kewadin Casinos Gaming Authority (the “Authority”), a governmental instrumentality of the Sault Ste. Marie Tribe of Chippewa Indians (the “Tribe”), submits this brief in support of its response to this Court’s Order to Show Cause why the Court should not remand the matter to state court.

As Kewadin pled in its Notice of Removal (Doc. 1, Pg ID 6-7, ¶¶ 7 and 9), this Court has removal jurisdiction under the “complete preemption” corollary to the well-pleaded complaint rule, pursuant to 28 U.S.C. §§ 1331, 1441(a) and 1446, the Supremacy Clause, and the Indian Gaming Regulatory Act, 25 U.S. § 2701 *et seq.* (“IGRA”). Original federal question jurisdiction under 28 U.S.C. § 1331 is properly invoked when federal statutes must be construed as applied to an agreement, as here. *Rita, Inc. v. Flandreau Santee Sioux Tribe*, 798 F. Supp. 586 (D. S.D. 1992) (denying preliminary injunctive relief for failure to prove one of the requisite factors of same, but determining court had original jurisdiction where IGRA and other federal statute to be construed along with agreement). 28 U.S.C. § 1441(a) is properly invoked when a case that could have been brought under the court’s original federal question jurisdiction is properly removed.

Plaintiff did not request remand. However, the Court entered an Order to Show Cause why it should not remand this case to state court (Doc. 5). As argued

in this brief, this Court should conclude that Kewadin has appropriately removed Plaintiff's complaint to federal court on the basis of the complete preemption corollary to the well-pleaded complaint rule under IGRA where:

- this Court must interpret or construe IGRA's provisions and the federally approved Gaming Ordinance and Tribal/State Compact mandated under IGRA and must apply these provisions to Plaintiff's purported contract to determine its status under IGRA; and/or
- this Court must interpret or apply IGRA's provisions and IGRA-related tribal governance provisions to determine whether the state-law claims would interfere with Kewadin's ability to govern its gaming operations as mandated and regulated by IGRA.

## **I. STATEMENT OF PROCEEDINGS**

Kewadin reproduces here, for the Court's convenience, the Statement of Facts from its pending motion to dismiss, with additional relevant passages from the Tribe's Gaming Ordinance noted:

### **A. Plaintiff's Complaint and Purported Contract**

On April 9, 2019, Plaintiff William Cross Jr. ("Plaintiff") filed a complaint against Kewadin in the Third Circuit Court of Wayne County, Michigan (see Exhibit A, Pl. Complaint, Doc 1, Notice of Removal with state court pleadings, Pg ID 16-26). Without waiving sovereign immunity for itself or for the Tribe, a

federally recognized tribe under IGRA § 2703 (5), Kewadin timely removed that Complaint to this Court, based on federal question jurisdiction, within 30 days of its service on April 15, 2019 (see Exhibit B. Doc 1).

Plaintiff asserts two claims against Kewadin in the Complaint: a breach of contract claim that seeks fees based upon investment funds for financing and capitalization of gaming-related projects of the Gaming Authority, including a “consortium with other owned casinos” (See Pl. Compl., Count I, Doc 1, Pg ID 18 and 23) and a declaratory judgment claim seeking an expedited declaration of the enforceability of the contract and plaintiff’s right to relief from the Authority’s revenues (See Pl. Compl., Count II, Pg ID 18-19).

Plaintiff alleges that he had cultivated unspecified relationships with various unidentified entities interested in investing, including “Finance Parties” purportedly identified on an exhibit to the contract (an exhibit that is not included with the purported contract attached to Plaintiff’s Complaint (See Ex. A to Pl. Compl., Doc 1, Ex. A, Pg ID 21, 2<sup>nd</sup> “Whereas” provision), and that Plaintiff was to receive a consulting fee for investment funding “generated via Consultant’s services under this Agreement from a Finance Party” (Doc 1, Ex. A, Pl. Compl., ¶ 7, Pg. ID 17-18). Plaintiff further alleges that, during the term of the contract, Kewadin “received investment funding of at least \$6,078,504.16,” but that Kewadin failed to remit the compensation due him under the alleged contract, and



that any non-payment of the consulting fee on each disbursement of investment funding would result in an 8% default interest rate” (Doc 1, Ex. A, Pl. Compl., ¶¶ 8-9 and 11, Pg ID 18; see also, Ex. A to Pl. Compl. §§ 4 and 9(b), Pg ID 22-23).

