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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GEORGE J. KEIM,

Plaintiff,

v.

HARRAH'S OPERATING CO. dba HARRAH'S RINCON,

Defendant.

Hon. Barry T. Moskowitz

Case No. 09 CV 1732 BTM AJB

RESPONSE OF *SPECIALLY APPEARING* DEFENDANT TO COURT'S ORDER TO SHOW CAUSE WHY CASE SHOULD NOT BE REMANDED FOR LACK OF SUBJECT MATTER JURISDICTION

ACCOMPANYING PLEADINGS:
DECLARATION OF RONALD R. GIUSSO

Date: December 4, 2009
Time: 11:00 a.m.
Courtroom: 15

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I.

INTRODUCTION

Following the conclusion of briefing on *Specially Appearing* Defendant's Motion to Dismiss, this Court, on October 26, 2009, issued an Order to Show Cause why this case should not be remanded for lack of subject matter jurisdiction.[1] The Court expressed a concern whether it had federal question jurisdiction over the case:

> This action arises out of a slip-and-fall injury Plaintiff sustained when he visited Harrah's Casino [*sic*], and Plaintiff seeks $7,500 in damages. Although this action might tangentially touch upon tribal interests, it appears that the claims fall outside the preemptive scope of the IGRA. Plaintiff's claims do not interfere with or otherwise implicate the Tribe's ability to regulate gaming. (10/26/09 OSC.)

KEIM alleges claims of negligence and premises liability for an incident occurring "8/21/2008 through 8/22/2008" while KEIM was a patron at the casino known as Harrah's Rincon Casino & Resort (the "Casino"). (Complaint at ¶3(b).) KEIM's claims of negligence and premises liability directly affect the Tribe's ability to regulate its gaming activities, to the extent such claims interfere with the Tribe's ability to regulate potentially: (1) the construction, design, and use of various building materials within and without the Casino; (2) the training of Casino employees; (3) the supervision of Casino employees; and (4) the maintenance of the Casino's premises – which sits on Tribal land. Therefore, Plaintiff's claims are patently within the preemptive scope of the Indian Gaming Regulatory Act ("IGRA").

The IGRA reflects the intent of Congress that tribes maintain considerable control of gaming to further their economic and political development. (*Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 549 (8th Cir. 1996).) Moreover, the Tribe's ability to redress injuries sustained by the Casino's visitors is sufficiently related to the regulation of tribal gaming enterprises as to fall within the preemptive scope of the IGRA. (*Doe v. Santa Clara Pueblo*, 138

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[1] Plaintiff has made no appearance in District Court and has not opposed the pending motion to dismiss.

N.M. 198, 209 (2005) ["Redressing injuries sustained by the Casino's visitors is sufficiently related to the regulation of tribal gaming enterprises that we have no difficulty concluding that the State and Santa Clara acted within the scope of the IGRA when they formed the Compact."].)

The Casino is not a mere revenue-producing tribal business, but pursuant to the IGRA, the creation and ***operation*** of Indian casinos is designed to promote "tribal economic development, self-sufficiency, and strong tribal governments." (25 U.S.C. § 2702(1).) The Southern District of California has ***repeatedly*** recognized the propriety of removal of cases involving the Rincon Casino, and has exercised federal question jurisdiction in a number of cases. (*See, Skolimowska v. Harrah's Operating Company, Inc., et al.*, Southern District of California Case No. 04-CV-1579 JAH (NLS); *Roach v. Harrah's Entertainment, Inc., et al.*, Southern District of California Case No. 04-CV-1374 (WMC); *Watkins v. Harrah's Rincon-San Diego*, Southern District of California Case No. 04-CV-0902-R(JFS); *Vargas v. Harrah's Entertainment, Inc., et al.*, Southern District of California Case No. 06-CV-0649J(CAB); *Almazan, et al. v. Harrah's Entertainment, Inc.*, Southern District of California Case No. 09-CV-1189JM(BLM); *Campagna v. Harrah's Entertainment, Inc., et al.*, Southern District of California Case No. 09-CV-0107JAH(JMA); collectively, Exh. A.)