The purported contract calls for Plaintiff to provide professional advice relating to financing and capitalization of projects by the Gaming Authority, including participation in a consortium with other owned casinos (See Section 3 of Ex. A attached to Pl. Compl., Doc 1, Ex. A, Pg ID 21).

The purported contract requires that notices of demands and claims must be in writing and sent via certified mail, return receipt requested and postage prepaid (Ex. A to Pl. Compl., § 13(e), Doc 1, Ex. A, Pg ID 25). The Complaint fails to allege that Plaintiff ever provided any such notices to Kewadin, documenting the Finance Parties that supplied “Investment Funds” to Kewadin solely because of his efforts.

The contract further provides that the rule of *contra preferentem* does not apply (Ex. A to Pl. Compl., § 13(g), Doc 1, Ex. A, Pg ID 25), and that the Effective Date of the alleged contract “shall be the date of the last signature to this Agreement,” with signatures permitted to be made in counterparts (Ex. A to Pl. Compl., §§13(l) and 13(c), respectively, Doc 1, Ex. A, Pg ID 26 and 24, respectively).

The “Counterparts” section, taken together with the “Effective Date” section, requires two dated signatures, the later of which will provide the “Effective Date.” However, Plaintiff’s signature does not bear a title or a date (Ex. A to Pl. Compl., p. 6, Doc 1, Ex. A, Pg ID 29).

Perhaps most significantly, Plaintiff did not signify his agreement to a reduction in the printed percentage for the “Success Fee” (a change that burdened him) by affixing his initials to the hand-written change (Ex. A to Pl. Compl., next to § 4, Doc 1, Ex. A, Pg ID 22).

The alleged contract contains no limited, definite duration term (Ex. A to Pl. Compl., § 2, Doc. 1, Ex. A, Pg ID 21; and Plaintiff alleges that the contract purportedly continues in effect “as neither party has terminated it in writing in accordance with [its] Paragraph 7” (Doc 1, Ex. A, Pl. Compl., ¶ 13, Pg ID 18).

The purported contract contains a provision (Section 11) entitled “Jurisdiction” purportedly delineating a venue provision and a governing laws provision, but failing to contain a clear and unequivocal waiver of the defendant’s right of removal or of sovereign immunity (Ex. A to Pl. Compl., § 11, Doc 1, Ex. A, Pg ID 23). Section 11 contains no clear and unequivocal waiver of the sovereign immunity of Kewadin (described as the “Client”) and the Tribe (*Id.*). To the contrary, Section 11 in fact contains an express and completely clear reservation of the sovereignty and sovereign immunity of Kewadin and the Tribe:

“Nothing contained herein shall be construed to be a waiver of the Client’s, or Client’s parent’s governmental entity’s, sovereign immunity.” (*Id.*).

**B. The Authority’s Oversight of Federally Regulated Gaming Activities Consistent with Its Federally Approved Charter and Tribal Ordinances**

The Tribe created Kewadin as a governmental instrumentality of the Tribe with an autonomous existence for the purpose of overseeing licensed gaming activities regulated under IGRA, and consistent with federal law, as demonstrated in the Gaming Authority Charter (Chapter 94, attached as Exhibit B (“Charter”), §§ 94.101, 94.105(1)), and the Tribe’s federally approved Gaming Ordinance (Chapter 42, attached as Exhibit C (“Gaming Ordinance”), §§42.103, 42.104(2), 42.216, 42.713 (authorized under IGRA and the Tribe’s constitution and to be administered in compliance with IGRA and federal regulations)).<sup>1</sup> The Gaming Ordinance is to be liberally construed in favor of the Tribe (Ex. C, § 42.104(1)). Perhaps most significantly for purposes of this Response, the Gaming Ordinance expressly cites the Organization Crime Control Act as one authority for the Gaming Ordinance, along with IGRA (Ex. C, Gaming Ordinance, § 42.103) and

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<sup>1</sup> Tribal ordinances, available on the Tribe’s Web site at [www.saulttribe.com](http://www.saulttribe.com), describe Kewadin, the sovereign immunity of the Authority and the Tribe, the prescribed limitations on any purported waiver of sovereign immunity or of jurisdiction in order for the waiver to be effective, the specifics and requirements of each waiver, and the manner in which any purported waiver of sovereign immunity or jurisdiction must be passed by the Board.

provides that Kewadin will comply with the Bank Secrecy Act (Ex. C, Gaming Ordinance, § 42.706).

Under the Charter, Kewadin is not empowered to waive the sovereign immunity of the Tribe (Ex. B, Charter, § 94.111(1)). No purported waiver of sovereign immunity of the Authority is effective unless it is made by express resolution to waive sovereign immunity by the Management Board of the Authority (Ex. B, Charter § 94.111(2)). Even if a Board resolution were to supply such a waiver (which is, of course, not the case here), such a waiver by required express Board resolution does not become a vested contractual right unless it is attached to the subject contract. (Chapter 44, Waiver of Tribal Immunities Ordinance (“Tribal Immunities Ordinance”) attached as Exhibit D, § 44.110).<sup>2</sup>

### **C. The Sole Contractual Section Plaintiff Identifies**

The Complaint seeks damages from, and injunctive relief in the form of a declaratory judgment against, Kewadin, a governmental instrumentality of the Tribe. Plaintiff’s Complaint points to a single section - Section 11 of his purported

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<sup>2</sup> In 2009, the Tribal Immunities Ordinance contained a § 44.108, since repealed. (See Exhibit E, 2009 Tribal Immunities Ordinance, § 44.108). However, § 44.110 remained the same and provided for no vested contractual right regarding a waiver of sovereign immunity or jurisdiction if a contract did not incorporate the Board resolution waiving sovereign immunity or jurisdiction (Exhibit E, § 44.110). Because there is no Board resolution waiving the sovereign immunity of the Authority or waiving jurisdiction attached to Plaintiff’s purported contract as required in § 44.110 in order to Plaintiff to have a vested contractual right in the waiver, the current ordinance applies, sans § 44.108.

contract -- and characterizes that Section as an agreement to cabin Kewadin to state court under state law. On its face Section 11 contains an express reservation of sovereign immunity of Kewadin and the Tribe in a final sentence that expressly overrides any other provision to the contrary in Section 11 (Ex. A to Pl. Compl., § 11, Doc 1, Ex. A, Pg ID 23). Moreover, Section 11 does not conform to Tribal Code requirement for waivers of sovereign immunity or jurisdiction.

The other alleged party to the purported contract, i.e., Kewadin through its then Chair, was not empowered to waive the sovereign immunity of the Tribe (Ex. B, Charter, § 94.111(1)). Under the Gaming Charter, no purported waiver of sovereign immunity of the Authority is effective except by formal resolution to waive sovereign immunity adopted by the Management Board of the Authority (Ex. B, Charter § 94.111(2)). Again, such a purported waiver does not become a vested contractual right unless the Board resolution is attached to the subject contract (Ex., D, Tribal Immunities Ordinance, § 44.110).

**D. Plaintiff's Failure to Date, Initial or Comply with the Purported Contract**

The purported incomplete contract which Plaintiff attaches to his Complaint lacks a dated signature to provide an "Effective Date" under its counterparts provision, does not bear Plaintiff's initials next to a reduced finder's fee, and does not reference or contain any Board resolution waiving the sovereign immunity of the Authority or the Tribe (See, generally, Pl. Compl., Ex. A, Doc 1, Ex. A). The

purported contract does contain a notice provision for any demands or claims under the contract, and Plaintiff does not allege that he has ever once complied with the notice provision since 2009, by identifying any Finance Party, any amount invested, or any date by which he should have paid. For over a decade, Plaintiff remained silent, allowing a purported interest rate to collect. (See, generally, Pl. Compl., Ex. A, Doc 1, Ex. A). Plaintiff alleges nothing more than an aggregate total of supposed investment funds in Paragraph 8 of his Complaint (Pl. Compl. ¶ 8, Doc. 1, Ex. A, Pg ID 18), but not once anywhere in his Complaint does he allege that he apprised the Authority which Finance Parties supplied which investment funds and when those funds were supplied and in what amounts. He never alleges that he ever documented for the Authority whether his services alone brought the Finance Parties to invest in gaming-related projects of the Authority or the Tribe. In short, Plaintiff fails to allege any facts that he followed the notice provision of the purported contract at any time.