Indeed, this Honorable Court exercised jurisdiction in a case that was brought in part on the basis of federal question jurisdiction. In *Booppanon v. Harrah's Rincon Casino & Resort, et al.*, Case No. 06-CV-1623BTM(BLM), the plaintiff asserted various claims concerning the Casino, including personal injury claims, and alleged that this Court had jurisdiction under federal question and the Americans with Disabilities Act. The *Booppanon* action was litigated before the Hon. Barry T. Moskowitz, and eventually this Court ruled on a motion to dismiss brought by the Harrah's defendants. District Judge Moskowitz denied the motion without prejudice, stayed the case, and ordered the plaintiff to first exhaust her tribal remedies.

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This Honorable Court, in the *Booppanon* action specifically found as follows:

> **It can be plausibly argued that nonmembers who enter onto the Rincon reservation to enjoy the goods or services of the Casino are entering into a commercial relationship with the Tribe** and that any disputes arising out of that relationship are subject to tribal court jurisdiction. **[...] The Casino operations are intertwined with Tribal welfare.** The creation and operation of the Casino was designed to promote "tribal economic development, self-sufficiency, and strong tribal governmen[t]." 25 U.S.C. §2702(1). **Although the day-to-day operations are run by HCAL Corporation, the Tribe owns the Casino and is ultimately responsible for managing the Casino's operations.** (citation omitted.)

(Exh. B, Order Denying Motion to Dismiss and Motion for Leave to Amend and Staying Case Pending Tribal Exhaustion, signed by Hon. Barry T. Moskowitz on 1/23/07 [emphasis added].)

Clearly, courts in the Southern District of California have historically exercised federal question jurisdiction in actions against the same or similar defendant. This action was timely and properly removed by *Specially Appearing* Defendant to the Southern District of California. Although KEIM's claims may involve a relatively modest dollar-amount, this Honorable Court and other courts within the Southern District of California have repeatedly found that similar claims are properly brought before the District Court under its exercise of federal question jurisdiction. As set forth herein, in the removal papers previously filed, and in the evidence previously submitted to this Court in *Specially Appearing* Defendant's Motion to Dismiss, this Court has federal question jurisdiction in this case, and it should not be remanded.

II.

PERTINENT FACTS AND ALLEGATIONS

The following facts are pertinent to this matter:

1. This action arises out of a slip-and-fall injury Plaintiff allegedly sustained when he was a patron at the Casino. (Exh. C, ¶3(b).)

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2. The casino sometimes referred to as Harrah's Rincon Casino & Resort is located on the reservation of the Rincon San Luiseno Band of Mission Indians, a federally-recognized sovereign Indian tribe (the "Tribe"). The Casino is owned, controlled, and operated by the Tribe pursuant to the IGRA, as well as the Tribal-State Gaming Compact (the "Compact") between the Tribe and the State of California. (Exh. D, ¶4.)

3. The Casino's creation was dependent upon government approval at numerous levels, in order for it to conduct gaming activities permitted only under the auspices of the Tribe. The IGRA, 25 U.S.C. § 2710(d)(1), required the Tribe to authorize the Casino through a tribal ordinance and an interstate gaming compact. The Tribe and California entered into such a compact "on a government-to-government basis." These extraordinary steps were necessary because the Casino is not a mere revenue-producing tribal business, but pursuant to the IGRA the creation and operation of Indian casinos is designed to promote "tribal economic development, self-sufficiency, and strong tribal governments." (25 U.S.C. § 2702(1).) One of the principal purposes of the IGRA is "to insure that the Indian tribe is the primary beneficiary of the gaming operation." (*Id.*, § 2702(2).)