Plaintiff's failure to allege that he ever informed Kewadin who the Finance Parties were, what investment funds were available, or what form investments would take is particularly troubling in light of the threat to Indian gaming from organized crime in the form of investors or money launderers. (See Exhibit F; see also: John F. Lemon, *Organized Crime on the Indian Reservations*, July 9, 2018, [www.academia.edu/37022973/Organized\\_Crime\\_on\\_the\\_Indian\\_Reservations](http://www.academia.edu/37022973/Organized_Crime_on_the_Indian_Reservations),

last checked June 7, 2019).

## II. ARGUMENT

### A. The Court’s Order to Show Cause Relies on Inapposite Cases.

In its Order to Show Cause, this Court indicated that, based on the removal papers, it was not clear to the Court that it would need to interpret or to apply IGRA in order to determine whether Kewadin had breached the purported contract (*Id.* Pg ID 2). The Order appeared to imply that Kewadin relied on some sort of “free-standing jurisdictional grant just because a tribe is involved” (*Id.*). Kewadin, however, relied upon a federal statute (IGRA) that federal courts have held to have “extraordinary preemptive power” and to fall within the complete preemption corollary to the well-pleaded complaint rule, as discussed below.

This Court’s Order then relied on two tort cases, neither here apposite. In the first tort (slip and fall) case, the federal district court essentially held that federal district courts were not free-standing appellate courts for appeals from tribal court decisions, and then dismissed plaintiffs’ suit “appealing” the tribal court’s decision that the tribe had conditioned its waiver of sovereignty upon compliance with notice, a provision with which plaintiffs did not comply. See, *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, 259 F. Supp. 3d 713 (W.D. Mich. 2017). More significantly, *Lesperance*’s grudging description of tribal sovereign immunity as an accident of history and harsh in its consequence is

unfortunate dicta and an outlier. In the Sixth Circuit tortious interference with contract case removed under ERISA, *Gardner v. Heartland Indus. Partners, LP*, 715 F.3d 609 (6th Cir. 2013) cited at page 2 of the Order. a corporate board had cancelled the ERISA plan (Supplemental Employee Retirement Plans a/k/a “SERPS”) for high-ranking senior management at the suggestion of the individual defendant board members who stood to gain (one of the \$10 million) from selling a business unit without reflecting the \$13 million payout from the SERPs (triggered by a change in control). In that case, no plan existed to interpret under ERISA.

The remaining case upon which the Order relied, *I*, is equally, if not more inapposite, because it involved a tribe that never became federally recognized through the period and conduct complained of in plaintiff’s state-law complaint. Nonetheless, defendants removed on the basis of IGRA complete preemption. Judge Bell expressly recognized, with approval, the Eighth Circuit’s complete preemption analysis appropriate to IGRA in *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 542-48, 550 (8th Cir. 1996), i.e., that recognizing that IGRA has complete preemptive force and that state-law claims are preempted if they interfere with processes mandated and regulated by IGRA relating to gaming activities on Indian land. The court then observed that it was not persuaded that permitting the state-law claims for breach of contract, fraud/misrepresentation, and defamation in that case would impede tribal governance of gaming. In support of



that position, the court also discussed, with approval, the complete preemption analysis in *Missouri ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102 (8th Cir.), *cert. denied*, 426 U.S. 1039 (1999), recognizing that IGRA had complete preemptive force, and that state-law claims are preempted if they interfere with processes mandated and regulated by IGRA relating to gaming activities on Indian land, but then noted that IGRA had no application to tribal gaming activities on *state* land. *Sungold Gaming*, 1999 WL 33237035 at \*3. Perhaps influenced by the Gun Lake Tribe's conduct in secretly entering discussions with other investors and for a different casino site, the district court then found the letters of intent and an agreement were to the creation of a management contract and remanded to state court. The remand should come as no surprise: that potential management contract was *contingent upon the tribe's gaining federal recognition*, and the tribe did not gain federal recognition. Significantly, IGRA's provisions do not apply unless a tribe is federally recognized, see IGRA § 2703(5).

None of these decisions suggest that remand is appropriate for the circumstances at bar.

**B. IGRA Has the Necessary Extraordinary Preemptive Force to Satisfy the Complete Preemption Corollary to the Well-Pleaded Complaint Rule.**

The Supreme Court developed the principles of the complete preemption corollary to the well-pleaded complaint rule in federal labor cases and federal employee benefits cases, where the need for a national uniform body of law informs Congressional intent to create “occupy the field” preemption (or, simply, field preemption).

*1. The Complete Preemption Corollary*

Notably, courts have found certain federal statutes to have extraordinary preemptive force, among these Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (“LMRA”), see, e.g., *Avco Corp. v. AeroLodge 735, Int’l Ass’n of Machinists*, 390 U.S. 557, 560-61 (1968) (“*Machinists*”) (finding that LMRA § 301 completely preempts state-law claim to enjoin striking union in breach of a labor contract), *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 391-92 (1986) (“*Caterpillar*”) (finding § 301 completely preempts state-law contract claim even though no federal question appears on the face of the complaint, and noting that “a plaintiff may not defeat removal by omitting to plead necessary federal questions”), and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (“*Garmon*”) (finding that the National Labor Relations Act (“NLRA”) completely preempts states from regulating conduct protected or prohibited by the

NLRA so as to avoid frustrating the purposes of the federal act), and finding such preemptive force in the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (“ERISA”), see, e.g., *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-63 (1987) (“*Metropolitan Life*”) (express preemption under ERISA § 502 to preempt all state-law claims that relate to or have a connection with an ERISA-governed employee benefit plan), and *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (implied preemption of state wrongful discharge claim arising from ERISA’s comprehensive and highly reticulated enforcement scheme).

Moreover, the absence of a remedy or a federal cause of action (express, private, or implied) for the plaintiff whose case defendant has removed does not defeat removal jurisdiction under the complete preemption corollary. See, e.g., *Machinists*, (removal upheld even when the state-law action for injunction against strikers did not exist under federal law); *Caterpillar*, 482 US at 391, n 4 (expressly disapproving Ninth Circuit’s conclusion that no complete preemption arises unless a federal act “displaces and supplements” state law with an express federal action).

## 2. *IGRA Satisfies the Complete Preemption Corollary*

Federal courts have applied the principles of the complete preemption corollary and have found IGRA a statute of extraordinary preemptive force, providing for federal and tribal governance of gaming on Indians lands to the exclusion of the states, except as provided in tribal/state compacts recognized

under IGRA, as more fully explained in the brief accompanying this response.

See, e.g., *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 542-48, 550 (8th Cir. 1996) (expressly stating that “[t]he methodology used in *Metropolitan Life* to determine whether there was complete preemption is useful in guiding our analysis” and then carefully surveying legislative history for Congress’s intent, determining that “IGRA has extraordinary preemptive power” to completely preempt state-law claims not exempted from preemption by ERISA (e.g., state insurance laws), and reversing remand order where dispute involved non-management contract agents (attorneys) who assisted in the process of regulating gaming and from whom the tribe expected candor relating to the potential managers); *Missouri ex rel. Nixon v. Coeur D’Alene Tribe*, 164 F.3d 1102 (8th Cir.), *cert. denied*, 426 U.S. 1039 (1999) (recognizing that IGRA has complete preemptive force and that state-law claims are preempted if they interfere with processes mandated and regulated by IGRA relating to gaming activities on Indian land, and vacating remand order where district court had failed to resolve threshold issue of whether gaming (lottery) occurred on Indian land).