4. As reflected in the Compact that created the Casino, the policy behind establishing the Casino was to "enable the Tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the Tribe's government and governmental services and programs." (*See*, Exh. E.) The Tribe maintains ultimate authority and control over all operations and decisions concerning the business, maintenance and management of the Casino and the entire Rincon Reservation. (Exh. D, ¶5.)

5. The Tribal-State Gaming Compact between the Tribe and the State of California required that prior to the commencement of gaming activities, the Tribe was to carry no less than five million dollars ($5,000,000) in public liability insurance for patron claims, and was to adopt and make available to patrons a tort liability ordinance setting forth terms and conditions under

which the Tribe waives immunity to suit for money damages resulting from intentional or negligent injuries to persons or property at the gaming facility or in connection with the Tribe's gaming operation, including procedures for processing any claims for such money damages. (Exh. E, at p. 31.) The Rincon Business Committee adopted, in a unanimous vote, the Patron Tort Claims Ordinance, which sets forth the mechanism by which a patron of the Casino may bring a claim such as the one asserted by KEIM in this action.

III.

ANALYSIS

A. The Southern District Of California And This Very Court Have Repeatedly Exercised Federal Question Jurisdiction In Similar Cases.

As noted above, the Southern District of California has repeatedly recognized that the creation and ***operation*** of Indian casinos is designed to promote "tribal economic development, self-sufficiency, and strong tribal governments" (25 U.S.C. § 2702(1)) by virtue of its repeated exercise of federal question jurisdiction in cases such as this. (*See, e.g., Skolimowska v. Harrah's Operating Company, Inc., et al.*, Southern District of California Case No. 04-CV-1579 JAH (NLS); *Roach v. Harrah's Entertainment, Inc., et al.*, Southern District of California Case No. 04-CV-1374 (WMC); *Watkins v. Harrah's Rincon-San Diego*, Southern District of California Case No. 04-CV-0902-R(JFS); *Vargas v. Harrah's Entertainment, Inc., et al.*, Southern District of California Case No. 06-CV-0649J(CAB); *Almazan, et al. v. Harrah's Entertainment, Inc.*, Southern District of California Case No. 09-CV-1189JM(BLM); *Campagna v. Harrah's Entertainment, Inc., et al.*, Southern District of California Case No. 09-CV-0107JAH(JMA); collectively, Exh. A.)

In addition, this Honorable Court has previously found that "[...] nonmembers who enter onto the Rincon reservation to enjoy the goods or services of the Casino are entering into a commercial relationship with the Tribe and that any disputes arising out of that relationship are subject to tribal court jurisdiction." (Exh. B.) "The Casino operations are intertwined with

Tribal welfare." (Id.) "[…] the Tribe owns the Casino and is ultimately responsible for managing the Casino's operations." (Exh. B.) Clearly, it is well established within this District of the United States District Court that claims, such as the claims presented by KEIM, are preempted by the IGRA and that such claims directly affect and interfere with the Rincon Tribe's ability to regulate gaming at the Casino.

B. Plaintiff's Claims Are Completely Preempted By The IGRA As Plaintiff's Claims Directly Affect And Interfere With The Tribe's Ability To Regulate Its Own Gaming Activities At The Casino.

Federal courts must exercise subject matter jurisdiction over claims involving federal questions. (*See*, 28 U.S.C. § 1441(b) ["Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."]; *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 66-67 (1987).) Plaintiff's claims raise important federal questions involving tribal sovereignty, tribal decision-making, interpretation and application of the IGRA, and interpretation and application of the Tribal-State gaming compact, wherein the Tribe and the State of California agreed to create a framework for redressing injuries sustained by Casino visitors. (Exh. E, p. 31.)