In this matter, in support of removal jurisdiction premised on federal question jurisdiction, Kewadin cites IGRA as a statutory basis for federal removal jurisdiction. Moreover, as with federal labor and federal employee benefits cases removed from state court under governing federal statutes with extraordinary

preemptive power, removal based on IGRA preemption also informs the development of a national uniform body of federal law against the backdrop of tribal sovereignty, since IGRA reflects dual federal and tribal governance of gaming operations by federally recognized tribes on reservation lands. Sovereign immunity is a matter of purely federal law, and “[m]uch like foreign sovereigns, Indian tribes have an interest in a uniform body of federal law in this area.”

*Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200, 1202, 1206-07 (11th Cir. 2012) (involving a commercial lease contract subject to approval by the Secretary of the Interior under federal law and regulation, under which the Tribe consented to jurisdiction to be sued in and to be bound by any judgment of a particular Florida federal district court or the Circuit Court for the 17<sup>th</sup> Judicial Circuit in and for Broward County, alleging a default of the obligations and duties assumed by the Tribe under the lease’s terms, and seeking declaratory relief as well).

The extraordinary preemptive power of IGRA provides the basis for removal jurisdiction under the complete preemption corollary of the well-pleaded complaint rule. Respecting that preemptive force results in a national uniform body of law on tribal sovereignty, consistent with the interests of federally recognized tribes.

**C. This Court Has Sufficient Federal Question Removal Jurisdiction Because It Must Interpret or Apply IGRA To Determine That the Purported Contract is Subject to IGRA, and That The State Claims Would Intrude on the Tribe's Ability to Govern Its Gaming Operations As Mandated and Regulated Under IGRA.**

This matter requires the Court to interpret or construe or apply IGRA because a federally recognized tribe must conform to IGRA mandates and regulations in its governance of gaming-related operations on Indian lands, particularly in light of IGRA's purposes of promoting tribal self-sufficiency and safeguarding tribes from the organized crime and other criminate activities. This Court should conclude that 1) this matter was properly removed under the complete preemption of the well-pleaded complaint rule based on IGRA, and 2) the Court must evaluate the status of the purported consulting contract and the effect of the state-law claims on the Tribe's ability to govern its gaming operations as required under IGRA and the related tribal charter and code provisions subject to IGRA.

*1. Tribal Sovereignty and IGRA Mandates*

Contrary to the deprecating summary of tribal sovereignty in the *Lesperance* opinion as an anachronistic accident of history, the immunity afforded Indian tribes under federal law is a central attribute of the "self-governing political communities that were formed long before Europeans first settled in North America." *National Farmers Union Ins. Cos. V. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985).

From the beginning of European settlement, Indian tribes were commonly recognized as separate “states” or “nations.” *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831); *Worcester v. Georgia*, 31 U.S. 515, 561 (1832). That inherent sovereignty is reflected in the Federal Constitution, which gives the federal government “exclusive authority over relations with Indian tribes.” *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985). Although they are termed “domestic dependent nations,” that term does not imply a lesser sovereign. As the Supreme Court has recognized, “a weaker power does not surrender \* \* \* its right to self[-]government, by associating with a stronger, and taking its protection.” *Worcester*, 31 U.S. at 561. The tribes thus did not lose their inherent sovereignty, including their immunity from suit, when they were brought under the dominant sovereignty and protection of the United States. *Id.*; Cohen’s Handbook of Federal Indian § 4.01, at 208 (2005).

In 1988, Congress enacted IGRA “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.” 25 U.S.C. §2702(1). Congress also declared as a purpose of IGRA “to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is

conducted fairly and honestly by both the operator and the players.” 25 U.S.C. §2702(2). Gaming cannot be conducted on Indian lands unless it is conducted as mandated and regulated under IGRA. Class III gaming must be (1) authorized by tribal ordinance that satisfies the requirements in 25 U.S.C. § 2710(b) and is approved by the Chair of the NIGC; (2) located in a state that permits such gaming; and (3) conducted in conformance with a compact between the Indian Tribe and the State that is approved by the Department of the Interior. 25 U.S.C. §2710(d)(1). The Secretary must also approve the gaming ordinance of an Indian tribe. 25 U.S.C. §2710(e). The federal government may enforce federal gaming laws against Indian tribes. If a tribe engages in Class III gaming on Indian lands in violation of IGRA or a tribal ordinance, the NIGC Chair has the authority to assess civil penalties or issue a closure order. 25 C.F.R. 573.3; 25 U.S.C. § 2713. In addition, IGRA makes state laws “pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto” applicable in “Indian country” as federal law. 18 U.S.C. §§ 1166(a) and (d).

2. *Determining the Status of the Contract and the Effect of the State-Law Claims on Tribal Governance of Gaming*

Given the severe consequences for an Indian tribe that fails to conform to IGRA’s mandates and regulations, and given the nature of the purported consulting contract in finding investment funds and investors for Kewadin for gaming-related



purposes, this Court should conclude that it must either interpret or apply IGRA to determine the status of Plaintiff's purported contract.

The purported contract, one of indefinite duration, calls for substantial "Success Fees" on extremely broadly defined "Investment Funding" with unspecified and unidentified "Finance Parties"; moreover, such "Success Fees" are purportedly due on unspecified and continuously occurring "Closings" and providing for a high default interest rate and attorneys' fees for failure to pay each such "Success Fee," including for twelve months following the contract's termination by written notice. Yet the contract contains no identification of Finance Parties, and plaintiff never alleges that he has provided any documentation of any such investors to be vetted to avoid infiltration or other money laundering crimes or conduct in connection with the Tribe's gaming-related operations.

As to the effect of the state law claims on the Tribe's ability to govern its gaming operations, this Court must interpret and apply IGRA and the related Gaming Ordinance and tribal code provisions, as well as the required Tribal-State Compact mandated under IGRA. IGRA 2710(d)(1)(C) recognizes that Class III gaming activities by a Tribe are lawful only if the Tribe carries out its Class III gaming activities in compliance with the Tribal/State compact. That statutory section is conjunctive: not only must there be a gaming ordinance approved by the NIGC Chair (sub-part A), and not only must the Indian land be located in a state

that approves Class III gaming (sub-part B), but also gaming-related activities must be “conducted in conformance with a Tribal/State compact” entered into under paragraph 3 of that provision. IGRA requires that the Tribal/State Compact must be approved and becomes effective when notice of approval by the Secretary of the Interior is published in the Federal Register. IGRA 2710(d)(3)(B). The Tribe’s Tribal/State Compact is a matter of public record. The Federal Register site is provided. 58 Fed Reg 63263 (1993) (Notice). It is also publicly available on the State of Michigan Web site, along with the Tribal/State Compacts of other federally recognized tribes in Michigan involved in Class III gaming activities.

The Compact exists solely because of IGRA. The Compact was approved, as required by IGRA, and published by Notice by the Chair of the NIGC in 1993. The Compact incorporates the policies and findings of IGRA 2701(3)-(5) and 2702 (including (2) re organized crime and fair and honest operation. In addition, IGRA 2710(e) addresses approval of any tribal gaming ordinance by the Chair of the NIGC.

The Tribe’s tribal “Gaming Ordinance” is defined under its Charter. The Charter makes the powers of the Authority subject not only to the Gaming Ordinance, but also to “other provisions of Tribal Law.” 94.113(3) and (4). The power of the Authority includes entry into contracts with any person for any activity incidental to the purposes for which it was established under Federal, state

or tribal law. 94.113(4)(g). Under the federally approved Gaming Ordinance provisions 42.103 and 42.104(2), IGRA, NIGC regs, and the Tribal-State Compact controls over any conflicting provision in the Gaming Ordinance. Should the state-laws claim be remanded and allowed to go forward under state law where the purported contract lacks necessary terms and does not identify Financed Parties or Investment Funding or Success Fees or Closing Dates, the state claims would interfere with the Tribe's governance of its gaming operations, including its reporting of revenues, determinations of distributions, and policing of potential investors for their ties with criminal activities.

Under these circumstances, this Court should determine that it does have federal question jurisdiction and that the case was properly removed.

## CONCLUSION

For the reasons stated in this Response to this Court's Order to Show Cause and brief in support, Kewadin hereby respectfully requests that this Court retain jurisdiction over this matter.

Dated: June 7, 2019

Respectfully submitted,

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a governmental instrumentality of the SAULT  
STE. MARIE TRIBE OF CHIPPEWA INDIANS,  
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