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Numerous federal courts have noted the strong preemptive force of the IGRA.[2] Courts have also remarked on the IGRA's comprehensive nature.[3] And, the Supreme Court has affirmed that Indian commerce is "under the exclusive control of the Federal Government." (*Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).) Every reference to court action in the IGRA specifies federal court jurisdiction. (*See*, IGRA §§ 2710(d)(7)(A), 2711(d), 2713(c), 2714, and 2715(c).) State courts are never mentioned. The broadest jurisdictional provision of the IGRA specifically provides for appeal of final National Indian Gaming Commission decisions to "the appropriate Federal district court," and covers the most substantive functions of the commission, including imposing civil penalties and approving of tribal gaming ordinances and management contracts. (*See*, *id.* at §2714.) Congress intended that challenges to substantive decisions regarding the governance of Indian gaming would be made in federal courts. (*See*, *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d at 546.)

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2 *See, e.g., Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030 (11th Cir.1995) ("The occupation of this field by [IGRA] is evidenced by the broad reach of the statute's regulatory and enforcement provisions and is underscored by the comprehensive regulations promulgated under the statute."); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433-35 (9th Cir.1994) (IGRA preempts state license fee based on wagers at Indian gaming facility). *See also*, the Senate committee report on the IGRA: "S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed." (*Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996), *quoting*, S.Rep. No. 446, 100th Cong., 2d Sess. 6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3076.) Although the Senate committee did not refer to the complete preemption doctrine, this statement demonstrates the intent of Congress that IGRA have extraordinary preemptive power, both because of its broad language and because it demonstrates that Congress foresaw that it would be federal courts which made determinations about gaming. (*Id.* at 544-545.)

3 *See, e.g., Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (9th Cir.1994), *cert.* denied, --- U.S. ----, 116 S.Ct. 297, 133 L.Ed.2d 203 (1995); *Forest County Potawatomi Community of Wisconsin v. Norquist*, 45 F.3d 1079, 1082 (7th Cir.1995); *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422, 1425 (10th Cir.1994), vacated on other grounds, 517 U.S. 1129, 116 S.Ct. 1410, 134 L.Ed.2d 537 (1996).)

The Eighth Circuit has held that the IGRA completely preempts state law claims.[4] (*See, Id.* at 544.) Specifically, "[a]ny claim which would directly affect or interfere with a tribe's ability to conduct its own [gaming] licensing process should fall within the scope of complete preemption." (*Id.* at 549.) In contrast, state claims that do not potentially interfere with a tribe's governance of gaming are not preempted. (*Casino Resource Corp. v. Harrah's Entm't. Inc.*, 243 F.3d 435, 438-439 (8th Cir. 2001) [holding the IGRA was not designed to deal with a contract dispute between a non–tribal general contractor and a non–tribal sub–contractor, all of which was peripherally associated with tribal gaming.].)

As the Court correctly points out, the Ninth Circuit has not held that the IGRA completely preempts state law claims. (*Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 431 (9th Cir. 1994.) In *Cabazon*, the Court held that it had federal jurisdiction in an action brought under the IGRA, 25 U.S.C.A. §§ 2701 to 2721, by various Indian tribes against the state of California, in which the tribes challenged the state's authority to collect license fees from

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4 The *Gaming Corp. of America* Court held that there was federal court jurisdiction in an action brought by several tribal casino management companies against a law firm that represented an Indian tribe, as the action, which pertained to gaming licensing and the casino management contract, involved a violation or possible violation of the IGRA. The facts showed that several casino management companies brought an action into state court where they alleged that a law firm that represented the Indian tribe who owned the casino, had disapproved of the companies' applications for permanent gaming licenses, which resulted in the termination of the casino management contract. The management companies' argued that the law firm had violated state and federal law, including the IGRA, as the law firm had made the licensing process unfair by intentionally or negligently making the management companies appear unsuitable to the tribal gaming commission. The law firm removed the case to federal court as it alleged that an action brought under the IGRA, completely preempted state law, and therefore all of the management companies' claims arose under federal jurisdiction. The federal district court remanded the action to state court as it concluded that state law was not completely preempted by the IGRA, and it also dismissed the action for its failure to state a claim regarding the law firm's breach of a duty of good faith and fair dealing under the IGRA. On appeal, the Court stated that a number of federal courts have noted the strong preemptive force of the IGRA; and an examination of the text and structure of the IGRA, its legislative history, and its jurisdictional framework likewise indicated that Congress intended that the IGRA completely preempt state law with regard to Indian gaming. (*Id.* at 543-544.) The Court noted that the legislative history of the IGRA indicated that Congress did not intend to transfer any jurisdictional or regulatory power to the states by means of the IGRA unless a tribe consented to such a transfer in a Tribal–State gaming compact. (*Id.* at 545.) The Court stated that the action brought by the management companies inquired into the law firm's duty to the Indian tribe with regard to the issuing of gaming licenses, and under the IGRA, state law could not be applied to regulate the tribal gaming licensing process, unless a Tribal–State gaming compact provided as such. (*Id.* at 545-546.) Accordingly, the Court declared that the action brought by the management companies, which involved the law firm's duty to the Indian tribe during the gaming licensing process, fell within the scope of the IGRA's complete preemption, and thus, because federal questions remained, the federal district court erred when it remanded the case to state court. (*Id.* at 550-551.) Consequently, the Court held that there was federal court jurisdiction, and reversed the lower court's decision. (*Id.* at 551.)

racing associations which conducted simulcast wagering on tribal lands; as the Court determined that the action fell within the statutory provisions of the IGRA, since it involved Tribal–State gaming compacts which subsequently invoked federal court jurisdiction. (*Id.* at 435.) The Court detailed that the Indian tribes brought an action against the State of California to force the state to turn over to the tribes the license fees that the state had collected from California's horse racing associations based on the revenues generated at the tribes' facilities. (*Id.* at 432.) The Court stated that in the Tribal–State gaming compacts between the tribes and the State of California, the state agreed to pay over to the tribes the amounts of past and future license fees it collected from the racing associations. (*Id.*) The Court ultimately concluded that it had subject matter jurisdiction under the IGRA to enforce the Tribal–State gaming compacts, as the agreement by the state to pay over the racing associations' fees to the tribe was contained within the compacts entered into by the parties during their IGRA negotiations. (*Id.* at 435.) Therefore, the Court held that it had subject matter jurisdiction over the Indian tribes' action to enforce the Tribal–State gaming compacts which governed the tribes' operation of simulcast wagering facilities and the state's collection of fees from that activity, as the IGRA (25 U.S.C.A. §§ 2701 to 2721) conferred jurisdiction on federal courts to enforce Tribal–State gaming compacts. (*Id.*)

In *Cabazon*, the Ninth Circuit applied a preemption balancing test to the IGRA.[5] The test assisted the Court in deciding whether federal law preempted a state's authority to regulate activities on tribal lands – in the context of a state tax. (*Id.* at 433.) Here, the facts are substantially different, and the balancing test is not appropriate as there is no state activity or interest to balance against federal or tribal interests. There is no state tax at issue. There is no state statute or compelling state interest. And there is no attempt by the state to regulate tribal gaming activities. Rather, there is a plaintiff who asserts claims of negligence, negligent

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[5] The Court applied the *Mescalero* balancing test, *i.e.*, "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." (*New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).)

training, negligent supervision, and premises liability, all of which directly affect and interfere with the Tribe's ability to regulate its gaming activities. [6]

In *Doe v. Santa Clara Pueblo*, 138 N.M. 198, 209 (2005), a minor who was kidnapped from a parking lot of a casino located on tribal land, by and through her parents and next friend, brought a personal injury suit against the Indian tribe. The trial court denied the tribe's motion to dismiss based on its determination that, pursuant to a valid tribal-state compact, the IGRA permits state courts to assume subject matter jurisdiction over personal injury suits arising on the premises of a tribal gaming facility located on tribal land. The Court of Appeals affirmed, finding the state and Indian tribe acted within the scope of the IGRA when they formed a compact which expressly shifted jurisdiction over visitors' personal injury claims to binding arbitration or to state courts, at the visitor's election. (*Id.*) The Court of Appeals reasoned: "[r]edressing injuries sustained by the Casino's visitors is sufficiently related to the regulation of tribal gaming enterprises that we have no difficulty concluding that the State and Santa Clara acted within the scope of the IGRA when they formed the Compact." (*Id.*)

Here, the Tribe's interstate gaming compact expressly requires the Tribe to adopt and make available to patrons a tort liability ordinance setting forth the terms and conditions, if any, under which the Tribe waives immunity for suit for money damages resulting from intentional or

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6 Even if the Court decides to apply the *Mescalero* balancing test, there is absolutely no compelling state interest to justify the assertion of state authority. Unlike *Cabazon*, the State of California is not a party to this action; there is no "extensive regulatory scheme" at issue; and there is no state tax at issue which benefits one governmental entity, *i.e.*, the State, to the detriment of another, *i.e.*, the Tribe. (*See*, *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d at 435.) State law does not govern this case. Rather, the terms of the Compact control. (*See*, *Id.* at 434, quoting S.Rep. No. 446, 100th Cong.2d Sess., *reprinted* in 1988 U.S.C.C.A.N. 3071, 3075-76 ["[U]nless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities."].) Indeed, the State entered into the Compact "out of respect for the sovereignty of the Tribe" and "to initiate a new era of tribal-state cooperation in areas of mutual concern . . ." (*See*, Exh. E, p. 2.) The federal interests before us are clearly set forth in the language of IGRA itself. (*See*, *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d at 433, *quoting*, 25 U.S.C. §§ 2701(1) and (2) [Intended to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments," IGRA seeks to "ensure that the Indian tribe is the *primary beneficiary* of the gaming operation." (emphasis added).].) Moreover, as articulated above, the Tribe has a strong interest in regulating its own gaming activities and redressing injuries sustained by the Casino's visitors. The express objectives of the IGRA, when combined with the Tribe's interests, precludes the application of state authority.

negligent injuries to person or property at the Gaming Facility or in connection with the Tribe's Gaming Operation, including procedures for processing any claims for such money damages. (See, Exh. E, p. 31.) Accordingly, The Rincon Business Committee adopted, in a unanimous vote, the Patron Tort Claims Ordinance, which sets forth the mechanism by which a patron of the Casino may bring a claim such as the one asserted by KEIM in this action.

Because the State and Tribe negotiated and agreed to address remedies for visitor injuries in the Compact, it is apparent that both parties themselves determined that apportioning jurisdiction over the claims of injured visitors was "directly related to, and necessary for, the licensing and regulation of [Class III gaming] activity." (*See*, IGRA, §§ 2710(d)(3)(C)(i), (ii).) As a result, when two equal sovereigns conclude, pursuant to the IGRA and with the Secretary of the Interior's concurrence, that visitor safety is directly related to the regulation of a Class III gaming enterprise, the Court should afford substantial weight to that conclusion. (*See*, *Doe v. Santa Clara Pueblo*, 138 N.M. at 209.) Therefore, redressing injuries sustained by the Casino's visitors is sufficiently related to the regulation of tribal gaming as to fall within the preemptive scope of the IGRA.

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IV.

CONCLUSION

By any analysis, Plaintiff's claims are completely preempted by the IGRA as Plaintiff's claims directly affect and interfere with the Tribe's ability to conduct its own gaming activities. Moreover, the Tribe's ability to redress injuries sustained by the Casino's visitors is sufficiently related to the regulation of tribal gaming enterprises as to fall within the preemptive scope of the IGRA. In addition, several courts in this District have historically found federal question jurisdiction in cases similar to this one. For all of these reasons, it is apparent that federal question jurisdiction properly exists, and this case should not be remanded.

DATED: November 13, 2009

STOKES ROBERTS & WAGNER

By: s/ Ronald R. Giusso
Maria C. Roberts
Ronald R. Giusso
Attorneys for *Specially Appearing* Defendant Harrah's Operating Co. dba Harrah's Rincon (erroneously sued herein)